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Competition Law in Small Economies

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Introduction

This Special Report has been prepared as a background for a discussion of Competition Law and Small Economies at the 2009 ICN Meeting in Zurich, Switzerland. It focuses on the answers to a survey sent to ICN Members on "Competition Law in Small Economies" (the Survey). The first phase of the Special Project was to send to the ICN Members the Survey and collect and compile the answers received.

Following the ideas developed by papers such as the OECD Global Forum on Competition Policy in Small Economies, the Special Project co-authors, Israel's Antitrust Authority (IAA) and Switzerland's Competition Commission (Comco), wanted to use ICN Members' experience to deliver a study on the theme "Competition Law in Small Economies." Indeed, the main issue raised by the Survey is to verify whether and how the size of an Economy (as defined in the Survey) may matter when crafting, implementing, or interpreting competition law.

The co-authors received directly or via ICN's Secretariat twenty-four responses from all over the world, representing economies of different sizes and characters, and reflecting diverse perspectives and approaches to the questions asked. The answers received enabled the co-authors to compile the present Special Project. This Special Project is solely based on the answers made available by the contributors. No checks against the ICN Guidelines, ICN Best and Recommended Practices, or ICN Key Work Products have been made.

The competition agencies[1] of Belgium, Bulgaria, Canada, Colombia, the Czech Republic, the European Union, Finland, Hungary, Ireland, Israel, Japan, Jersey, Lithuania, Luxembourg, Mexico, Mongolia, the Netherlands, New Zealand, Russia, Singapore, South Korea, Switzerland, Taiwan and the United States responded to the Survey. Most of the responses are available at: www.icn-zurich.org. Among the contributors, the ones who explicitly consider themselves as small, moderately small, or small to medium-size economies are Belgium, Colombia, the Czech Republic, Finland, Hungary, Israel, Jersey, Lithuania, Luxembourg, Mongolia, New Zealand, Singapore, Switzerland and Taiwan.

The co-authors submitted for comments a draft version of the Special Project to the contributors. Thus, some contributors kindly provided their guidance to the co-authors in finalizing the Special Report.

The second phase of the Special Project is to hold a panel discussion, to present the findings of the Special Report to the Members of the ICN, and to discuss the effect of size of the Economy (as defined in the Survey) on competition law during the 2009 ICN Zurich Annual Conference.

The co-authors would like to extend their gratitude to the contributors, who took time and energy to answer the Survey and provided additional guidance in the final steps of the Special Project.

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[1] A complete list of the acronyms of the competition agencies can be found at Appendix 'A'

I. Analytical Framework

Concern is expressed by some contributors that the main question posed may imply a less stringent application of competition law if one accepts that "size does matter." However, the answers of other contributors which regard themselves as small economies alleviate such concern. A number of these contributors declare that they have many markets with high concentration and that open trade policies are of greater importance to small economies than to large ones, from a competition policy angle. Other respondents state that the size of the economy should be taken into account only to a certain extent.

* *

1. Does the size of the economy affect the application of competition law, and if so how?

Purpose of Competition Law, Impact of Size, and Efficiency Considerations

There seems to be a fair amount of concern expressed by some contributors indicating that the main question posed may imply a less stringent application of competition law if one would accept that "size does matter." Indeed, as candidly concluded by the **European Commission (EC)**, it sees "no reason to modify competition laws or their application according to the size of the relevant geographic market, and consider[s] as counter-productive and dangerous arguments that competition laws should be diluted or [misapplied] in order to allow 'national champions' to develop, regardless of the size of the jurisdiction or market." The **Japan Fair Trade Commission (JFTC)** also believes that in the application of competition law, the market defined from the viewpoint of competition law is important, and that the geographical market defined by competition law may not necessarily coincide with the distinct legal jurisdiction. Therefore, it argues that no special treatment would be necessary in the enforcement of competition law based on the relative size created by its judicial boundaries. However, the answers of other ICN members which regard themselves as small economies should allay such concerns. Indeed, as noted by **IAA**, the current policy trend – emphasizing an effects-based rather than a form-based approach – is sufficiently flexible to deal with competition issues raised by small economies. Free trade (or open borders) is firmly anchored amongst the majority of the contributions. However, an open borders policy may not exclusively alleviate the economy. The **Authority of Fair Competition and Consumer Protection of Mongolia (AFCCPM),** on the other hand, notes that competition laws should enable enterprises to compete fairly since the "size of most undertakings in a small economy is [either] small [or] medium," and that therefore "The size of the economy affects [the] application of competition law."

Many contributors mention the role of competition law, before tackling the question of whether size does matter with respect to the implementation of competition law. According to the **Finnish Competition Authority (FCA)**, "The goal of the competition law is to prevent and remedy the situations where competition is restricted, and it would be difficult to conclude that the size of the economy should change this basic goal." The **Bulgaria Competition Authority (BUL-CA)** summarizes its answer as follows: "The basic objectives of competition policy are similar for large and small economies. In both, competition policy is designed to protect and promote the competitive process." Bulgaria also notes that "The competitive process is not an end in itself but a means to an end as it promotes improvements in efficiency which in turn [leads] to welfare gains for [the] society [as a whole]." The **Competition Council of the Republic of Lithuania (CCL)** opines that "the principle competition rules should be applied in every free market economy independent of its size." According to the **Jersey Competition Regulatory Authority (JCRA)**, competition is not an end in itself, but is the primary means to promote consumer welfare. To achieve this goal, JCRA follows an effects-based approach to competition law, in line with current EC practice, meaning that it examines the actual and potential effects of a practice on markets in Jersey in its determination of whether or not there is an infringement of the competition law. The **South Korea Fair Trade Commission (KFTC)** for its part points out that "the size of the economy does not make any difference in the importance and necessity of establishment of competition policy and culture," and believes that the "application of competition law should be determined by the size of a relevant market, not by the size of the economy." The competition agencies of **Ireland** and **Canada** concur with this idea, and the **Competition Bureau Canada (CBC)** adds that "harmonization of rules across jurisdictions should be paramount." The **Czech Republic Competition Authority (CRCA)** believes that "the size of the economy … affects the operational framework and potential criteria to be [taken into account] while enforcing the competition law." However, according to the CRCA, "the size of the economy *does not affect the application of competition law* as such." The objective of competition law in Singapore is "to promote the efficient functioning of [its] markets and hence the competitiveness of [Singapore's] economy." The **Netherlands Competition Authority (NMa)** agrees with the EC in that "what really affects the application of competition law is the size of the market in which it is applied, rather than the size of the economy." According to the **Colombian Competition Authority (CCA)**, "The application of competition law does not depend on the relative size of the economy." Instead, its application is based upon the agency's analysis of significance of the conduct in question and its decision on whether it should be pursued by the authority. CCA concludes that "The substantial principles of competition law are maintained without variables, independently of the type of economy and the way it develops."

The **New Zealand Commerce Commission (NZCC)** responds that it "does have characteristics that affect the application of competition law." Although it considers that "the analytical framework which should be used to assess market power should be the same in small or isolated economies as in larger economies, market factors may result in more limited competition and/or higher barriers to entry." NZCC adds that "This could result in a greater incidence of dominance/substantial market power findings." **JCRA** takes a similar view, reaching the same conclusion as the OECD Global Forum on Competition's Secretariat Note in 2003 that "small economies do not require a different application of competition law; however, the economic circumstances of markets in small economies may materially influence the outcome of the competition law assessment."

While not disagreeing with the principles of competition law, **IAA** does not believe in a "one size fits all" solution to the questions asked by the Survey. IAA describes itself as a country with a relatively small-sized "island" economy exhibiting significant trade impediments as well as geopolitical factors that may inhibit the entry of potential competitors. The **Taiwan Fair Trade Commission (TFTC)** agrees with IAA and explains that the legislative modifications currently underway strive to strike a balanced approach between defeating anti-competitive conducts and Taiwan's special attributes in terms of its size and scale. Taiwan saw rapid progression in its economy during the 1980's. To this end, one year after the enactment of the *Fair Trade Act* (FTA) which takes into account certain attributes of Taiwan's economy, the Government established the (TFTC).

In contrast, **KFTC** responds that "[the size of the economy does not] change the key principle of competition law enforcement that whether to impose remedies and their levels should be determined by weighing the competition-restraining and competition-promoting effect that a conduct might have."

Some contributors focus their answers on the type of market under examination. For example, **FCA** states that the size of the economy has a limited significance in the context of competition law and relates to the functioning of competition in the domestic market. The **Irish Competition Authority**'s **(ICA)** view is that "the nature of [its] economy should not have any influence on the competition policy, its objectives, analytical framework and practice." ICA continues by saying that "If anything, the 'small' nature of the Irish economy should favor the implementation of a strong competition policy addressed in particular to non-traded goods markets … (such as network, infrastructure or services industries) where consumers still do not benefit, to an appreciable extent, from efficient pricing, innovation, and greater product quality and variety."

Some respondents indicate that the size of the economy should be taken into account, up to a certain extent. For example, **FCA** notes that "despite [their] similar goal, the most effective competitive actions in small economies may differ from those in large economies." **CCL** balances its above statement by adding that "these rules and their application could be adjusted to peculiarities … of a small free market economy." Some of the competition agencies from **Bulgaria**, **Finland**, **Israel**, the **Netherlands**, and **Singapore** indicate that in small economies the importance of the effectiveness argument tends to be greater. The main reason behind the effectiveness argument is that this approach takes into account the economic circumstances of markets within the economy. **BUL-CA** indicates that competition law should evolve through a number of flexible instruments applied on a case-by-case basis and in a manner that allows for increasing attention to be paid to efficiency considerations. According to **IAA**, as the self-corrective mechanism in small economies is presumably weaker, regulatory errors stemming from improperly designed and enforced competition laws may thus entail higher impact on its small economy, underscoring the need for a structured and efficient antitrust policy. However, the current policy trend – emphasizing an effects-based rather than a form-based approach – is sufficiently flexible to deal with competition issues raised by small economies. **CCS** "supports the view that in small economies the principal focus of competition law should be economic efficiency." CCS adopts "a case-by-case approach in appraising the economic effects of particular activities." This approach, according to CCS, "is designed to provide certainty to businesses where possible, while not prohibiting activities that can be justified on economic efficiency grounds." In the jurisdiction of Singapore, "transparent enforcement is supported by clear guidelines and supported by flexible schemes that allow parties to notify particular activities to [CCS] for approval." Specific features of Dutch society, such as the close relationships within the business world, increased international cooperation as relevant markets sooner overstep national borders, and a high level of political interest in the *de minimus* rules may be specific to small "markets/economies," according to the **NMa**.

In its response, **FCA** notes that "Different competitive actions based on the size of the economy can be reached via three optional 'levels' of the competition law and its application:

- Content of the law itself may differ in small and large economies, based on different economic conditions[;]
- If the content of the law itself is the same for small and large economies, its application could include ad-hoc criteria that might lead to different structural outcomes in small economies[;]
- A smart formulation of the law itself would enable its application in such a way that the individual decisions could differ based on the economic conditions."

After analyzing the first two options, FCA concludes that "the most flexible way to diverge the competitive actions in a small economy is to do so at the individual decision level." Indeed, FCA believes that "The degree of competition and efficiency arguments are typically those two variables that need to be balanced in a decision. The importance of the efficiency arguments tends to be higher in a small economy than in a large one." However, the relation between these variables is not always a straightforward decision. Thus, FCA asserts that a "competition law formulated in such a way that individual decisions could reflect the differences in economic conditions is the most flexible way to implement the diverged competitive actions."

Finally, according to the **Mexico Federal Competition Commission (MFCC)**, the "Application of competition law implies an effective institutional performance of the competition authority to oversee its enforcement activities." In order to "guarantee an effective execution of the competition authority's work," argues MFCC, there must be "a sound legal framework and a minimum level of institutional development that support competition principles."

Small Markets / Markets with High Concentration and their Impact on Competition Policy

Both the **EC** and the **United States Department of Justice and the United States Federal Trade Commission** (**U.S. competition agencies)** used their experience in small markets within their jurisdiction to respond. The EC underlines that "The ultimate goal of the European Union (EU) as a trading block is to establish a single EU-wide market in as many economic sectors as possible." According to the EC, liberalization regulation in many sectors has achieved such a single EU-wide market. **JFTC** declares that the application of the law to small markets would be similar to the application of competition law to anticompetitive conducts in regional markets within a large economy (for instance, collusions in regional bidding).

Among the contributors which regard themselves as small economies, a number declare that they have many markets with high concentration. From a pure competition policy perspective, **IAA** considers that in a small size economy there are likely to be fewer players in many sectors which may cause concern for collusive behavior or abuse of dominance. Taking this view, the notion of "size" should relate to the relevant market, rather than to the overall size of the economy. **BUL-CA** reports a similar view. Indeed, according to BUL-CA, "a small economy faces an inherent tension in the development of its competition policy in that many of its industries on the one hand can support only a small number of competitors and are therefore highly concentrated and on the other hand contain many firms that struggle to attain minimum efficient scale when catering solely to domestic demand." According to **NZCC**, "Many of [its] markets are highly concentrated." The answer to such concentration is to minimize barriers of entry to markets. NZCC states that this situation "requires competition policy, broadly defined, to focus on ensuring minimal barriers to trade of goods and services, and to the movement of labor and investment, both within and beyond the national borders." The avoidance of "rules of thumb" based on market concentration is made possible by a full competition assessment on the facts, balancing anti-competitive and pro-competitive factors. However, in a few markets, NZCC declares that "competition might not allow firms to achieve minimum efficient scale." Thus, NZCC concluded that "competition policy and law should focus on the goal of ensuring the efficient operation of markets, and must recognize that in some case, this may be better achieved by means other than competition."

Among the contributors which regard themselves as small economies, a number declare that open trade policies are of greater importance to small economies than to large ones, from a competition policy angle. Whether an economy is integrated in a supra-national institution such as the EC or not, these contributors indicate that their economy, or sectors of their economy, must be open to trade (both imports and exports). Indeed, the **Hungary Competition Authority (HCA)** makes a point by declaring that small economies policies have been conducted since the inception of its antitrust law, focusing mainly on the role of imports as a major source of competitive pressure in many industries and constantly emphasizing the importance of efficiency. More generally, the **CRCA** opines that "the increasing interconnection of national markets, need of coherent and comprehensive competition rules applicable within the supranational business environment and strengthening importance of economic analyses may [conclude] that the size of [an] economy does not and *should not* affect the application of competition rules in order to secure competitor's belief in predictability of the competition law application." **BUL-CA**, for its part, declares that "a liberal trade policy is more important for a small economy than for a large one as it can reduce the disadvantages of small size both through increased exports (thereby improving the ability of firms to achieve scale economies) and imports (thereby promoting competition)." BUL-CA insists that a "small economy also needs to ensure that regulatory policies are not contributing to barriers to entry and exit within its markets." BUL-CA balances its above statement by indicating that "In sectors where competition is severely limited, regulation is needed to limit the potential costs imposed by the presence of market power." In a closed small economy, notes the **Belgium Competition Authority (BEL-CA)**, "there is also likely to be an above average pressure for a more regulatory approach to market management," given the highly oligopolistic nature of the market structure; and it adds that, in a such closed small economy, "Pressure from competitors [coming from] larger markets is likely to offer a more important stimulus to competition than antitrust enforcement can ever hope to offer." BEL-CA consequently stresses – as BUL-CA does – the importance of open markets policies: "Policies promoting international trade and foreign direct investment flows are the best way to promote competition in small economies," because of their constant pressure, as opposed to the interventions of competition authorities addressing only a limited number of specific cases. Indeed, it appears that Belgian enterprises "have to align their prices on German price, i.e. the [Belgian enterprises] are price-takers. It also appears that [the] profitability [of Belgian enterprises] is significantly constrained by import competition because the size of the Belgian domestic market is small enough in order to allow foreign undertakings to cater for the entire domestic market at 'cut-throat' prices," notes BEL-CA.

For **Comco**, its economy is "markedly divided between its highly competitive open export-oriented sectors, such as watches, or banking services, and its often highly concentrated, protected, closed market sectors, such as agricultural markets which are kept this way by cumbersome state regulations and political pressure (fear of competition and lobbying)."

CCS states that the "obvious way to minimize constraints [– the size of the local market, the lack of resources, constrained labor supplies or high land prices –] is by opening up the domestic economy to trade." This is the model that CCS has adopted. The Economic Survey of Singapore Second Quarter 2008 attached to Singapore’s contribution mentions that "Singapore’s tradable sector where 93% of final demand (excluding intermediates) derives from external sources" is highly dependent on foreign markets. Such facts are reflected in Singapore’s trade policy where roughly 96% of imports enter Singapore duty-free; exports enjoy similar privileges. Competition policy must complement and support policies that open the economy to trade and foreign competition and should not unduly increase the cost of doing business in Singapore or add to business uncertainty. Thus, Singapore accrues its objectivity and credibility within the business world by maintaining a transparent legal regime supported by reasoned decisions published on CCS’s website.

CBC underlines its support of "free and open market-based economies." Its successful relationship with the US is highly valued, as well as its commitment to "sign trade agreements with other trading partners." Its close ties with the US convinced the Competition Policy Review Panel to state that "in assessing the effectiveness of Canadian competition law and policy, the Panel believes that it is desirable to conform Canadian legal requirements with those of the US, where practicably feasible, with a view to minimizing unnecessary procedural or substantive differences, given the high level of integration of business operations in the two countries."

Even such openness to trade does not guarantee a direct effect on trade (for example physical distance, cultural or political differences might deter would be foreign competitors to enter a market). While openness to trade is generally beneficial, it may have consequences. Indeed, **NZCC** suffers mostly from international anti-competitive wrongdoings, "being either anti-competitive conduct occurring offshore or arrangements in which at least some of the parties to the conduct are over-seas based." Its main response consists in cooperation with overseas competition regulators. NZCC states that "as a result of its leniency policy [it] has become aware of more international cartels that are impacting on [its] markets." Indeed, a number of international parties file applications in New Zealand "out of their concern that [NZCC] would start an investigation to follow up what had been discovered elsewhere, and would take enforcement action against them."

JFTC mentions that although the size of the Japanese economy is not small, the competition agency notes that for a small economy, the geographical market under competition law may more likely be larger than that created by its judicial boundaries and that if the competition authority of a small economy applies its competition law mainly in such market, then an issue specific to a small economy may emerge, such as a possible argument that the promotion of free trade can complement the enforcement of competition law.

Importance of International/Supranational Competition Networks

A number of contributors underline the importance for small economies to take advantage of supranational organizations. Indeed, **JFTC** thinks that it would be effective for small economies to use an international network to respond to a specific case through international collaboration, and that the ICN would provide a suitable arena to establish such a network. From within a supranational organization, **HCA** states that it has not tried to use small economy specific arguments in substantive issues mainly for two main reasons:

- First, as a practical commitment to the European Union.
- Second, because, since 1991, "it has been pursuing to adapt and apply a 'mainstream' best practice based competition policy" due most notably to its open economy.

BEL-CA indicates that its jurisdiction is also a member of the EU and the competition agency explains how the EU experience enables small economies to limit the oligopolistic nature of their natural small markets. According to BEL-CA, "The opening of markets or the integration of small economies thus avoid[s] or alleviate[s] the conflict between efficiency and competition:

- Export-orientation allows the actual size of the plants to be closer to the theoretical METS [minimum technical efficient scale][;]
- Export orientation is tantamount to an increase in the size of the market and thereby allows – all other things being equal – for a lower degree of concentration as measured by HHI and simultaneously for actual plant sizes being close to the METS. This explains why on a territory of a small open economy like [itself], several large plants and undertakings can survive even in industries requiring a large METS (like steel, flat glass, and non-ferrous metals)."

BEL-CA also asserts that competition agencies in small economies benefit more from contributions of networks and from the experience of competition authorities from larger economies than competition agencies from larger economies.

Comco indicates that "[it] currently enjoys numerous free trade agreements in a number of economic sectors with its most important trade partners, and is actively seeking to expand such trade agreements."

The **Federal Antimonopoly Service of the Russian Federation (FAS Russia)** has a unique position amongst the contributors. Indeed, FAS Russia notes that "taken as a whole [it] does not correspond to the definition of a small economy due to its size." However, FAS Russia states that "a decentralized character of the Russian statehood (Russia is a Federation comprised [of] 86 subjects each … having a substantial administrative and budgetary authority) and small scale of economy of many of its subjects suggest a partial application of the notion of 'small economy' to several of the subjects of the RF since many of the issues raised in the Survey … pertain to their local economies." To a certain extent, according to FAS Russia, "the response to this question will be analog to this connection to small economies embraced by international trade agreements where competition issues spreading over their national boundaries are regulated by an authorized supranational body." FAS Russia mentions the EC as an example of such authorized supranational bodies. For FAS Russia, the general question asked in the Survey breaks down into a series of smaller questions:

- "'Local' and 'nation-wide' abuses of dominance[;]
- Applicability of the competition law within the administrative boundaries of the subject of the Russian Federation and beyond them[;]
- [Structure of the competition authority] and its ability to address abuses at different layers of the federal state."

Limited Resources of Small Economies

Some contributors from the following jurisdictions **Belgium**, **Japan**, **Mexico**, **New Zealand**, and **Singapore** highlight the fact that small economies may face higher expenses than large ones. As an example, **CCS** compares its budget ratio to the budget of other competition authorities (mentioning for example that its budget ratio is 3 times greater than that of Japan relative to the Japanese GDP, and 2.5 times the ratio of UK budget relative to the UK GDP). CCS concludes that "to run an effective agency in a small economy requires political will and an ongoing commitment from the government." Moreover, expertise in specific areas of law might just not be available in small economies. Indeed, as noted by the following two competition agencies from **Mexico** and **Japan**, competition agencies of small countries have problems due to limited resources. They must therefore prioritize. **BEL-CA** concurs. It does not see "significant differences in the competition law and policy environments of larger economies and open small to medium sized economies," except that "[the] smaller the economy, the more difficult it is to ensure that a competition authority is sufficiently equipped to achieve an adequate enforcement of the rules of competition." **NZCC** for its part argues that "Given [its] competition institutions' [small size, it] might also struggle to achieve minimum efficient scale." Consequently, NZCC looks to "draw on international experience and case law where relevant and to use its available resources to best effect." For example, NZCC "has functions both as the generic competition body and as the industry-specific regulator for a small number of regulated sectors, so as to draw on the pool of competition expertise."

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II. Notion of a "Small Economy"

Responses to this question vary from agreeing that the criteria put forth in the Survey are adequate, to believing the criteria to be incomplete, or even not useful. The manner in which each contributor addresses the size of its own economy also comes through in this section due to the generality of the question. To this end, a number of contributors mention the significant effects of being part of a supranational network or larger jurisdiction on the way the agency addresses competition matters. In addition to the characteristic of size, some contributors highlight their dependence on international trade as an essential feature that contributes to the overall openness of their economy.

* *

2.1. Are the abovementioned criteria adequate in your view?

The competition agencies from **Canada, Czech Republic, Israel**, **Lithuania**, **Mexico**, and **Switzerland** answer that the abovementioned criteria are adequate in their view. **BUL-CA** also believes them to be satisfactory, adding that "not all of them need to be observed in order to draw a conclusion as to the size of the economy." **BEL-CA** and **CCA** declare that the criteria mentioned in the Survey are adequate, except for the legal, cultural, social, and historical differences compared to the neighboring economies because it " implies judging non objective variables" (CCA's contribution). More generally, the competition agencies from **Hungary** and **Switzerland** warn that "one should not apply such criteria mechanically, instead, the best [use of the above criteria] is to make clear which notion of smallness is applied and to make sure that it fits to the particular analysis" (HCA's contribution). Comco adds that "some criteria, such as GDP, territory, or population lack conclusive thresholds." **FCA**'s contribution includes another relevant criterion, namely, "structural aspect, including [factors, such as] the characteristics and amount of population centers, distribution of population, level of infrastructure and geographical distribution of purchasing power."

KFTC believes that the "criteria … adopted to define a small economy alone does not seem to be a matter of importance." The criteria, argues KFTC, "might be meaningful when they serve as the premise for discussion on whether or not a small economy, once defined as it is, requires a different competition law enforcement regime." As KFTC thinks that "a small economy does not justify a different enforcement regime, [it] considers the attempt to define a small economy unnecessary [in] the first place." KFTC summarizes its position as follows: "when it comes to antitrust enforcement, the size of the economy is less important than the notion of geographic or product market;" indeed, "defining an economy as [a] small one uniformly and then trying to apply a different legal regime to all industries does not make sense." KFTC concludes that "the attempt to define the size of the economy can be said meaningless." **CBC** indicates that "the size of a nation's economy does not matter for Canada in terms of the economic analysis that it conducts for a merger review or a review of any other business conduct." It balances its above statement by adding that size "may matter in terms of bargaining leverage in getting the most desired remedy in settlement negotiations or in terms of the cooperation an agency may receive from parties." **ICA**, however, notes that although "considerations about the size of markets under scrutiny do not influence the analytical framework, the fact that an economy is small in terms of GDP or population, or geographically isolated compared to its neighboring countries may affect the *findings* of the competition investigation in that they may constitute factors limiting competition." For instance, ICA argues, "it is possible that a small market may not present sufficient profitable opportunity for foreign competitors to enter." ICA declares that "[in] this way the competitive threat of entry to the domestic market is blunted and incumbent monopolies can maintain their privileged position. This small country problem is exacerbated to the extent that domestic regulations inhibit rather than enhance competition and/or where distribution systems are country specific and hence less susceptible to a credible threat of market entry," concludes Ireland.

2.2. How do you define your economy ("large" or "small")?
2.3. By which standards?
2.4. How do you define the size of your neighboring economies or major trading partners?

CCS demonstrated with actual data its integration in the world economy. According to CCS's response, its trade to GDP ratio (2004-2006) is 456.7% compared to United States' ratio of 26% for the same period (cf. Annex of CCS's contribution. CCS notes that by any standards it is likely to be regarded as a small economy, since it accounted for just 0.3% of the global economy in 2007 and 1.5% of the East Asian GDP. The size of the Singapore population, its small geographic size and the absence of natural resources are all factors which contribute to Singapore being a small economy. CCS concludes that given these features the economy will always be dependent on foreign demand.

On the other side of the spectrum, the **U.S. competition agencies** note that it is a large economy by any measure. **MFCC** considers that "the size of [its] economy is not small, because of its openness and degree of regional economic integration, as well as its GDP level." **CBC** sees its jurisdiction as a "medium-sized but open economy."

A number of contributors believe their economy to be small. Indeed, **JCRA** declares, to an equal extent as CCS, that "No matter how one defines a 'small' economy, Jersey would be included." **NZCC** compares itself "with other members of the OECD," and concludes that it "is clearly a small economy" in terms of GDP, size of the territory, and geographical location. For its part, **TFTC** notes that "[it] is a small open economy, both in a conventional sense and in terms of its economic attributes." Competition agencies from **Belgium** and **Hungary** consider their jurisdictions "to be a small or moderately small economy" while **CCL** differentiates its economy between the size in terms of GDP and by population on absolute figures ("small economy") and its regional integration ("midsize economy"). The competition agencies from **Colombia** and **Mongolia** consider their economies as "small" ones. **CRCA** states that it is considered to be a small country in comparison with neighboring countries such as Germany or Poland. The **Luxembourg Competition Council (LCC)** indicates that, although its size, population, and GDP in absolute terms are small compared to neighboring countries, Luxembourg's economy is open to exports and imports. **Comco** does not offer a clear-cut answer to this question. Indeed, it believes its economy is small to medium-sized.

With its peculiar situation underlined in question 1, **FAS Russia** indicates that there are a number of examples of "small economies" within the Russian Federation mostly in its southern parts between the Black and Caspian Seas meeting the criteria denoted in the Survey: the Adyg, Chechen, Ingush, Kalmuk Republics, Kabardino-Balkaia, Karachai-Cherkessia and Northern Ossetia. These regions have a definitely expressed ethnical identity (Ingush, Chechens, Kalmyks, etc.), "a high degree of autonomy and self governance (both their Parliaments and Presidents are elected, while in most of other subjects of the Russian Federation the Head of the Administration is appointed by the federal government)," and budget autonomy in terms of disposing proceeds of levy and received from the Russian federal budget. Their economies are substantially "closed" – "about 25% of their GDP is sold outside their respective boundaries." Their economies can be considered small compared to the size of the overall national economy (the contribution of each of the above subjects in the national economy is less than 2%).

The contributors use different scales to "measure" the size of their economies. For example, according to **JCRA**'s contribution, Jersey is a 45-square mile island with a population of a little over 90,000 and a GDP of around US$5.1billion. As an island, it is also relatively isolated geographically. JCRA found in a prior decision that "over 95% of all goods imported into Jersey [– including a majority of the food products available in the island –] come via ocean freight from Portsmouth in the southern UK." **IAA** commented that Israel is largely isolated from neighboring countries and consequently does not benefit from any significant cross-border trade. It has also high transportation costs, which often create prohibitive impediments to entry, hamper imports and position domestic export-targeted firms in a relative disadvantage compared to their international counterparts. The consequences are for IAA that the small size of the Israeli economy influences its economic performance: relatively small volume of economic activity, catering a limited domestic demand and serving just over 7 million people with annual GDP of US$203 billion, and US$28,000 per capita. **NZCC** mentioned that New Zealand experiences similar problems and challenges as the Israeli's competition agency, but due to other factors. Indeed, even though New Zealand is about three-quarters of the size of Germany, its location is over 2,000 kilometers apart from Australia, its closest "neighbor." New Zealand has an open economy as indicated by the Trans-Tasman Mutual Recognition Agreement and the Australian/New Zealand Closer

Economic Relationship Agreement; in most cases, products produced in Australia can enter New Zealand duty-free. **TFTC** argues that economic development in its economy relies mainly on international trade largely "because of the scarcity of natural resources and the size of its territory." **AFCCPM** uses the following criteria in order to define the smallness of its economy: the size of undertakings based in Mongolia is quite small and almost none of global players do exist in Mongolia's territory. AFCCPM also asserts that its population is about 2,6 million, only a minor fraction of the Russian Federation's (142,2 million) and China's (1.3 billion) population. According to **FCA**, "[it] is characterized by a relatively high GDP per capita, but by a small size of its economy, by a small and sparse population, distant geographical location and a high degree of regional economic integration." FCA is also "geographically divided between population centers with higher purchasing power and employment and sparsely populated areas with lower economic capacity." **CBC**, for its part, indicates that Canada has "population is scattered across a large landmass and its population centers are small relative to the efficient scale of business operation, particularly in the manufacturing sector." **Comco** reports that Switzerland is "a relatively small economy, both in terms of population and area." However, its GDP per capita is among the highest in the world (CHF 67,223 in 2007), and according to the 2009 Index of Economic Freedom, it ranks "9th out of more than 170 countries." Another characteristic for the Swiss economy is its location: in the heart of western Europe between some of Europe's largest economies (Germany, France, and Italy).

NMa mentions that the Netherlands has "a small national territory (41,528 square meters)," a large, open economy in terms of GDP, and a large population (16 million). The Netherlands offers a "cultural" particularity, noting that the "polder" model is one of the foundations of the trade and business culture of the Netherlands. The polder system consisted of the collective work on building the dikes and water defenses, since the Netherlands lies mostly below the sea level. According to NMa, "This so-called polder model is said to be a factor in the Netherlands' extensive cartels, which led in the early 1990's to its being known as the cartel paradise of Europe." NMa adds that "another likely contributing factor was the traditional pillar system of Dutch society, whereby society, and de facto, business, was segregated along religious and ideological lines (a socialist pillar, Catholic pillar, Reformed pillar, etc.)." Moreover, "there is a ready acceptance of authority in the Netherlands, an acceptance with cultural and historical origins, indirectly connected to the limited extent of the national territory."

BEL-CA believes that if an economy is a member of a network or part of a larger jurisdiction, it will affect the way the antitrust authority deals with antitrust matters, even though in the case of a very small economy, the authorities of larger economies might not intervene because of the minimal impact the antitrust matter has in its own market. Indeed, the EU – being a supranational body – is highly valued by contributors which are members of the EU, and which describe themselves as small economies. However, there seems to be still a split between "new" and "old" members of the European club. For example, **HCA** highlights that its membership in the EU and overall economic openness may have an offsetting effect on the size of its economy. However, according to HCA, their "dimension of administrative capacity and effective enforcement power … is worse [than other Members of the EU since] Hungary is linguistically isolated." Another factor that HCA highlights is its "present social, cultural and economic environment [which] is still to a very large extent a result of a historically peripheral position in Europe, worsened by decades of planned economy and isolation from the trends and developments of the West." HCA concludes that "the historical setting seems to dominate the picture," more than purely small economies factors. **LCC** states that Luxembourg – being an "old" member of the European club – notes that "it is part of an advanced regional economic integration process" it has important economic ties as well as with its neighboring countries as with more far away countries not necessarily being a member of the regional economic integration organization, and a number of big worldwide enterprises are established on its territory. For **CRCA**, it has also other attributes typical of small economies, such as markets open to exports and imports of goods and services, dependency on foreign trade, and strong ties with foreign countries such as Germany, Slovakia and the Russian Federation. **FCA** mentions that Finland is also highly dependent on international trade and is a Member of the EU. Thus, FCA believes its jurisdiction to be "an open economy with a high degree of economic integration." **CCL** declares that its competition law "is fully harmonized with … EU [competition law] and in relevant cases [EU] law is directly applicable." It concludes that all major competition rules are enforced in Lithuania's economy "as it would be in a large one." Finally, according to **BUL-CA**, the Bulgarian economy is "a free market economy" based on the principles of "free market initiative and fair competition." However, notes BUL-CA, "the process of liberalization is at different stages with regard to different sectors." In some sectors, certain microeconomic factors, such as high entry barriers, low competitiveness and unfair competition, or high market concentration continue to hinder the competitiveness of some Bulgarian enterprises. On the other hand, Bulgarian legislation is in line with EU legislation, but it needs to be wholly implemented. **Comco** responds that Switzerland – not being a Member of the European club – is nonetheless very influenced by events that take place within the EU. Indeed, Switzerland's main strategy is to become "euro-compatible to let its enterprises compete the most efficient way with other global players." For example, the work of the Swiss Antitrust Authorities is currently being evaluated by the Federal Council (the Government) and Parliament. The Panel which conducted the evaluation urged in its report among other suggestions to "consider amending the Competition Law in a more euro-compatible manner [with respect to merger control]."

With regard to the major trading partners, some contributors develop their answers as follows: Colombia's major trading partners are Venezuela and the United States, according to **CCA**. Similarly, **MFCC** argues that "Mexico is geographically linked to the largest economy in the world and its commerce with [it] is very significant." According to **CCL**, Lithuania's neighboring economies should be treated in a similar manner, that is, one should differentiate between the size of the economy in terms of GDP and by population on absolute figures ("small economy") and the regional integration ("midsize economy") of Lithuania's neighbors. **BEL-CA** considers the Dutch economy to be "borderline" large, the German and French economies to be large, and Luxembourg's to be small. **Comco** indicates that Switzerland's main trading partners (the EU, the US, and Japan) are considered by any standards large economies.

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III. Anti-competitive Agreements

There is no consensus among contributors on how the size of an economy affects the application of competition law regarding anti-competitive agreements. Some contributors do not believe that there are significant patterns or differences with respect to cartel activity in highly concentrated markets, while others emphasize that open borders are very important for maintaining competition in their economy. With respect to whether there is evidence of more oligopolies in small economies, about half of the contributors do not think it is the case, while the others believe there is room for such evidence. Furthermore, some contributors highlight the presence of business or trade associations, and their ambiguous role with respect to antitrust issues. Contributors also express mixed views concerning the need for harsher sanctions in small economies. Most contributors see no reason for small economies to employ a different framework of analysis to the assessment of any type of vertical restraints based merely on market size.

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3.1. How, if at all, should such elements be taken into account?
3.2. What is the importance of open borders in this context?

General Comments

The elements included in the introduction to these questions have been either accepted or rejected by the contributors. Indeed, the competition agencies from **Japan**, **Singapore**, and **Switzerland** think such patterns do not exist, while the competition agencies from **Bulgaria**, **Colombia**, **Luxembourg**, **New Zealand**, and **South Korea** believe in such characteristics in small economies. **JFTC** argues that be it cartel or collusion, the fact that the market participants know each other well will enable them to reach an agreement by communicating their intentions to each other and that the fact is not specific to small economies. For example, it mentions that the bid participants know each other very well in Japanese collusion cases. In its response, **Comco** indicates that in the years 2003-2007 it took 9 formal decisions, and "the cases investigated usually involved high market shares." Indeed, only one was under the threshold of 50% of market share, while some even reached 90% (such as the hospital fee structure) or 100% (for example the tax on recycling). However, notes Comco, "the investigations in the two above examples were closed, without evidence of cartelistic behavior." Comco concludes that "there seems [to be no] distinct causality between the percentage of market shares and illegal cartelistic behavior." **CCS**, for its part, "is not aware of any research to verify the suggestion that competitors in small economies know each other better."

NZCC mentions that generally "competing enterprises in New Zealand … know a good deal about each other." Indeed, there are a large number of employees and managers going from one competing enterprise to another. Of course, these employees and managers keep contact with their former colleagues, and they meet also outside their business activities, notably during their leisure activities, thus facilitating a risk of collusion. According to NZCC, "the 'coziness' of small economies may facilitate a higher level of cartel behavior, all else being the same." NZCC reports that "when the [New Zealand Commerce Commission] was no longer confined to limiting the boundaries of relevant markets to national borders, the likelihood of this happening was reduced." **KFTC** mentions that, although there's no clear evidence to such characteristics in small economies, it considers they might be true because of the similar reasons addressed by NZCC above. Indeed, KFTC states that, as a characteristic of a small economy, "The fact that people and operators know more about each other in small economies may lead to more incentive of anticompetitive agreements." KFTC also voices its opinion that such a fact may lead to justify the role of the competition authority in that it should intensively monitor against potential cartel activities in order to reduce the incentives for businesses to enter into anticompetitive agreements.

CCA states that "the fact that [it] is easy to access the market agents information will ease the prospect of colluding." CCA however underlines the need not to adopt special measures in this regard. **LCC** agrees "on the basis of an empirical assessment, with the conclusion that close relations, networking, information sharing and availability of information are mechanism that may favor collusion, be it implicit or tacit, and that such mechanism are, more likely to occur in an economy that is small, sharing a common history and tradition of making business, especially in markets which are local and … not important enough to attract new entrants which could change longstanding practices." **BUL-CA** claims that "[in] an economy characterized by the power of small circles, it is easy to maintain cartels and other collusive arrangements because when 'everybody knows everybody else' there is no need for detailed and vulnerable contractual arrangements."

In its response, **IAA** refers to its gasoline market, which serves as a prominent illustration for the effect of barriers to entry on the stabilization of oligopolistic market structures in a small island economy. In the case of *Delek*, the IAA found that the complex vertical agreements agreed upon by the three major incumbent gasoline companies and their respective station operators were "restrictive and hence illegal." In a decision issued in 1993 it was stated that "prices paid by end consumers were affected by a requirement included in these agreements that the gas station operator sells gasoline and other products at the exact price determined by the gasoline companies, thereby securing the oligopolistic equilibrium."

Role of Supranational Institutions

Supranational bodies, such as the EU, may affect the way competition is applied in the economies which adhered to a said body. According to **JCRA**, Jersey's competition law requires both the JCRA and national courts to treat questions concerning horizontal agreements in a manner consistent with EU competition rules, so far as possible. According to Jersey's Law, "even if an arrangement is found to appreciably hinder competition in Jersey or any part thereof, it may still be subject to an exemption granted by the [JCRA], or to certain potential exemptions granted by Jersey's Minister for Economic Development." The power to grant an exemption by the Authority is governed by the same principles as those listed in Article 81(3) of the EC Treaty. The Minister for Economic Development also can grant a limited number of exemptions, such as small enterprises exemptions, or public policy exemptions, in consultation with the JCRA. **BEL-CA** adds that, being part of a supranational body (the EU), the application of EU Law by competition authorities from a small economy is bound to be more frequent than by a competition authority of a larger Member State. Indeed, "More agreements and practices are likely to 'affect trade between Member States, or at least it will be less difficult to interpret the ability of agreements to appreciably affect trade between Member States' given the fact that anti-competitive agreements are more likely to cover the whole territory of an open small to medium sized economy than to cover the whole territory of an open large economy."

Open Borders

Competition agencies from **Belgium**, **Canada**, **Colombia**, **Czech Republic**, **Israel**, **Ireland**, **Luxembourg**, **New Zealand**, **Singapore**, **and South Korea** comment on the effects of open borders in their economies. **BEL-CA** declares that the "degree of 'openness' of markets is a key issue, especially in respect of small to medium sized economies." BEL-CA indicates that the "focus of Competition Authorities in open small to medium sized economies should be on the industries and undertakings enjoying some power of price-setting due to product differentiation or sheltering from international competition." **LCC** adds that "open borders are of importance, but only insofar as the market conditions really attract new entrants."

CRCA states that open borders are very important for its economy. **ICA** mentions the benefits of Ireland having joined the EU and from the open borders in this context (the European internal market) may have "made anticompetitive agreements more difficult to sustain." **KFTC** mentions that if an economy has its borders open, then foreign competition will pressure internal businesses not to enter into any anti-competitive agreements; such pressure cannot be ignored. Even though it says that open borders have greatly benefited its economy as a whole, **CBC** explains that while trade and investment policies may indeed "blunt the potential anti-competitive impacts that can result from high levels of industry concentration... in many industries the influence of foreign competition is limited due to economic factors (e.g. transportation costs) or as a result of government policy." CBC details the three categories it believes contain the oligopolies: "(1) oligopolies resulting from government policies that directly or indirectly restrict foreign competition and foreign investment in Canada, (2) national or regional oligopolies where there is little if any foreign competition, and (3) oligopolies with a cross-border (i.e. North American) or international dimension."
IAA underlines the importance of open borders with the example cited above, and believes open borders are the first best option available to "island" economies such as itself. However, **CCA** stresses the fact that the local competitors might obstruct the entry of foreign agents, "using the capacity that they have to share information."

Furthermore, **NZCC** states, "most cartels have lately been operating outside New Zealand where these domestic factors should play a limited role." The role of open borders is good, as it can "help domestic markets for tradable goods to be more competitive than would otherwise be the case, but at the same time, overseas cartel activity can be 'imported' into the country." However, as mentioned above, most of the current cartels under investigation by NZCC involve large international companies. **CCS**'s experience today shows that many of its anti-competitive agreements' enquiries "have involved local geographic markets, typically service industries or non tradable goods."

3.3. Is there evidence for more oligopolies in small economies?
3.4. If so, what type of competition policy is best suited to cope with the implications that oligopolies have on competition?

Oligopolies

With regard to evidence of more oligopolies in small economies, about half of the contributors from **Belgium**, **Czech Republic**, **EU**, **Japan**, **Luxembourg**, **Mexico**, **New Zealand**, **Singapore**, **Switzerland**, and **U.S.** who answered this question do not think this has been demonstrated. Indeed, according to the **U.S. competition agencies**, "Facilitating practices most commonly arise in oligopolistic markets, which occur in the US and other larger economies, as well as in small economies." U.S. competition agencies approach facilitating practices on a case-by-case basis "in light of their individual purposes and effects." U.S. competition agencies are "not aware of any reason to apply a different analysis in small, as opposed to large, economies." **CCS**, for its part, "is not aware of any research to verify the suggestion that there is more collusion in smaller economies." Rather, reasons CCS, "Experience would suggest that the nature of the industry is likely to be a better indicator for the likelihood of collusion than whether the firms are located within a small economy." **JFTC** believes that "it is not clear whether or not there are more oligopolies in small economies; however oligopoly exists in large economies, so it is believed that the enforcement of competition law in an oligopoly market is an issue common to both small and large economies." In New Zealand, "Some major business sectors …, including airlines, grocery retailing and telecommunications, have oligopolistic market structures." **NZCC** is not "aware of evidence for/of the existence of relatively more oligopolies in New Zealand than elsewhere." **CRCA** has come to the conclusion that "the Czech competitive market proves not to be of any significant difference compared to both smaller and much greater economies." **Comco** adds that if "markets in Switzerland are more concentrated and therefore more prone to anti-competitive agreements than could be justified by natural trade barriers, the reason must primarily lie in artificial trade barriers which may facilitate collusion." Comco concludes that "A first-best policy remedy to prevent high market concentration than implies a consequent elimination of such artificial trade barriers and not the adoption of special competition law rules." **MFCC** does not see any "evidence for more oligopolies in small economies, but [believes] that in these cases the competition authorities should as a priority [fight] against cartels," using adequate instruments and committing enough resources to that end. **BEL-CA** does not "have the impression that there is a significantly higher risk of collusion and anti-competitive conduct in open small to medium sized economy" than in larger economies. On the contrary, BEL-CA argues that the "types of cases dealt with by competition authorities are … very similar."

EC indicates that an empirical study is needed to answer this question. If the existence of more oligopolies is indeed proven, then the EC believes "it would be a further argument in favor of international trade liberalization, either bilaterally, worldwide, or in trading blocks." EC notes that "Trade liberalization, by widening markets so that they extend beyond national or regional jurisdictions, should benefit consumers by making it harder to attain a dominant position, although it may complicate the lives of competition agencies, which would more often need to deal with cases in which the market is larger than their jurisdiction, and possibly co-ordinate with other competition agencies dealing with the same case." EC does not use different measurements depending on the size of the geographic market. Finally, **LCC** does not have the necessary data – after only four years of service – to "determine whether beyond the enhanced risk of collusion, this risk materializes in Luxembourg."

The other half of the contributors from **Belgium**, **Colombia**, **Finland**, **Ireland**, **Israel**, **Lithuania**, **the Russian Federation**, **South Korea**, and **Taiwan** who answered this question declares that the size of the economy may affect the number of oligopolies. **FAS Russia** declares that its local branches operating in the small "subjects" of the Russian Federation provide "evidence of greater likeliness of collusion in their territories." An example is retail gasoline price fixing. Indeed, as a rule, "a fewer number of retail oil sellers operate in such regions compared to bigger regions of the [Russian Federation]." "More than 60 percent of sales in these regions are made by 2-3 oil retailers." "The remaining independent retailers use to buy wholesale gasoline from them and, therefore, also depend from their pricing policies." "The greater risk of collusion is partially compensated by better possibilities of finding evidence of collusion, therefore, no special anti-collusion provisions are used in the territory of small subjects of the [Russian Federation]."

ICA indicates a number of industries with "tendencies to high levels of concentration," including "cement, banking, health insurance, life insurance, newspapers, and supermarkets." ICA says that in other "sectors like energy, telecoms and postal services, higher concentration are the result of on-going liberalization process of previously State monopolies and can similarly be found in much larger economies of the European Union."

IAA says that an "oligopolistic market structure is prevalent in Israel, arguably fostering cartelistic behavior." IAA illustrates its statement by mentioning one cartel example in the liquefied petroleum gas (LPG) market, and another one in the "nation-wide floor tile cartel which had endured for over a decade."

TFTC illustrates a case in its gas and diesel market: since 2000 the oil market has been a duopoly in Taiwan (30% and 70% of market shares). According to TFTC, the "scenario on the adjustment in the price by the two companies was: 1) The initiating party would issue an announcement in the media with respect to a decision to change its price. 2) If the respondents decided to follow, the two wholesale prices of the two competitors would be adjusted within the same range at the same time. 3) If the respondent decided not follow, then the initiating party would immediately withdraw or make an amendment to earlier decision." TFTC "held that the use of the media to announce price rises was [in] effect a public negotiation of price adjustments [between] both parties." TFTC adds that "This affected the capacity of most gas station operators to compete in terms of price and eventually had an adverse influence on consumer welfare." The decision is currently on appeal.

FCA's view, the "business culture that has prevailed in the past, or even prevails today, as well as the geographical dispersion of economic activities are other aspects to consider" besides the size of the economy. FCA notes that "it is easier to collude in a small economy than in a large one, which means that explicit cartel arrangements are often not necessary in a small economy." FCA concludes that in a small economy, "tacit collusion is easier than in a large one, which means that hardcore cartels may not always be necessary for efficient collusion on prices." As such, tacit collusion may be an even bigger problem in small economies than hardcore cartels. FCA thinks that authorities in small economies should make their top priorities to intervene against factors facilitating tacit collusion.

KFTC thinks that the "high likelihood of oligopolies in small economies itself does not require a different type of competition policy regime or different levels of remedies."

CCL mentions that "Relying on last several years' investigations data it could be said that in some more concentrated relevant goods markets, the Competition Council of Lithuania disclosed several restrictive agreements on exchange of confidential information between competitors." CCL presumes that "in more concentrated markets where a number of market operators are not large, a greater probability of conclusion of prohibited agreements between competitors acting in the same goods market exists."

CCA declares there are "more oligopolies in small economies; in fact [CCA] can provide some examples, that belong to important markets of our economy, such as aerial services and telephony." In very small economies, there is, according to **BEL-CA** which separates its analysis between very small and small to medium sized economies, "a significantly higher risk of oligopolistic market structures, collusion and anti-competitive behavior …, especially if [these very small economies] are moreover relatively closed." BEL-CA adds that there "will also inevitably need to be more focus in small economies on issues such as cooperative oligopolistic market behavior."
Even though the **NMa** does not mention that there are more collusions due to the smallness of its economy, it does mention that "the *de minimus* rule is under constant political pressure, especially by political parties that have a strong interest in protecting small and medium sized enterprises." However, this does not take from the fact that "different enforcement tools may be more or less effective to tackle a potentially enhanced risk of collusion, and these may well relate to the size of the territory," argue NMa.

Role of Business/Trade Associations

The role of business or trade associations and the authorities' responses to such associations are highlighted by a number of contributors. **TFTC** declares that "In the last year [Taiwan] resolved seven actions that contravened the provisions of the [Law] concerning cartels." TFTC mentions that "Business associations, such as the jewelry commercial association, non-life insurance association, tourist bus association, and liquefied petroleum gas association, accounted for more than half of the cartel cases." TFTC concludes that "In these relatively conservative industries, often operating at a more regional level, joint pricing is much more common[; there] is also a tendency towards anti-competitive practices which seems to stem from the leadership of these associations that have a well entrenched business culture." There are many trade associations in Japan "which enable competitors to get to know each other quite well through the exchange of information." **JFTC** argues that even under such circumstances the "introduction of leniency has proven very effective and has produced numerous results." **CCS** has looked at the "role of trade associations in facilitating inappropriate contact between members on several occasions, a feature of the Singapore economy that might reflect its small size and close ties." However, CCS also sees these associations as "networks to channel a pro-competition message, to encourage compliance through education and to enhance the understanding by local businesses of the prohibitions within the [Competition Act]." As CCS is young (the Competition Act came into effect on January 1, 2006), it uses advocacy and the promotion of a culture of competition to complement its enforcement efforts. The role of trade associations in **ICA** is said to have been "at the centre of two conspiracies that netted criminal convictions against eighteen companies and individuals," the Connaught Oil Promotion Federation and Irish Ford Dealers Association. During meetings of these associations, members would "[reach] price fixing agreements …, [agree on] methods for policing their conspiracies and [punish] those members who cheated on the cartel agreements." ICA mentions that "other criminal prosecutions are presently before the Irish courts involving other trade and business associations." A major focus of the **JCRA** "has been the removal of fixed or recommended fees in Jersey's trade and professional associations." A number of sectors were affected by these anti-competitive agreements, such as dentists, driving instructors, taxi-cab operators, building contractors, plumbers, electricians, and a fixed fee for conveyance services in real estate transactions. However, JCRA cannot say "whether the former apparent prevalence of trade association fixed or recommended fees in Jersey had anything to do with small economies having more oligopolies." **NMa** underlines the role of close relationships between those active in business in anti-competitive agreements: "it may affect the prioritization policy of the competition authority," and it may contribute to the existence of wide-scale cartels in particular sectors, such as the construction sector. Moreover, "It may affect the operation of the leniency system," argues NMa. Indeed, "the step to applying for leniency may be more difficult for an individual [enterprise] than in other economies where operators know less about one another." In the Netherlands, there "has been significant debate … about the role of the 'whistleblower' in competition law," because it is generally a disgruntled party who accuses a former employer or business partners in an exaggerated way. Furthermore, the competition authority may use such close-knit relations to pass its competition message, as mentioned by the CCS's contribution.

Efficiency Considerations and Other Measures

Competition agencies from **Bulgaria**, **Luxembourg**, **Netherlands**, **New Zealand**, **Singapore**, and **Taiwan** indicated in their contributions some comments on efficiency considerations and other measures. **TFTC** declares that "Efficiency has been one of the legislative goals being pursued in [Taiwan]." Taiwan "relaxes regulation which allows for some horizontal agreements but only in circumstances where it can be demonstrated that there exists a net public benefit, usually through efficiency gains." More generally, Taiwan's "focus has been on markets where there exists a higher concentration of market power largely because collusion in these markets results in more widespread detriment." TFTC takes "more actions and imposes stricter sanctions that specially target hardcore cartels that that substantially impede competition without any contribution to economic efficiency." In Singapore, parties may come to the competition authority for guidance or a decision "if they consider that an agreement could be in risk of breaching the [Competition Act]." **NZCC** heads in the same direction as it "authorizes" anti-competitive agreements "if it can be shown that such [agreements] would lead to a net public benefit, that is, of the benefits from the agreements exceed the detriments from the lessening of competition." As mentioned in its answer to question 3.1, **LCC** declares that the need for a strong competition authority in a small economy is of importance, because the "detection of collusion [is made] more difficult, as concerned undertakings enjoy, or feel to enjoy, a strong mutual dependence and reliability." Indeed, even in a small economy, "the authority must have the ability to persuade the population and the economic decision makers of the usefulness of the open economic process." **BUL-CA** views competition authorities as "to be prepared to facilitate entry when someone shows an interest in coming into the market." Finally, one element identified by **NMa** is international cooperation: "The limitation of the relevant market by state borders may make a difference." The Netherlands makes use of the European Competition Network and its rules on case allocation. Another point mentioned by NMa is that "there may be more cases where the alleged infringement has an effect on markets in a neighboring country." NMa illustrates this statement with the shrimps cartel case where the cartel was operating in the Netherlands, Germany, and Denmark.

3.5. Could the enhanced risk of collusion and anti-competitive conduct justify harsher sanctions or a different focus of competition laws?

Four contributors from the following jurisdictions **Bulgaria**, **Israel**, **Mexico** and **Mongolia** believe harsher sanctions are justified with respect to the small size of the economy. On the other hand, the rest of the contributors view the size of the economy as no justification for hasher sanctions. Only competition agencies from **Hungary** and **Lithuania** keep "middle road" statements. Indeed, **CCL** is of the view that sanctions should have a deterrent effect, while being at the same time of a "reasonable size." For its part, **HCA**'s leniency policy "has failed to produce spectacular results." Some commentators concluded that it was because of "the more significant role of informal ties" due to Hungary's small size. They add that "stronger sanctions may not help, rather obstruct cartel enforcement in this environment." HCA is not able either to refute or confirm these arguments.

AFCCPM declares that "sanctions should be harsher to halt … anticompetitive conducts" in small economies. **BUL-CA** mentions that in a small economy, "in order to give a bigger incentive, the fine should be prohibitively high." **IAA** also believes it is necessary to apply harsher sanctions, because "the risk of cartelistic behavior is higher in a small economy, leading to augmented prices and deadweight losses." IAA has therefore "been imposing increasingly substantial penalties on convicted antitrust offenders, including imprisonment." Indeed, concludes IAA, the principle of convicting by imprisonment even defendants who do not have any prior convictions "is based on the view that prison sentences can effectively deter parties from participating in cartels." Furthermore, **MFCC** declares that "sanctions should be sufficiently high to deter anticompetitive conducts." Such sanctions would enable small economies to keep the same focus as large economies on competition law.

EC adopts the same approach to small or big markets, and the fines "imposed will partly depend on the conclusion on the extent of the economic harm caused by the infringement." **LCC** agrees, in that it doubts that "the existence of an enhanced risk of collusion should lead to an increased level of sanctions." In general, LCC states that the sanctions "should be decided on the consideration whether an anti-competitive behavior occurred and be dissuasive in all events, regardless of whether the collusion was favored or not by any external element." However, LCC continues, "it may well be that the incidence of such behavior is much more important in a small economy than it would be in a big economy. With regard to this consideration, where the sanctions take into consideration the damage done to the economy, LCC adds, it may well be that collusive behavior in small economies should be sanctioned more severely." LCC concludes that "this would not be linked to the fact that it occurred in a small economy, but because it caused a big damage to that economy."

Competition agencies from **Colombia**, **Czech Republic**, **Netherlands**, and **New Zealand** think small economies do not need to apply harsher sanctions. If a collusive risk is indeed higher in small economies, then the **CRCA** adds that it would be an incentive to improve the agency's work, "rather than to adopt more severe penalties for anti-competitive behavior." **BEL-CA** concurs with CCA, CRCA and NMa, but only in the case of open small to medium sized economy. Sanctions in Ireland are of criminal nature, and include imprisonment, due to Ireland's legal system. In practice however, sanctions imposed by the Irish courts "have proven to be very low." **Comco** believes harsher sanctions or a different focus of competition law "in the context of agreements" seem a "second-best solution", compared to the "elimination of … artificial trade barriers."

For its part, **CBC** "is aware that deterrence is an important factor in the elimination of cartel activity." CBC mentions also that it has been improving its fight against cartels thanks to "its immunity program, and fines for violation have gradually been increasing through plea negotiations." CBC concludes by indicating that in its overall experience "the availability of criminal penalties that address not only corporations but also individuals represents an effective deterrent to cartel activities."

3.6. Does this require or justify a different analysis of vertical restraints, especially of resale price maintenance and of parallel import bans, in small economies?
3.7. Moreover, could the fact that the risk of foreclosure is higher justify a different analysis?

Empirical Evidence

Competition agencies from **Canada**, **Hungary**, **New Zealand** and **U.S.** declare that they do not have empirical evidence indicating that vertical restraints are more often linked to imports in small economies. According to the **U.S. competition agencies**, vertical restraints are common in both small and large economies. On the other hand, **LCC** declares that "the territories of small economies are easily subject to exclusive distribution agreements, foreclosing parallel imports to the detriment of free competition." LCC explains that it might be so because vertical agreements are more common in small economies, or such vertical agreements affect more deeply a small economy than a large one, or it is more difficult for enterprises within a small economy to "overcome the hurdles" of vertical agreements. LCC states that "empirical data show that indeed, [its] territory is generally included in distribution agreements covering Belgium and sometimes the Netherlands as well, preventing Luxembourg buyers from buying directly in other countries, thus raising prices and often reducing choice." However, LCC concludes that the "problem seems first of all to be an enforcement problem, rather than a problem linked to the analysis of such vertical agreements," because the producers/distributors of the goods are in general located abroad, making it hard for a National Competition Authority of a small economy to act against them. Another point highlighted by LCC is the relative strength of enterprises: often, the buying enterprise in the small economy is smaller than the producer/distributor, and "thus more vulnerable to retaliatory measures applied when it does not follow the politic favored/suggested/imposed by the producer/distributor."

Use of a Different Analysis of Vertical Restraints

Most contributors do not agree with the statement from the Survey. Indeed, competition agencies from **Czech Republic**, **Hungary**, **Israel**, **Japan**, **Luxembourg**, **Mexico**, **Netherlands**, **New Zealand**, **Singapore**, **South Korea**, **Switzerland**, and **U.S**. all declare that they "are aware of no reason why a different framework for analysis should apply to the assessment of any type of vertical restraint based merely on market size" (U.S. contribution). **U.S. competition agencies** add that "the core analysis of market power, risk of foreclosure, and competitive effects remains the same regardless of market size." Moreover, **CCS** observes that "being a small economy does not necessarily imply the need for a stricter enforcement of vertical agreements, even if these are related to imports in so far as there is no dominance." **CCA**, on the other hand, believes that "a different analysis of vertical restraints should be made if in the conditions surrounding an import is included a vertical restraint clause and is related to an agent that does not have subsidiaries or branches which could be claimed for an anticompetitive behavior." If such a case arises, then CCA would "put into consideration [the solution before] supranational offices such as the Andean Community." Thus, an effects-based analysis seems to be the most common analysis for vertical agreements among respondents to the Survey.

BEL-CA calls for renewed vigilance "whenever distribution networks are organized on the scale of a domestic market of a very small or a small to medium sized economy, while the regulatory framework and economic characteristics of goods or services suggest that the relevant geographic market for goods or services is larger than [the] national [jurisdiction]." **Comco** had a popular belief that, as its policy against vertical restraints was considered permissive, "international enterprises managed to isolate Switzerland by using vertical agreements preventing cross-border commercial exchanges and fixing resale prices." With the partial revision of the Cartel Act in 2003, "the presumption that certain types of vertical restraints (resale price maintenance and territorial restraints) eliminate effective competition was therefore introduced." The revision also led to greater harmonization of Swiss law with the EC’s. The main force behind these modifications of the Act and subsequent Notices of Comco – especially the controversial and very restrictive "Notice regarding the Competition Law Treatment of Vertical Agreements" (2007) – was driven by the concern mentioned above and not by efficiency considerations. However, Comco adds that the harmonization of its Cartel Act with the EC’s is "paramount" to let Swiss undertakings compete in Europe, and concludes that "vertical agreements deemed to be legal according to the European Law should also be legal under Swiss Law."

Resale Price Maintenance

FCA notes that "resale price maintenance [is a] potential problem particularly in a small economy, where competition between resellers may more often be weak," because "the number of resellers is typically low and potential competition limited, which increases the risk [of] collusion and, consequently, the risk [of] foreclosure." FCA concludes that intervention, especially in markets where competition is divided into big market shares, is more likely to be welcomed. **JCRA** mentions that "a narrow category of vertical arrangements (principally, vertical price fixing) will be seen as having the object of appreciably hindering competition in Jersey." JCRA's Guidelines on Vertical Arrangements stipulates that for example, "exclusive distribution agreements may restrict competition by preventing competition between alternative distributors. … Whether [this] potential restriction amount[s] to real restrictions for the purpose of the Law, however, depends on whether they restrict competition *in practice* to an appreciable extent." **CBC** mentions that "Canada recently repealed its former criminal prohibition on price maintenance and replaced it with a civil provision that only addresses resale price maintenance subject to the requirement that the Competition Tribunal may only issue a remedial order where it finds that price maintenance has had or is likely to have an adverse effect on competition in a market." **TFTC** reports that under its approach, it divides vertical agreements in price restraints, such as retail price maintenance, and non-price conditions, such as the restrictive conditions imposed between firms. The former issue is tackled by the Fair Trade Agreement (FTA) which stipulates that the setting of maximum or minimum levels is prohibited and is *per se* illegal. However, the ban does not include services, but only applies to setting resale prices of goods. For **Comco**, "*per se* illegalities of certain types of vertical restraints should be strictly avoided." Moreover, Comco states that a "different treatment of price and non price vertical restraints would, independent of the size of [an economy], be highly questionable, since from an economic perspective they constitute nearly perfect substitutes." **JFTC** voices another opinion. JFTC declares that "it makes no difference whether the product is imported or produced domestically," because the whole purpose of "restricting maintenance of the resale price is to secure a benefit to the consumers in the market where it is resold."

Parallel Import Bans

KFTC states that "In a small economy, imports account for a large share of the economy." Consumer welfare may be undermined by parallel imports bans "by activities such as raising consumer prices or limiting sales volume." For **JFTC**, the only issue arising from such parallel import bans is when they are used to maintain a higher price in the domestic market. Such issue thus does not justify a different analysis based on the size of the judicial boundary or the risk of foreclosure, argues JFTC. In Taiwan, pursuant to the FTA, the rule of reason is applied to a catalogue of non-price vertical restraints, where circumstances can demonstrate that such restraints lessen or impede fair competition. For example, **TFTC** notes that discrimination "is … prohibited where it is 'without justification' and other conduct is forbidden when done 'improperly' or through 'improper means'." TFTC has published guidelines clarifying the notion of "the likelihood of impeding fair competition," as well as specific guidelines for certain industries, such as the distribution industry. In one of its explanation with respect to parallel imports, TFTC notes that "a parallel import won't be regarded as a counterfeit for the purposes of [the] FTA unless … it can be demonstrated that the importer intended to mislead consumers as to the source of the products." TFTC adds that if the importer tries to trick consumers into believing that he is working for the authorized agent, such "free-riding" will be considered as an infringement under the FTA. **HCA** adds for its part that "a restriction on imports is also deemed to be a restriction on competition." HCA concludes by stating that "[the] issue [concerning the exhaustion of intellectual property rights which by their nature may restrict parallel imports] was solved … with accession to the EU, by which national exhaustion was transformed into Community exhaustion." **Comco** states that Switzerland, not being part of the EU, believes that "the problem raised by bans of parallel imports seems primarily to be rooted in patent law [and] a first-best solution to this problem lies in an adequate patent law regime and not in 'special' competition law rules."

Complementary Statements on the Analysis of Vertical Restraints

Some contributors chose to address these questions differently. Competition agencies from **Bulgaria** and **Lithuania** follow the "practice and guidelines of the [EC], [and the] case law of the European Court of Justice" (Lithuania). **ICA** pursues the same policy of mirroring the EU law, "in this way, companies and their advisers would be in a better position to make their own assessment of vertical agreements under national competition law." According to **FAS Russia**, due to the open borders of the small "subjects" with the rest of the Federation, and sufficient inter-brand competition, these "subjects" do not suffer from the adverse effects of vertical agreements. FAS Russia uses as an example the mobile phone services: "although [the four] nationwide operators may have retail price maintenance agreements with the local dealers selling mobile telephone plans to local population," the four nationwide operators and regional operators create "sufficient competition." **HCA** stresses again the importance of imports for small economies. One of HCA's "major policy documents" reflects this opinion: "Following from the openness of the Hungarian economy and the country's small size, the [HCA] attributes particular importance to import competition, which applies to both the competitive pressure exerted by imports and the impact of policy in import competition." **JCRA** mentions an example in the coal distribution industry that used recommended resale prices. These recommended resale prices had anticompetitive effects, according to JCRAA, "because the recommended retail prices tended to correspond to the distributors' own retail prices, they facilitated common retail pricing on a vertical level between the distributors and the retailers. [JCRA] also found that the recommended retail prices facilitated coordination on a horizontal level between the two distributors [, and the] end result was little to no price diversity from any source of supply for coal products in Jersey." JCRA made the distributors to cease issuing recommended retail prices. JCRA clearly states that such an act is not a novel interpretation of competition law in a small economy. Indeed, JCRA mentions the EC's Guidelines on Vertical Restraints which states that "Especially in a narrow oligopoly, the practice of using or publishing maximum or recommended prices may facilitate collusion between the suppliers by exchanging information on the preferred price level and by reducing the likelihood of lower resale prices." The elimination of recommended retail prices in Jersey's coal distribution industry represented an application of these principles to specific facts and circumstances that existed in a relevant product market within a small economy. **IAA** emphasizes that "in a small economy where production inputs or distribution schemes may be limited, foreclose effects resulting from vertical restraints may be significant. An example provided by IAA concerns *the Egged – Nitzba* case (1999 Antitrust 3003820). *Egged*, the main provider of public bus transportation, with a market share of roughly 70%, "had entered into a series of exclusivity agreements with *Nitzba*, the historic operator and owner of the majority of the bus terminals in major cities and towns in Israel" in which "Egged's buses had exclusive access to Nitzba's terminals and Nitzba undertook to decline the entry of buses of any actual or potential inter-city bus operator besides Egged" for ten years and were renewable for additional ten-year periods. IAA found that passengers were not able to choose another means of public transportation, given the lack of railroad networks. The Authority concluded that "the exclusive access to bus terminals that Nitzba had granted to Egged placed the smaller bus operators in a position of inherent inferiority, which effectively prevented them from competing for inter-city services, since they could not utilize network economies."

Risk of Foreclosure

Competition agencies from **Czech Republic**, **Japan**, and the **Netherlands** do not see "any reasonable justification for applying any different analysis." Competition agencies from **Canada** and **U.S.** are not aware of any empirical data indicating a higher risk of foreclosures in small economies than in large ones. **FCA** holds the opinion that there is a higher risk of foreclosure in small economies.

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IV. Abuse of a Dominant Position

The majority of responding countries agree that the analytical framework underlying the assessment of abuse of a dominant position is not altered by the economy's relative size. At the same time, contributors acknowledge that the size of the economy may constitute a relevant factor in the application of competition law and policy to a certain conduct or practice. In addition, some countries point to areas of competitive concerns that are more typical to unilateral conduct within a small economy than within a large one, which require close attention by the competition agency with jurisdiction in the territory. With respect to joint dominance, members take different approaches; however, none of the contributors explicitly associate any specific approach with an economy's small size.

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4.1. Does this mean that a specific regime should apply to the conduct of dominant undertakings in a small economy? Or does this make no difference?

Effect of Size on the Analytical Framework of Dominance

As to the question of whether the principles of competition analysis should be altered to accommodate the size of the economy, **BUL-CA** observes that "there should not be any reasons based on size alone, to regulate the conduct of dominant firms differently in a small economy." Competition agencies from **Canada**, **Japan**, and **Jersey** emphasize that their analysis of unilateral conduct is consistent with the promulgated 2008 ICN Recommended Practices on dominance, derived from the ICN Unilateral Conduct Working Group, Dominant/Substantial Market Power Analysis Pursuant to Unilateral Conduct Law, which explains that "the analytical framework used to assess market power is the same in small and/or isolated economies, but market factors may result in more limited competition". **FCA** cites EU legislation, noting that it already "provides a good basis for solving and preventing the abuse of dominance in both small and large economies, and no specific regime is required." **CCL** concurs on the effectiveness of EU Legislation alone. **HCA** maintains that no deviation from mainstream competition analysis is warranted based solely on the size of the economy. NMa makes clear that in particular, there should be no exercise of lenient procedures in a small economy to foster the "growth of a national champion." Competition agencies from **Colombia**, **Czech Republic**, **EU**, **Israel**, **Ireland**, and **U.S.** simply state that no different analysis is needed. Several countries include their response in their introductory statement, where they clarify that the size of the economy should not affect the principles of competition analysis of market power – a position that also appears to apply to the specific context of abuse of dominance. Thus, **KFTC** states that "unique characteristics of a small economy can be fully considered during the general process of market definition and analysis of anti-competitive effects." **NZCC** voices a similar opinion.

While several other countries do not provide a general answer to this point, one country expresses a different view from the majority of responses. **AFCCPM** explains that "the size of most undertakings in a small economy [are] small and medium which requires specific competition law and policy enabling them to compete fairly and to grow up to [be a] global market player[s]." In addition, a couple of countries acknowledge that their law factors in the small size of their economy. **TFTC** attributes features in the monopoly section of its Fair Trade Act itself to the nature of its economy (which is elsewhere described as a "small open economy"). Specifically, Taiwan's desire to further encourage the development of its economy is in part shaped by the regulation of abuse of dominance promulgated by its Fair Trade Act. Regarding monopolies, to further encourage the development of Taiwan's economy, TFTC states that "it seems inappropriate to adopt an entirely negative attitude towards large scale firms and restrict their capacity to develop by taking advantage of economies of scale." Thus, TFTC states that it prohibits anti-competitive conduct only when it can be demonstrated that the monopolist has abused its market power.

Similarly, **CCS** states that the relatively high market share threshold indicating dominance in its guidelines (over 60% of the relevant market) "takes into account the fact that some degree of market concentration is inevitable in small economies."

Challenges to Competition Enforcement

Numerous respondents are of the opinion that small economies may give rise to unique challenges to competition enforcement, which may ultimately increase the prevalence of abuse of dominance. *For example, some markets in a small economy may be more prone to concentration and therefore may breed more dominant firms.* **KFTC** observes that "it is rather a small economy that needs much closer monitoring." **BUL-CA** comments that many industries in a small economy tend to be more concentrated than in larger economies. Similarly, the **EC** states that "it is a priori reasonable to suppose that the smaller the geographic market, the easier it is to attain a dominant position." Also according to **CCL**, a small economy "limits the number of viable companies within the territory." **MFCC** agrees on this point. **FCA** states that "economic conditions are potentially different in a small economy" and emphasizes that the viability of competitors in a small economy varies depending on the pertinent economies of scale and efficiencies in specific industries.

IAA explains that small economies encourage instances of raising rivals' costs by a dominant firm in order to foreclose their upstream inputs or downstream outputs. **LCC** subscribes to this opinion, emphasizing the foreclosure effect by intermediary monopolies "mainly where the dominant undertaking is vertically integrated and active itself on the downstream market." LCC elaborates that "A competition policy based on efficiency considerations might bring some improvement here, but it should also be particularly aware of the foreclosure aspects."

AFCCPM reports that its economy, which it considers relatively small, is characterized by state monopolies. **IAA** suggests that a small economy encourages the formation of state monopolies, especially among utilities such as gas and electricity. **CCL** also believes that "state monopolies might also be more common in small economies than in large ones." **BEL-CA** states that the regulatory pressure put on small economies due to their risk of market failure "may also inspire an ambiguous attitude to state monopolies and state-owned enterprises in general." **U.S. competition agencies**, however, responded that there appears to be no empirical evidence that shows whether state monopolies are more prevalent in small economies. **CCS** considers Singapore to be a small economy, as well the competition agency explains that its economy is not characterized by a large number of monopolies.

Self-Corrective Market Mechanisms

Several submissions stress the fact that the self-corrective mechanism of the markets in a small economy is presumably less pronounced than in its large counterparts. According to **IAA**, once a monopoly position is entrenched, it is not easily eliminated by market forces. Thus, the relative competitive harm or adverse effect caused by a dominant undertaking's conduct may be more severe. Similarly, **BUL-CA** notes that a "small economy has a stronger incentive than its larger counterparts to limit abuse of dominance, because in a small economy dominance is much more prominent and more difficult to erode once created, due to the existence of scale economies and high entry barriers." **LCC** mentions that it faces a situation in which "longstanding monopolies, or nearby monopolies, have developed," resulting in fewer viable incumbents in the marketplace. **FCA** also points out that "self healing mechanisms that would help to recover competition might… be better in the larger economy [than in a small one]."

Local Competitive Concerns

FAS Russia discusses a unique enforcement challenge created by the fact it is a federation of 86 "subjects." It considers itself as a large economy although many of its subjects are relatively small. In each of the subjects, a relatively independent competition agency operates with jurisdiction over its respective subject. In small subjects, however, the size of the economy affects the enforcement capabilities of the local agency, which is frequently ill-equipped to deal with unilateral conduct, in particular by providers of utility services such as gas and electricity supply. Such providers, who are normally based and officially registered in another subject, challenge the local agency by applying their power to engage in refusal to deal and tying arrangements. According to FAS Russia's submission, the central apparatus is better positioned to tackle such abuse of dominance cases. One can make an analogy from this situation to the challenge faced by small competition agencies in dealing with abuse of dominance by multi-national corporations.

NMa brings up another aspect characterizing abuse of dominance in small economies, which is general in nature but also affects the success of preventing a monopolistic behavior. According to the Dutch competition agency, it may be more difficult for a competition agency governing a small economy to gather relevant information since the business and legal communities are tight-knit and their members are nervous to share information with the government. **CRCA** sees disadvantages and benefits in the size of the economy. On the one hand, it is easier for a competition agency to examine small markets, enforce policies and communicate its opinion. On the other hand, it is more difficult to locate unbiased experts who would be willing to bolster the agency's cases before the courts.

Correlation between Market Share and Market Power

There are mixed responses on the question of the degree of correlation between market share levels and market power in small-sized economies. **CCS** ascertains that being a small economy inevitably results in a higher degree of market concentration in non-traded goods and services markets than in larger economies. In particular, scale considerations mean that the degree of concentration is likely to be greater than in larger countries. **BUL-CA**'s contribution expresses the view that higher entry barriers could make a small economy more vulnerable to anti-competitive unilateral conduct, thus warranting lower market share thresholds for dominance. Notwithstanding, competition agencies from **Czech Republic**, **Finland**, **Japan**, **Jersey**, **Lithuania**, **Mexico**, and **New Zealand** express the view that an economy's relative size does not change the market share indications of dominance.

Effects of Size on Competitive Concerns

Significantly, several submissions tend not to acknowledge substantial differences in the competitive concerns which exist in small economies compared with large ones. **U.S. competition agencies**' contribution state that while "the fundamental analysis used to assess unilateral conduct is the same in both large and small economies, we recognize that, in some cases, a jurisdiction's size may affect the facts to which the analysis is applied." Thus, "the size of the economy, along with other factors, may play a role in unilateral conduct analysis to the extent that it impacts market conditions relevant to the analysis." **EC** concludes that the concern of market power may be as prevalent in large economies as in small ones, although it adds that a small monopoly in a small economy is as dangerous as a large monopoly in a large economy. **IAA** states that it has no record that the size of the economy, in and of itself, affects the competitive analysis one way or another. Similarly, the **CRCA** emphasizes that if an economy is open, the competitive concerns evoked by its size are largely mitigated.

Also according to the ICN Unilateral Conduct Working Group- Dominant/Substantial Market Power Analysis Pursuant to Unilateral Conduct Law "the basic framework used to assess dominance/substantial market power is not altered by an economy's relative size or openness to trade. However, such factors can influence the ultimate outcome of the dominance/substantial market power assessment." **JCRA** concurs with this view, and has found evidence of it within its own small jurisdiction. For example, while in larger economies potential concerns of "essential facilities" may be addressed by market forces alone, in Jersey it has been observed that it is impractical to duplicate the jurisdiction's only commercial harbor, airport, and electricity grid. **FCA** is also of the opinion that the size of the economy frequently shapes the antitrust analysis. **NZCC** demonstrates this principle by citing the willingness of its legislature to implement regulatory programs involving one efficient and competitive provider in lieu of numerous non-viable providers. In New Zealand, a single company controls the majority of milk processing in the country, making it a significant international player. The operation of this provider is regulated through certain statutory obligations regarding raw milk supply and the entry and exit of suppliers. While not necessarily disagreeing with the aforementioned, **KFTC** does state that there should be an examination of whether the specific industry of a small economy warrants a different treatment. "Application of competition law should be determined by the size of a relevant market, not by the size of the economy."

Additional Concerns

A few submissions note that because of the competitive concerns associated with small-sized economies, the competition regime should be especially alert. **BUL-CA** stated that in a small economy, the competition agency must be more cautious against unilateral exclusionary conduct. **MFCC** stipulates that a competition agency in a small economy should be especially powerful and have "the capacity to intervene opportunely." More specifically, BUL-CA believes that a competition regime in a small economy should mainly target artificial barriers to entry. **FCA** emphasizes excessive pricing, which is aggravated by low entry potential. **Comco**'s contribution also addresses the issue of monopolies within the setting of a small economy. Comco states that "Because of the [alleged] higher market entry and exit barriers in small economies, monopoly power – respectively market power in general – may endure longer than in large economies, implying comparatively higher welfare losses. According to this argument, competition authorities in small economies should be empowered to assess price setting strategies of monopolies and dominant firms and take on the role of a quasi price regulator." But Comco also mentions that "due to the complexity involved in calculating whether a price is unfair and determining the 'correct' price level, excessive pricing abuses have proved to be notoriously difficult to prosecute in practice." As an example, Comco's contribution offers its most recent case of excessive prices involving "mobile terminating fees of Swisscom, the largest Swiss telecom provider." The case involved a sanction of more than 300 million Swiss Francs and "is currently pending before the appeal court." **HCA** views actions hampering import as a source of concern. **LCC** emphasizes the danger posed by intermediary monopolies' abuse and by high prices charged to the end users by retailers. **AFCCPM** focuses its enforcement against state monopolies. **JCRA** gives priority to access problems caused by public utilities, as do **FAS Russia**'s local competition agencies. Finally, **ICA** suggests that a competition agency in a small economy should focus on barriers to entry and expansion as well as vertical integration. Competition agencies from **Colombia**, **Finland**, **Hungary**, **Israel**, and **Mexico** balance efficiency considerations with additional competition aspects and express willingness to substitute in the appropriate circumstances (e.g., when utilities are involved) a market structure comprising several non-viable competitors for a dominant company with cognizable efficiencies, namely such efficiencies that are passed on to consumers.

4.2. Is there a different approach towards collective dominance issues?

Approaches Towards Joint Dominance

Notably, responses to this question are meager compared to other sections. The majority of the contributions did not respond to this question. **TFTC** notes that while its antitrust law generally treats concentration groups as single firm dominance, its antitrust practice merely involves the latter situations. **CRCA** notes that it has a "limited experience with the investigation of collective dominance so far." According to CRCA, anti-competitive behavior in the market caused by the collective dominance "should not to be treated in a different way only on the basis of the size of the economy." **BUL-CA** follows EU's jurisprudence. TFTC observes that while difficult, it is possible to apply different rules to a situation of joint dominance. **U.S. competition agencies** emphasize that its agencies "do not believe that collective dominance should be proscribed through application of unilateral conduct law because in [its] experience, it is impossible to use this theory to distinguish rational and legitimate competitive responses from anticompetitive behavior." In addition, the U.S. competition agencies state that in their experience "in the absence of an agreement among competitors, it is extremely difficult to construct a remedy that is pro-competitive and does not require the competition agencies to engage in price regulation or industry restructuring."

JCRA observes that issues of collective dominance have not arisen in Jersey since its antitrust law first came into effect in 2005. Its Guidelines on Abuse of Dominant Position equates its rules regarding collective dominance to those of the EU. **FAS Russia** states that it addresses the issue of collective dominance both on the "subject" level of its Federation as well as nation-wide. Pursuant to Article 11 of its competition law, a finding of collective dominance normally implies much more severe sanctions than those imposed on unilateral abuses because it is considered a restrictive agreement. **IAA** states that Israel is clearly a small economy, a committee for the modernization of the antitrust law prepared a legislative memorandum overhauling the treatment of collective dominance (referred to as "concentration groups"). The proposed language will make it possible to give instructions to all or some of the members of an oligopoly, the purpose of which is, *inter alia*, to prevent damage to competition and consumers, or to increase competition among the parties to whom the instructions are given. **CBC**'s method to assessing collective dominance is the same as their approach to single-firm dominance: "As with single-firm dominance, the mere exercise of market power on a collective basis is not sufficient to raise an issue under the abuse provisions of the *Competition Act*." CBC elaborates that while "a group of firms may be exercising market power collectively, it is still necessary to establish a practice of anti-competitive acts that constitutes some abuse of that market power."
In conclusion, while contributors described different approaches towards the situation of joint dominance, no contributor explicitly associated any specific approach with an economy's small size.

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V. Mergers

The majority of the contributors express the view that there is full justification for merger review in a small economy, which should not deviate from the substantive rules of a merger control regime which apply in a large-sized economy. This is so because the substantive criteria underlying standard regimes applied by most antitrust agencies, whether a merger creates, enhances or facilitates the exercise of market power, are applicable to all situations *arising in small economies in which it is appropriate to block or condition a merger. At the same time, numerous contributors made it clear that the size of the economy may ultimately affect the economic realities surrounding the merger and, in turn, the final outcome of the analysis. Numerous contributors point out that the size of the economy may also shape procedural elements of the merger control regime, such as the statutory thresholds which trigger a duty by the parties to a proposed merger to submit a pre-merger notification filing to be reviewed by the competition authority.*

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5.1 Are there any differences with respect to the substance of the merger control regime?

Design of Substantive Merger Control Regime

BUL-CA believes that merger control is necessary in a small economy just as strongly as in a large economy. Competition agencies from **Belgium**, **Czech Republic**, **Hungary**, **Jersey**, and the **Netherlands** concur on this point. To this end, **CBC** points out that there "is no substantive difference in the Canadian approach to merger analysis from that used in the United States, even though the economies of both countries vary greatly in terms of size." **BEL-CA** notes that "[on] the contrary, open very small and small to medium sized economies should in our opinion take care not to look at markets as a larger economy would in order to avoid using artificially narrow definitions of relevant geographic markets." Moreover, **JCRA** believes that the justification for merger control in small economies is stronger because their markets are easier to dominate. Similarly, **KFTC** observes that such a regime is crucial in a small economy because mergers more easily tend to harm competition. It is embedded in the answer of essentially all other countries, as can be derived from their general answer, that there is no less justification for some kind of pre-merger control regime in a small economy than in a large one.

Regarding mergers, the design of **TFTC**'s merger control regime included consideration of whether a merger would enhance international competitiveness as well as any potential disadvantages that may arise as a result. The legislation was also designed to ensure that only enterprises with significant market presence would be subject to merger control and care was taken not to set the threshold for market share too low.

Analytical Framework for Merger Review

A different question is whether the analytical framework for a merger review process varies depending on the size of the economy. **U.S. competition agencies** express its position that "merger analysis and the merger control regime should not differ based on whether an economy is 'small' or 'large.' A particular product and geographic market may be very concentrated in a large economy and not at all concentrated in a small economy; it depends on the particular facts." Sharing the same opinion, **EC** observes that consumers in a small economy deserve the same protection as those in a large one from mergers which tend to create higher prices and lower quality. Moreover, EC objects to the notion that in small economies "companies can only acquire the necessary dimension by dominating their national markets," because, if anything, a national company cannot be globally successful without first meeting competition at home. **BEL-CA** states that "merger control should be designed in a way that it is likely to catch transactions that risk having a substantially negative impact on competition on the domestic market, without catching more transactions than necessary in order to achieve that goal." Other member countries are in accordance: **JCRA** states that it applies a merger control regime based on the generally accepted methodology of defining relevant markets, assessing levels of market concentration both before and after the merger, assessing the potential for unilateral or coordinated anti-competitive effects, considering factors such as entry and buyer power and considering potential efficiencies arising from the merger. **IAA** observes that while "concentrations are an effective and commonly utilized means for realizing greater efficiencies," implementing a lenient merger control regime might aggravate the problem of highly concentrated markets which characterize small economies. A similar opinion was stated by several other contributors such as **BUL-CA** ("basic fundamentals are valid whether the economy in question is large or small"), **FAS Russia** (emphasizing that the same regimes applies on the Federation level and local "subjects"), **ICA** (focusing on barriers to entry, which can be high or low in a small economy), **CCL**, **KFTC**, **CRCA**, and **NMa**.

NZCC poses an interesting case. While not diverging from the aforementioned statements, NZCC is willing to approve mergers between parties with a "somewhat larger market share." New Zealand also states that "where the public benefits from mergers are assessed as outweighing the detriment from the substantial lessening of competition," New Zealand’s merger law deviates from competition objectives by authorizing its competition agency to approve such mergers. NZCC associates this special power with the legislature's view that "in a small economy, there may be situations where allowing a lessening of competition may produce a greater efficiency gain than preserving competition."

ICA is of the opinion that "concerns about plurality and diversity of media are likely to be more frequent in smaller countries rather than larger ones." As a result, the legislature in Ireland has authorized the Irish Minister of Enterprise, Trade and Employment to block, for the aforementioned concerns, media mergers approved by the ICA.

5.2 Are there different justifications for having a merger control regime in small economies?

Modification to Merger Regimes

A few countries appear to support some modifications in the merger control regime itself to accommodate the small size of the economy. **AFCCPM** states that in a small economy, "merger regulation regimes should be considered differently," in order to encourage undertakings to develop a more competitive advantage. Similarly, **LCC** is of the opinion that in a small economy the merger control regime should be more lenient, in order to provide for economies of scale, recognizing that only a few undertakings will "have the necessary size." LCC also observes that if an economy is both small and open, it should attempt to shape a merger regime which is similar to its neighbors' in order to realize the benefits of convergence. **MFCC** observes, without further detail, that "in some degree, small economies try to adapt their merger control regime to its structural characteristics."

A few other contributors believe that it is acceptable for the turnover sales thresholds over which the merging parties must notify their merger to be determined based on the size of the economy. For instance, **ICA** points out that the smaller the economy, the lower the notification thresholds, and **KFTC** is in accordance. **IAA** points out that "market share thresholds protect small markets, which are common in Israel, and in which even a monopoly might be left unchecked if the statutory turnover thresholds were to be the sole criterion." In addition, **JCRA** states that its current reportability thresholds are based on each merging party’s share of supply or purchase of goods or services supplied to, or purchased from, persons in Jersey." It further explains that while "such thresholds may not follow the ICN’s Recommended Practice that 'notification thresholds should be based on objectively quantifiable criteria,' they have worked well in Jersey’s context, and may be particularly well suited for very small economies." It should be noted that the ICN Recommended Practices also note that the size of the economy may affect the notification thresholds.

Special Focuses in Merger Analysis

Several countries highlight specific issues that should be in the focus of the merger analysis in a small economy. Competition agencies from **Finland** and **Switzerland** stipulate that the degree of openness of the relevant market should be carefully looked into and that "efficiency arguments are to be considered carefully in a small economy" (FCA's contribution). According to these two competition agencies, efficiency is important in a small-sized economy because companies often struggle with the need to attain a minimum viable scale. As a result, in such economies, the "SIEC-test (Significant Impediment to Effective Competition) provides a better measure of the impact of a merger to consumers . . . than the dominance test." Similarly, **CCS** attributes its focus on the efficiencies created by a notified merger to the small size of its economy. CCS has the power to approve mergers which will result in a substantial decrease in competition in the market if they create efficiency gains which are "clear, quantifiable, merger-specific and likely to materialize within a reasonable timeframe." **LCC** focuses on the competitive concern of tacit collusion between the merging firm and the remaining competitors and the relevant market's ability to attract new entrants post-merger. **CCL** highlights the role of imports in the merger analysis of its small economy. **JFTC** suggests that a small-sized economy might more often recognize an illegal conduct by undertakings outside the judicial territory, although the competition authority may face an issue as to whether it can enforce the country's own competition law to remove activities conducted by undertakings outside its judicial boundary that have anti-competitive effects on its own domestic market. **KFTC** believes that a merger analysis in a small economy should not overlook competition in overseas market by considering factors such as potential pressure from foreign competitors, the possibility of diversion of exports to the domestic market, and efficiency gain for the entire public through expansion of the exports. **JCRA** has faced access problems that affect the final outcome of its analysis. For example, in analysing a merger in 2006 between two seaborne temperature-controlled freight service providers, JCRA concluded that while entry was possible, the scale of such entry was unlikely to place competitive pressure on the incumbent firms, due in part to limited ferry capacity and suitable warehouse space in its territory. These concerns led JCRA to require divestiture concerning this merger.

5.3. Should there be different guidelines for geographic market definition*?*

There is no objection by any country to the notion that the methodology underpinning the delineation of the relevant geographical market should not be altered and should rather follow the standard SSNIP test analytical steps.

Geographic Market Definition

EC dedicated much of its submission to establishing that there should be no different geographic market definition for a merger notified in a small economy, and that failing to follow this principle, will in fact, result in harm to competition. EC in its contribution points out that is has been criticized, particularly by Nordic states, for discriminating against small member states in which often times firms reach a dominant position before they attain minimum viable scale, and, as a result, are prohibited from consummating mergers that would improve their ability to successfully compete in local markets. This scrutiny focuses on EC's tendency to define the relevant geographic market of a merger involving a small economy as the national economy and oppose mergers which would create a "national champion." EC rejects this criticism in its contribution because it ignores the injury to consumers in the small economy that would occur if EC extended the relevant geographic market to include other member states. For example, the *Volvo/Scania* proposed merger was opposed based on EC's finding of a national market for heavy trucks in order to protect the local consumers in several after markets. Case No. COMP/M.1672. In particular, EC calls for caution regarding deviation from a national market definition where there are only possible future plans to harmonize member states' markets. For instance, in the *EDP/GDP/ENI* case, EC delineated a national geographic market in the market for electricity networks due to present insufficient connectivity between the networks of Portugal and Spain. Case No. COMP/m.3440 EDP/GDP/ENI (Decision of 9 Dec. 2004; Affirmed on appeal).

In addition, as previously stated, EC rejects the contention that in order to allow a small-sized economy to compete in a global market, the creation of a "national champion" should be permitted. This is a point with which the **U.S. competition agencies** concur: "it would be a mistake to excuse an anticompetitive merger aimed at creating a 'national champion,' whether the economy is a 'large' or 'small' one." **CBC** notes that the US in fact has an impact on its geographic market definition: "Consumer reaction to a price increase often extends the geographic market beyond Canada's borders into the United States. On the demand side, the majority of Canadians live within reasonable travel distance to the United States, and cross-border flow of goods and services allows for easy access to products either purchased in the U.S. or imported into Canada for resale."

Similar to EC's position in the *EDP/GDP/ENI* case, **IAA** specifies that the demonstration of openness to import is insufficient, in and of itself, to define the geographic market as larger than national because some skepticism is needed regarding the ability of imports to mitigate a proposed merger's anticompetitive effect.

Other countries also express the view that the geographical market definition should not be affected by the size of the economy, among which are competition agencies from **Belgium**, **Colombia**, **Finland**, **Japan**, **Jersey, Lithuania**, **New Zealand**, **Singapore**, and **South Korea**. **JFTC** argues that in merger regulation competition authorities focus on the relevant market to analyze the competitive problem, not on judicial territory and that whether the economy is large or small does not substantially affect competitive assessment in merger regulations. Interestingly, **JCRA** emphasizes that the geographic market definition involves a "highly fact-specific inquiry" and that in its experience many products are purchased by its residents outside the island, including trust and fund administration services or home shopping. While at the same time, JCRA has come across merger cases in which the geographic market definition was found to be only a portion of Jersey. This shows that one cannot predict such a definition based on the size of the economy alone.

Several statements on the likely scope of a geographic market in small economies are made by **NMa** ("the small geographical area may well be relevant to the definition of relevant geographic market in particular sectors") and **JFTC** ("the size of the relevant market would likely be larger than the size of judicial territory in small economies"). NMa maintain, albeit with regard to dominant position, that "the size of the country may have an impact on the size of the relevant geographical market in a dominant case, leading to smaller markets." **MFCC** responded similarly to JFTC.

5.4. How might the size of the economy affect the application of legal presumptions?

Flexibility in Application

Many jurisdictions state that the analysis of mergers should give priority to salient economic considerations in applying merger control, implying that business operations should be assessed through its economic effects on a case-by-case basis, rather than their legal form. As suggested by **BUL-CA**, "Competition law in a small economy needs to comprise a set of flexible instruments that can be applied on a case-by-case basis to reduce competition concerns while promoting economic efficiency." **FCA** agrees and states that "legal presumptions include the risk that their application leads to an assessment of a merger which is too static. A case-by-case evaluation is more flexible way to make the overall assessment of a merger case." Similarly, **NZCC** notes that there is no evidence that any specific legal presumptions are applicable to a small economy. **JCRA** cites the lack of legal presumptions in its merger review guidelines and practice. Competition agencies from **Colombia**, **Czech Republic**, **EU**, **Israel**, **Lithuania**, and **Taiwan** express the same opinion. **LCC** accepts *prima facie* criteria based on the concentration level of a market provided that they are not decisive.

Legal Stipulations

A few contributors discussed their legal presumptions involving market shares. Although, numerous countries consider market shares to be an initial indicator in the analysis of a merger's competitive effects, no country offers an irrefutable presumption of harm to competition based on satisfaction of market share thresholds. However, several merger control regimes offer "safe harbors" for certain proposed mergers, which are exempt from notification based on their small market shares. For example, in the **Czech Republic**, if the combined share of the merging parties is no greater than 25%, the merger is presumed legal. In **New Zealand**, parties to a merger in a market where the CR3 test (concentration ratio of the largest three companies) is under 70% and the merging firm has a market share under 40%, or where the CR3 is over 70% but the combined market share is under 20%, the merger is presumed not to lessen competition. NZCC, however, emphasizes that it does not see how these market share thresholds are related in any way to the size of its economy. **BEL-CA** also explains that in their experience when "market share thresholds are combined with mandatory notification, the pre-notification research may well take up to 40% of the total time spent on the case." They also give the opinion that "rules that make knowing whether a transaction should be notified almost as expensive as notifying, are neither serving the public nor the private interests."

5.5. Which types of remedies are best suited for small economies?

Structural Remedies

Responses reveal that many member jurisdictions, such **Colombia**, **Canada**, **Finland**, **Israel**, **Mexico**, **New Zealand**, and **U.S.**, advocate structural over behavioral remedies. Such a proposition is in conformity with the International Competition Network, Merger Working Group, Merger Notification and Procedures Subgroup, Recommended Practices for Merger Notification Procedures (2005) [hereafter ICN Merger Notification Procedures], which notes that " structural remedies are easier to administer than behavioral remedies because they do not require medium or long-term monitoring to ensure compliance." In addition, **CBC** states that "there are opportunities for more creative remedies that depend upon market entry conditions. Specifically, alternative types of remedies that can be considered could include petitions to remove tariff or non-tariff barriers to foreign entry. This could include policy barriers such as the removal of existing foreign ownership restrictions. In particular, given the agencies limited resources typical to a small market economy, **NZCC** (where the legislature does not permit behavioral remedies) believes that regulatory oversight associated with detailed behavioral relief may be excessively burdensome. According to NZCC, their procedure of dealing with mergers "avoids unnecessary reporting of mergers, reduces the burden on the Commission to consider proposed mergers with no competition implications and particularly it prevents the cost of monitoring and regulating businesses after they have merged." As noted above, **JCRA** has experience in applying divestiture remedies in merger review.

Behavioral Remedies

A few other countries have a different point of view. **NMa** refers to the ability of monitoring behavioral measures in small economies. As stated by its submission: "Perhaps it could be said…that in small economies, behavioral remedies may be less difficult to monitor, due to an increased market transparency, than would be the case in a larger territory." Similarly, competition agencies from **Jersey** and **Luxembourg** advocate both types of corrective measures (structural or behavioral remedies), depending upon the circumstances of the case. **JCRA** also observes that its small-sized economy would facilitate the monitoring and compliance with imposed behavioral remedies. According to JCRA, "small economy considerations were relevant, however, to the imposition of behavioral remedies," in a particular high-profile merger case involving the two largest convenience store chains in Jersey where "imposing a national pricing policy was an effective way to protect consumer interests while permitting the merger to proceed."

FCA notes that "when structural remedies are necessary, it should be taken care that the divested parts of the companies involved are able to compete as stand-alone businesses or as parts of some other entity." FCA also emphasizes the importance of competition advocacy in a small economy to removal of unnecessary regulatory and other barriers to entry, so more mergers can be approved. **Comco**'s contribution explains that most of the remedies accepted by Comco in recent years have been "structural in nature," but also states that Comco also shows "an inclination to agree on behavioral remedies, sometimes in connection with structural or quasi-structural remedies."

5.6. What are the appropriate criteria triggering an intervention or an inquiry into a merger project: turnover thresholds; structural criteria, such as the degree of organizational integration (existence of branches or subsidiaries) of one or both of the merging companies; effect on competition?

Notification Thresholds

Competition agencies from the **EU**, **Lithuania**, and **U.S.** clearly articulate the point that notification thresholds, aiming at flagging transactions that are likely to result in considerable competitive effects, should be derived from objective sales turnover or asset data. This proposition favoring objective thresholds over structural indicia conforms to the ICN Merger Notification and Review Procedures and OECD Recommendation of the Council Concerning Merger Review. These recommendations advocate that merger notification thresholds should be based exclusively on objective criteria, such as sales and assets, and should incorporate appropriate standards of materiality as to the level of "local nexus" required for merger notification. The ICN and OECD's position is that market share-based thresholds are not desirable because the data is difficult to ascertain and too subjective to trigger a duty to file. In this respect, **BEL-CA** reports that it "switched in 1999 from market share to turnover thresholds," and that "make knowing whether a transaction should be notified [are] almost as expensive as notifying, [and] are neither serving the public nor the private interests."

Structural Thresholds

Notwithstanding the ICN Recommended Practices for Merger Notification and Review Procedures, some merger control regimes, such as the following competition agencies from **Israel**, **Jersey** and **Taiwan**, continue to employ structural thresholds. Such thresholds are based on market share data or similar (i.e., “share of supply”). **JCRA** and **IAA**, coming from self proclaimed small "island" economies, as well, provided reasons for their favoring of such a practice in their respective countries.

Under Jersey antitrust law, the current reportability thresholds are based on each merging party’s share of supply or purchase of goods or services supplied to, or purchased from, persons in Jersey. While acknowledging that thresholds may not follow the ICN’s Recommended Practice stated above, **JCRA** explains that such thresholds "have worked well in Jersey’s context, and may be particularly well suited for very small economies. Share-of-supply thresholds are more closely related to the central focus of merger control-determining whether a proposed acquisition would substantially lessen competition-compared to criteria such as the turnover or assets of the merging parties." Furthermore, based on JCRA's experience, such thresholds "[make] it easier to explain to merging parties, in a jurisdiction where competition law is a new concept, why they must undergo the merger review process." In addition, JCRA's internal analysis, based on a survey of the past three years, indicates that if the regulatory agency switched to sales turnover thresholds, this would not dramatically reduce the number of merger filings but would materially increase the number of unnecessary filings. **IAA** voices similar concerns. The Israeli Restrictive Trade Practice Law employs a hybrid test triggering a duty to notify a merger based on either turnover or structural indicia. IAA argues that based on its island economy and inclination towards concentrated market segments, the use of market shares side by side with turnover indicia has proven to be better suited for the protection of competition in small markets, where even a monopoly might be left unchecked if the statutory turnover thresholds were to be the sole criterion. Moreover, empirical studies conducted in Israel demonstrate that its antitrust authority has opposed or conditioned several proposed mergers that were notified solely based on market share threshold that otherwise would have gone forward unchecked. According to IAA, in order to capture such anti-competitive mergers, it would have been forced to adjust its sales turnover thresholds, imposing an unwarranted burden on market participants.

Comco's contribution also states that "to simply lower turnover thresholds may not be an adequate solution." Comco elaborates that "low turnover thresholds may imply an undue burden for firms and competition authorities and – in countries with small competition authorities – tie up considerable resources for merger control." Comco's contribution offers a practical proposal in the form of the following notification regime: "Turnover thresholds which trigger a mandatory notification are set relatively high. For all mergers not subject to mandatory notification, there is the presumption that effective competition is not lessened, which may however – on a case-by-case basis – be rebutted by the competition authorities. Further, for Comco, a bilateral agreement with the EC (and probably other European countries) to settle the treatment of transboundary mergers would be desirable to avoid inefficient double controls."

5.7. Should there be a mandatory or a voluntary notification regime, with or without a prohibition to proceed without clearance?

Mandatory Premerger Notification Systems

Most jurisdictions employ a mandatory premerger notification system. This practice centers on the recognition that the restoring of a more competitive environment after the market has undergone a proposed structural change might be excessively costly or even impossible. This proposition, *a fortiori,* is applicable to an already concentrated small market economy. Respondents from the following competition agencies, **Canada**, **Czech Republic**, **European Union**, **Jersey**, **Israel**, **Lithuania**, **Mexico** and **Taiwan** support a mandatory regime.

Voluntary Premerger Notification Systems

Nevertheless, some jurisdictions emphasize that small economies mandate a voluntary notification system which best allocates the relatively scarce resources of the antitrust enforcement agencies. **NZCC**, for example, holds the position that: "a mandatory regime would create unnecessary additional work, both for the business community and the [New Zealand Commerce] Commission." Likewise, **CCS** states that "a voluntary regime avoids unnecessarily increasing business costs or delaying business decisions as a result of lengthy merger investigations."

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Appendix A - List of Agencies by Acronyms

The Authority of Fair Competition and Consumer Protection of Mongolia (AFCCPM)
The Belgian Competition Authority (BEL-CA)
The Bulgarian Competition Authority (BUL-CA)
The Colombian Competition Authority (CCA)
The Competition Bureau Canada (CBC)
The Competition Commission of Singapore (CCS)
The Competition Council of the Republic of Lithuania (CCL)
The Czech Republic Competition Authority (CRCA)
The European Commission (EC)
The Federal Antimonopoly Service of Russia (FAS Russia)
The Finland Competition Authority (FCA)
The Hungarian Competition Authority (HCA)
The Irish Competition Authority (ICA)
The Israel Antitrust Authority (IAA)
The Japan Fair Trade Commission (JFTC)
The Jersey Competition Regulatory Authority (JCRA)
The Luxembourg Competition Council (LCC)
The Mexico Federal Competition Commission (MFCC)
The Netherlands Competition Authority (NMa)
The New Zealand Commerce Commission (NZCC)
The South Korea Fair Trade Commission (KFTC)
The Swiss Competition Commission (Comco)
The Taiwan Fair Trade Commission (TFTC)
The United States Department of Justice and the United States Federal Trade Commission (U.S. competition agencies)