

COMPETITION LAW IN FRENCH POLYNESIA: ENFORCEMENT CHALLENGES FROM A YOUNG AND SMALL COMPETITION AUTHORITY

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This article addresses the issues that arise for a competition authority which operates in a small economy. The point of reference is the recently established Polynesian Competition Authority which is based in Papeete, French Polynesia. It is unique in the French Republic in that it is the first independent administrative authority to be established in a French territory.

Prenant appui sur la situation de l'Autorité Polynésienne de la Concurrence, autorité administrative indépendante de création récente et installée à Papeete, en Polynésie française, l'auteure après avoir souligné sa spécificité au sein de la République française, traite des difficultés rencontrées dans sa mission de régulation de la concurrence dans une économie insulaire.

I COMPETITION BENEFITS THE ECONOMY AND CONSUMER WELFARE

It is widely recognised that free and fair competition is one of the most important pillars of a market economy. Effective competition ensures consumer and producer welfare. It contributes to economic growth and development. Innovation and productivity are the principal sources of economic growth. Innovation in the context of French Polynesia has currently to be understood as something different from the

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producing of a cutting-edge innovation in the global technological frontier. Most of the innovation in French Polynesia exists in the form of adapting foreign technologies. Adaptation entails more than mere copying; it requires research and development. Competition promotes this type of *laggard* innovation,¹ including the acquiring of tacit knowledge for the purposes of technological adaptation, imitation, and process innovation. Competition promotes innovation and productivity growth, thus, fostering competition enhances economic growth and promoting competition law enforcement will enhance the growth prospects of French Polynesia. In other cases, the adoption of certain competition laws serves as a requirement of trade or financial benefits.²

Increased competition can improve a country's economic performance, open up business opportunities for its citizens and reduce the cost of goods and services throughout the economy. Well-functioning markets generate investment, wealth and employment opportunities. By creating an enabling environment, competition unleashes the creative energies of entrepreneurs and productive forces of society, and thereby contributes to expanding opportunities for gainful employment. Competitive markets also lead to a wider choice of goods and services for consumers at low prices without compromising on quality. Competition creates the environment for firms to minimise their costs and pass on the cost reductions to consumers. It also helps to spur innovation, which also leads to public welfare outcomes. In this way, consumers, especially the poor, can get value for money. Competition, therefore, empowers the poor; it creates opportunities for new firms, including small businesses, to enter markets and grow; it puts pressure on existing firms to innovate and ensures the lowest possible prices for consumers and better-quality products.

II ENFORCEMENT IN FRENCH POLYNESIA

The Polynesian Competition Authority³ was created by French Polynesia's Act No 2015-2 of 23 February 2015 in accordance with art 30-1 of the Statute of French Polynesia.⁴ Within the Republic of France, it is the first independent administrative authority established by a territory (French Polynesia). This particular status makes it a real innovation within the Polynesian administrative landscape, as the willingness of the public authorities to enact their own competition law and put in

1 As opposed to *frontier* innovation.

2 Eg, reciprocal trade agreements, foreign investments, loans by institutions such as the AFD, World Bank etc.

3 *Autorité polynésienne de la concurrence* in French - *Te mana tataura'a matete i porinetia* in Tahitian.

4 Article 30-1 of the Organic Law No 2004-192 of 27 February 2004 on the autonomous status of French Polynesia.

place a competition authority provided with the necessary enforcement powers demonstrates. The decision taken by the public authorities to do this is a strong signal of the stability and openness of the French Polynesia economy.

An independent administrative authority is not part of the administration's hierarchy and has its own powers (opinion and recommendation, authorisation, decision and sanction). It has functional autonomy at the legal level and material autonomy.

The Polynesian Competition Authority acts on behalf of French Polynesia, which has delegated part of its regulatory power to it, in the field of competition law. It is independent from both the public authorities and the economic sectors subject to its controls.

The Polynesian legislator has assigned three main missions to the Polynesian Competition Authority:⁵

- Ex-Ante: control mergers and the creation/extension of retail spaces,
- Ex-post: investigate, establish and sanction anti-competitive practices,
- Advise and issue opinions on any competition matter.

This competition agency takes quasi-judicial decisions against perpetrators of anti-competitive practices (collusion, abuse of dominance, etc) by ordering them to cease, if necessary under penalty, by imposing financial penalties and, in cases of seriousness and urgency, by taking precautionary measures to eliminate the effects of the practice. It is responsible for rejecting or authorising mergers or the creation or extension of retail premises, sometimes subject to commitments to eliminate the anti-competitive effects of the transaction. Decisions can be challenged before the competent judicial or administrative court.

In accordance with the provisions of art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which states that everyone is entitled to a fair hearing by an independent and impartial tribunal, the investigation is carried out independently by the investigation department, which is under the direction of the Rapporteur General. It is only after an adversarial investigation procedure that cases are referred for consideration by the decision-making body of the Authority.

The Polynesian Competition Authority is a young agency. It faces the challenges typical in first years of enforcement – mainly related to advocacy, regulation powers and economic specificities in the decision-making process.

5 <www.autorite-concurrence.pf>.

III AWARENESS AND ADVOCACY

Fostering a culture of competition is key, and entails fashioning an enforcement approach that reflects the economic characteristics of French Polynesia and the need to simplify competition law rules to suit the enforcement capacity in French Polynesia.

The effectiveness of competition law depends on the extent to which the law has actually evolved in a country in tandem with the socio-economic realities and historical dimensions of that country. It is necessary that there is a certain degree of acceptability and ownership of the law among the stakeholders, to ensure its effectiveness. This is possible if stakeholder expectations and concerns are taken into consideration while drafting and implementing the law, and if their capacity to actively participate in the enforcement process is built in.

The overall goal of this process should be to make the law more comprehensive, together with a robust and effective competition agency, to enable effective enforcement. One of the missing elements as has been witnessed in some countries is the engagement of civil society. The competition agency will not be able to implement the law effectively on its own, and therefore needs to build strong relations with civil society actors. Various tools are available to the agency, including subscribing to inter-institutional cooperation agreements, establishing public policy recommendations through sectoral studies carried out aimed at correcting market failures (which can be applied to regulated sectors), and issuing opinions on issues related to the identified challenges even before requests emanate from private companies and government sectors.

Many businesses appear to be unaware of the benefits of competition. This appears to be entrenched in the wider community. The Polynesian Competition Authority undertakes advocacy in the business community and seeks to impress on policy makers the benefits of competition. A culture of competition among stakeholders and the wider business community is necessary for the effective enforcement and promotion of competition law and policy. A culture of competition in this context refers to the awareness of the business community, governmental agencies, non-governmental agencies, the media, the judiciary, academia, and the public, of the rules of competition law and of their overall responsibility to ensure that such rules are observed in the interest of competition and overall economic development.

A continuous, long-term process of awareness generation and sensitisation should continue at all levels to garner public support for competition reforms. In addition to undertaking multiple stakeholder initiatives, focus group discussions would be

necessary to identify group-specific issues, and align them with the enforcement process.⁶

Lessons learnt from more mature competition authorities' experience show a common ramping-up trend from issuing multiple opinions and recommendations (some of them becoming milestones to governmental and regulatory reforms toward free competition) to sanctioning anti-competitive behaviour (from horizontal or vertical collusion to more sophisticated cases related to abuse of dominance). The starting point importance of sectoral opinions and recommendations issued by competition agencies should not be underestimated. They often play a major structural role in the economy.

IV AGENCY GOVERNANCE AND REGULATION

Often competition issues have huge implications for other regulators and institutions. Competition enforcement cannot happen in isolation, and should be viewed as part of a complex system and process. In addition to sector regulators, other institutions would need to be taken into confidence by the competition regulator to ensure efficiency in the process of competition enforcement. Such necessary cooperation must nevertheless be carefully managed, especially in small insular economies where the business and political elites are often intertwined. Institutional arrangements must be made so that the decision maker is as independent as possible from political forces, to ensure that the decision is not tainted by narrow political considerations which fail to give sufficient weight to public policy considerations.

Within French Polynesia, local government handles the regulation of strategic economic sectors. The government is therefore the pivotal authority fixing prices or deciding which actor can enter the market. This is especially the case in the energy and telecommunication sectors. This can prove problematic due to historical operators controlled by the local government which could theoretically benefit from an asymmetry of information.

To address this problem, combining competition and other sector regulatory functions has proved to be a successful and efficient solution which could be worth exploring in French Polynesia. It enables reaching the right balance (regulation/competition) while combining expertise, forces, and synergies to minimize managing costs at the best efficient level. This institutional solution model

6 Lessons to Be Learnt from the Experience of Young Competition Agencies, ICN Vice-Chair for Young Agencies and Regional Diversity, 2019.

is adopted in many jurisdictions (eg the ACCC in Australia, the CMA in the UK, the CNMC in Spain).

Indeed, competition law and direct regulation are the immediate candidates since they share some commonalities. They both attempt to regulate market conditions to increase social welfare. The basic idea is that in some markets serious obstacles to the well-functioning of the market's invisible hand exist (natural in the case of direct regulation or artificial in the case of competition law), which should be mitigated by some level of intervention. Some of the methods used to determine whether regulation is required are also similar. Both require analysis of market failure and competitive conditions as well as how a remedy would affect conditions in the market. Yet they are generally based on different assumptions and involve different tools. Direct regulation assumes that the market suffers from an inherent natural market failure. The regulator is thus often empowered to intervene directly in the market and set market conditions *ex ante* in such a way that micro-manages the economic environment and reduces the effects of the market failure. Competition law is based on a somewhat opposite assumption: that the market's invisible hand will generally work well if firms are prohibited from erecting artificial barriers to competition and thus intervention is minimal and geared towards preventing such obstacles. It makes sense to integrate both functions, especially in small and micro-economies. Indeed, the economic analysis of market conditions might in many cases be relatively similar given highly concentrated market structures. In small economies, remedies might need to be more interventionary than in large economies.⁷

V CAPACITY BUILDING

Capacity building of the competition agency is also critical for building capacity and confidence among other regulatory agencies and institutions in the territory. Competition agencies should closely monitor the behaviour of firms in key markets, rather than spreading them too thin. Market monitoring mechanisms have been, or are being, developed by some competition agencies and are an extremely important function of a modern competition agency. Agencies can take the assistance of national or visiting experts to develop such a mechanism.⁸ Choice of sectors is critical in competition enforcement and should be based on criteria such as

7 Challenges Faced by Small Agencies and those in Developing Economies, Contribution from CUTS, Global Economic Forum, OECD DAF/COMP/GF/WD(2017)23.

8 William E Kovacic and David A Hyman Competition Agency Design: What's on the Menu? GW LAW Public Law and Legal Theory Paper No 212-135 Legal Studies Research Paper No 2012-135.

availability of data and information, interface with consumers and public interest, presence of regulator, and political interference.

The Polynesian Competition Authority is defining sectoral priorities on a yearly basis and is exploring data mining solutions that could meet both its needs and practical feasibility considerations.

VI EXPERTISE DEVELOPMENT

Capacity development of young professionals, external as well as internal to the agency, on competition policy and law issues is a necessity. Enhancing knowledge can be achieved by developing courses on competition policy and law issues in universities. Many countries can even look at the possibility of developing such courses jointly with universities in advanced economies that have been offering such courses.

Cooperation between agencies indeed prove very beneficial, where agents can benefit from trainings or exchange visits with other competition agencies. Mature competition authorities should extend such assistance to less experienced competition agencies.

To achieve such development goals, the Polynesian Competition Authority is developing cooperation with and is grateful for the support it receives from other agencies in the Pacific and abroad, namely the ACCC in Australia, the ACNC in New Caledonia, the French Autorité de la concurrence, and the EU Commission.

VII DECISION-MAKING PROCESS

In small economies, market size is influenced by three main factors: population size, population dispersion, and the degree of economic integration with neighbouring jurisdictions. They can support only a small number of competitors in most of its industries to answer demand. Entry barriers into markets are generally high and potential competition from new entrants is often limited.

The economy of French Polynesia has, like many other insular small economies, a low domestic demand coupled with limited production capabilities. It suffers from quite high transport costs from their major trading partners. Island economies are constrained to the use of air and sea transport for imports and exports. Being an archipelago, transportation costs are high even between internal markets. This problem is exacerbated by the fact that French Polynesia is off the major sea and air transport routes. It is somehow economically immersed in a large jurisdiction – France.

Production and exports are concentrated on a few major industries (eg tourism, fishing, pearls) and thus depend on a narrow range of products. On the distribution

side, products are mainly produced elsewhere and imported. In addition, some markets create bottlenecks for many other markets (eg transportation services, telecommunications, or warehousing).

Almost all markets are highly concentrated, with a very small number of players operating in them. Although high concentration is often needed to realise economies of scale and produce efficiently, in small economies such as French Polynesia the challenge in decision-making is increased when it comes to deciding on mergers.

Many mergers may be necessary to achieve efficient scales of production, but in small economies that often translates into levels of concentration high enough to allow market power to be reached in many markets.

In addition, several large business entities often control a large part of the economic activity in the market and their business and political elites are often intertwined. In such markets with high aggregate concentration, the risk is that firms might prefer to operate at sub-optimal levels rather than grow internally, to avoid modification to the status quo, thereby engaging in oligopolistic coordination with direct consequences affecting social welfare.

Such high level of aggregate concentration raises significant competitive concerns. It increases the instance of oligopolistic coordination in and across markets. Given their current and potential multi-market contact, conglomerates are often likely to create a reciprocal status quo, thereby not entering each other's market or not engaging in aggressive competition in markets in which they could potentially compete. Conglomerates might also create strong deterrents to the entry or expansion of competitors which are not related to another conglomerate into their markets. In addition, large conglomerates may well attempt, and sometimes succeed, in translating their economic power into political power, to protect their privileged positions, in the form of government-erected barriers to the entry and expansion of their rivals.⁹

Furthermore, these conglomerates often represent a large source of employment or savings for the public, the suppliers, and consumers. This implies that they are often considered too big to fail by the government and obtain protection from competitive forces that might erode their power and harm the public in the short term.

9 Lewis Evans and Patrick Hughes Competition Policy in Small Distant Open Economies: Some Lessons from the Economics Literature New Zealand Treasury Working Paper 03/31; Michal S Gal Merger Policy for Small and Micro Jurisdictions 2202718.

In the decision-making process, the above-mentioned has broader implications, where the unit which is relevant for economic analysis is often not the freestanding firm, but the economic unit of which it is part through formal (eg ownership) and non-formal (eg family ties) connections.

Mergers should in turn be analysed through a wider lens, taking account not only of its effects in the market in which the specific merger takes place, but also analysing its effects on other markets in which the parent or holding companies of the parties to the merger operate. Such effects include, of course, portfolio effects, but may go beyond them to include the effects of aggregate concentration on how the market operates. This is of the utmost importance in small economies, considering the weakness of potential self-correcting powers.

In such a context costs of false-positive errors can be quite high since, once created, market power is extremely difficult to correct. In addition, other competition law tools (collusion and abuse of dominance) are difficult and lengthy procedures not suited to efficiently prevent ex post detrimental consequences on the market. It is thus even more important to prevent, ex ante, certain changes in market structure.¹⁰

The difficulty for the market to self-correct also leads to the interesting and important question of standard of proof. If it is necessary to rely on precise and concordant evidence in order to establish a firm conviction that an infringement has been committed or that a deal will be detrimental to competition in the market, what might constitute a sufficient body of evidence to bring the limited ability to self-correct into the balancing test?

10 Michal S Gal Merger Policy for Small and Micro Jurisdictions 2202718.