

AN OVERVIEW OF THE COMPETITION LAW AND POLICY CHALLENGES IN THE PACIFIC ISLANDS: THE CASE OF FRENCH POLYNESIA

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This is an edited version of a paper first presented at the 2023 OECD Global Competition Forum. The emerging cooperation amongst competition authorities in the Pacific and the creation of the Pacific Island Network of Competition Consumer and Economic Regulators (PINCCER) provides an example of useful regional cooperation which can help tackle the challenges faced by new competition agencies in small economies in the region. This article focuses primarily on French Polynesia. It begins with an overview of the Polynesian market and the particular challenges it faces; Part IV presents possible approaches to solve the competition challenges faced.

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Regulators (PINCCER) sont des exemples de coopérations régionales susceptibles de répondre utilement aux défis auxquels sont confrontées les instances de la concurrence dans les petites économies de la région du Pacifique. Les auteurs portent principalement leurs observations sur le cas de la Polynésie française pour au fil de leurs développements proposer quelques réponses aux défis auxquels cette communauté d'outre-mer est confrontée dans le domaine de la concurrence.

I INTRODUCTION

Competition enforcement is often thought of as a uniform body of theory which aims to attend to the same needs through the same methods. However, the experience of many jurisdictions, along with different scholars' developments, primarily from or about developing countries, have shown that this is not the case. In fact, it could be said that competition policy, theory and application, has evolved over time at a two-pace rate.

At one end of the spectrum are the countries where the developments for and from mature economies that were taken on board early. Currently, these jurisdictions benefit from robust antitrust regulations, case law, and well established enforcement agencies whose prime purpose is to preserve allocative efficiency or consumer welfare.¹ Their current priorities are often related to the digital economy and high technological industries, and this has led them to focus on the surveillance of Big Tech companies, where most of the antitrust debate is concentrated.

At the other end of the spectrum are smaller economies and developing countries. This is the case of the majority of the 151² competition authorities created around

1 The authors recognise that currently there is an ongoing debate regarding the goals of the competition law, however, from a historical point of view, it is possible to affirm in general terms, that the main objective of this branch of law for the past decades has been consumer welfare. For more about the tension between the goals of competition law, see William E Kovacic "Antitrust" (2021) 35(3) Summer, © 2021 by the American Bar Association. Reproduced with permission available at: https://www.americanbar.org/groups/antitrust_law/resources/magazine/2021-summer/root-and-branch/. See Eleanor M Fox "Economic Development, Poverty, and Antitrust: The Other Path" (2007) 13 Southwestern Journal of Law and Trade in the Americas 211, NYU Law School, Public Law Research Paper No. 07-12, NYU Law and Economics Research Paper No. 07-26, Available at SSRN: <https://ssrn.com/abstract=1002637/>.

2 This information is drawn from the GWU Competition Law Center Data Base, which reports a total of 151 Competition Authorities including Regional Supranational Authorities and the Lebanon National Authority which is in the process of creation after the enactment of the national competition law in March 2022. Of these 151, 130 are part of the ICN, while 21 are not; 6 are regional international authorities and the rest are National Competition Authorities which is an agency itself or part of another entity of government.

the world by 2023,³ as well as of other developing states that have not enacted competition laws. As is well known, these jurisdictions have different market structures, especially regarding size, and have struggles in comparison with developed ones.⁴ Many of them face profound inequality and poverty issues where competition policy could make a difference. Such policy, correctly developed, becomes part of the engine to boost the development process, creating the necessary incentives to enhance growth, innovation, and distributive effects. Therefore, competition policy could contribute to solving the high living cost crisis existing in some of these nations.

However, developing countries have a weak voice in the international antitrust arena⁵ despite their being the majority in the world. The challenges derived from their similarities in market structure (size in particular) could be common across jurisdictions. In many cases, they have no interest or have been discouraged from taking a leading role in global discussions, and their challenges capture the attention and resources of only a small group of scholars and research institutions.

Thus, there is a need for these countries to learn from experience, from successful and failed attempts of their peers in similar economic and structural conditions. This can shed some light on the path, enhancing the learning curve and the implementation process of a proper competition and enforcement policy. The sharing and building of this collective set of knowledge can help answer some questions that have been posed by one of the authors of this article: How does a competition agency

3 According to the IMF by 2015 only 37 countries were considered Advanced Economies while the rest of the world was classified as Emerging or Developing Economies, and some countries were not even included in the tables. See <https://www.imf.org/external/pubs/ft/weo/2015/02/weodata/groups.htm#cc>.

4 Budizinski, Oliver, Beigi Maryam HA *Generating instead of protecting competition, The economic characteristics of developing jurisdictions* (Edward Elgar Publishing, 2015).

5 See Guidi, Mattia, Tavares, Mariana, Twonly, Christopher "Considerations for a "top-to-bottom review" of the ICN: Legitimacy, effectiveness and efficiency" (2022) available at: <https://awards.concurrences.com/en/awards/2023/academic-articles/considerations-for-a-top-to-bottom-review-of-the-icn-legitimacy-effectiveness> ."Despite the ICN's "consensus rule" for accepting new work products, NCAs and NGAs from advanced industrialised economies often have more influence. So, ICN work tends to focus on issues of interest to them (even at the expense of others). The same is true for the focus of the resulting work products". See Fox, Eleanor M "Linked-In: Antitrust and the Virtues of a Virtual Network" (2009) 43 *The International Lawyer* 151, NYU Law and Economics Research Paper No 09-27, available at SSRN: <https://ssrn.com/abstract=1431560> "[I]n spite of great efforts of inclusiveness, the ICN agenda is principally set and the norms principally forged by the developed world, although consensus when reached involves give-and-take on all sides".

leader hit policy winners? What techniques improve the likelihood of good policy results?⁶

The emerging cooperation amongst competition authorities in the Pacific and the creation of the Pacific Island Network of Competition Consumer and Economic Regulators (PINCCER) provides an example of useful regional cooperation which can help tackle the challenges faced by new competition agencies in small economies in the region.

This article focuses primarily on French Polynesia. It begins with an overview of the Polynesian market and the particular challenges it faces; Part IV presents possible approaches to solve the competition challenges faced. Part V provides conclusions.

II OVERVIEW OF THE MARKET AND ECONOMIC CHALLENGES FACED BY FRENCH POLYNESIA

Developing economies are often equated with small market economies, due to their common features. Normally, the size of the market in these jurisdictions is influenced by three main factors: size, dispersion of the population and openness to trade.⁷ These factors usually translate into the three main characteristics of small economies: high industrial concentration, high entry barriers, and suboptimal levels of production,⁸ and may be increased by the toll of competition pressure imposed by remoteness or isolation,⁹ as is the French Polynesian case. In this regard, Evans and Hughes concluded that:¹⁰

Particularly in small economies, there is a trade-off between numbers of firms and economies of scale that competition policies should reflect. The tension between scale and numbers of firms is aggravated by geographic isolation. Further tension can occur

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- 6 Kovacic, William E "Leading a Competition Agency, Great Competition Enforcers Lessons from Regulators" (September 2023) Concurrences.
- 7 Gal, Michal "Size Does Matter: General Policy Prescriptions for Optimal Competition Rules in Small Economies" (2001) 73 Southern California Law Review, NYU Ctr for Law and Business Research Paper No. 01-004, available at SSRN: <https://ssrn.com/abstract=267070> or <http://dx.doi.org/10.2139/ssrn.267070/>.
- 8 Gal, Michal "Merger Policy for Small and Micro Jurisdictions" (18 January 2013). "More Pros and Cons of Merger Policy" (2013), available at SSRN: <https://ssrn.com/abstract=2202718>
- 9 Gal, Michal "The Effects of Smallness and Remoteness on Competition Law - the Case of New Zealand" NYU, Law and Economics Research Paper No. 06-48, (2007) 14(3) Competition and Consumer Law Journal, available at SSRN: <https://ssrn.com/abstract=942073>
- 10 Evans, Lewis "Competition Policy in Small Distant Open Economies: Some Lessons from the Economics Literature" (2004) available at: <https://www.treasury.govt.nz/publications/wp/competition-policy-small-distant-open-economies-some-lessons-economics-literature-wp-03-31#abstract-01>

where economies are widely dispersed within national borders, resulting in even smaller geographical markets within the small economy (...).

We now describe the French Polynesian market and analyse how those factors and characteristics have affected it.

III WHAT POLICY CHALLENGES DOES THE NCA FACE?

French Polynesia is located in the Pacific Ocean, more than 4000 km from the principal cities of the Pacific.¹¹ According to the World Bank, its GDP was around 6 billion USD by 2021¹² and its population grew to 306,279 inhabitants by 2022,¹³ distributed among 5 archipelagos that group a total of 118 islands spread over 500,000 km².¹⁴ Most of the population (around 75%) is concentrated in the Society Islands archipelago, primarily in Papeete, the capital, which is in the Windward group of the archipelago and where access to land is affected by scarcity due to the physical limitations inherent to an island.

Given the small market size, internal production is not enough to meet demand and therefore the country is highly dependent on imports.¹⁵ A major part of the goods are transported by sea (99% by volume and 83% by value of imports). However, the only port able to handle international trade is the port of Papeete which can handle medium-sized ships. Therefore, all foreign goods must arrive first in Tahiti for transshipment to other locations inside the country. Also, the port operation suffers from inefficiencies and high prices, due to the regulatory framework applicable to the stowage sector. This makes the loading and unloading process more expensive than in other countries of the region.¹⁶

Regardless of the country's remote location, most importations (measured by value) come from France (27,2%) and from the rest of the EU (15,4%).¹⁷ This could be a direct result of the preferential treatment French Polynesia grants to EU imports

11 French Polynesian Competition Authority, Opinion No.2019-A-02 "Import and Distribution Mechanisms on French Polynesia" (September 2019) available at: <https://autorite-concurrence.pf/avis-n2019-a-02-du-19-septembre-2019/>

12 Statistics can be found at The World Bank Database, available at: <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=PF>

13 Statistics can be found at The World Bank Database, available at: <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=PF>

14 French Polynesian Competition Authority, above n 12.

15 Ibid.

16 Ibid.

17 Ibid.

in comparison with the ones coming from the rest of the world, including from its closest neighbours.

Moreover, despite the high dependence on imports, the country possesses a complex system of tariffs, taxes, and non-tariff barriers designed to protect the national industry. Nonetheless, in most cases, the national industry cannot supply all of the demand and sometimes it does not produce the goods covered by the aforementioned measures. If we analyse the tariff rate in isolation, it does not raise much concern; however, if it is considered along with the rest of the taxes designed as protectionist measures, the rates go up around 30%,¹⁸ a highly concerning value in terms of competitive pressure.

Further, the amount collected through customs duties and substitute taxes provides an important source for the public finances.¹⁹ This is concerning given that in modern trade, the role of customs duties is to regulate the flow of trade through transparent and clear incentives. But when the finances of the state are structured in ways that depend on the money collected in customs, the government loses the ability to use them as an incentive to promote or decrease the flow of international goods into the national market.

The local development tax (TDL), imposed as a transitory tax to replace custom duties' reductions, appears to be of special concern given its particularly punitive effect on essential products (coffee, toilet paper, apparel, beer, among others).²⁰ It also appears to be too broadly based, since it also applies to imported goods that have no equivalent in local production, or protects goods that have a little local added value (eg only packaging or assembly activities).

It is also necessary to consider the local tax exemptions that favour incumbent and powerful players to the detriment of new entrants, and the old sanitary regulations which are in need of re-evaluation and, which have some anti-competitive effects (eg French-language labeling).

As for non-tariff barriers, French Polynesia imposes a ban on some imports of mass consumption products, such as fish, sausages, soap, and juices; some of the bans apply only to products that are not from the EU. Other products such as rice,

18 Ibid.

19 Ibid. According to the Competition Authority's opinion, the revenue from these tariffs and taxes could represent 40% of the State's fiscal income.

20 According to Opinion 97-24 APF, art 11: "Art 11 - As from 1 October 1997, local products shall enjoy special customs protection. As from 1 October 1997, a local development tax (T.D.L.) shall be introduced to protect local processing industries, under customs service supervision, whose base, rates and modalities of payment and collection shall be defined by decision of the Assembly of French Polynesia no later than 2 months before its implementation." (Authors' translation).

sugar, flour, fruit, and meat, are also affected by import quotas. The system for setting import quotas for fruit and vegetables by the Agricultural Conference also appears to be ineffective. Demand forecasts are underestimated, supply forecasts are overestimated, and quotas allocated are unpredictable. This limits the ability of importing wholesalers to buy at lower cost, leads to price increases and frequent shortages, and has no positive effect on meeting local production needs.

As a result of the above conditions, consumer goods prices as a whole are 40% higher than in metropolitan France and the other French overseas territories. This situation has the greatest impact on the purchasing power of the poorest households for whom these goods represent a significant proportion of their budget (more than 30% compared with 12% for the richest households). The final price that reaches consumers is composed of: (i) the initial purchase price that represents 27% of the total price of a product; (ii) transport, 8%; (iii) import duties and taxes, 8%; (iv) VAT, 13% on average; and (v) the remaining 44% corresponds, most likely, to the commercial margin of the distributors (importers-wholesalers and retailers).

An obvious conclusion is that distance or remoteness alone does not explain high price levels. Transportation and duties represent only 8% each of the consumer's final price. Rather, we conclude that the regulatory barriers and the framework established by the country over time, along with the size and structure of the markets concerned (routing, production, import, and retail distribution), and the fact that such markets are often not competitive enough, are the factors driving up the prices and imposing a high toll on the country's population.

The French Polynesian Competition Law was introduced in 2015, and the Authority started to function in 2016. Therefore, it is a young authority²¹ that faces big challenges derived from the landscape described above. Among those, the smallness dilemma,²² which implies that the size of the market cannot support many producers efficiently, but the high levels of concentration to achieve scale economies could reinforce and incentivise oligopoly coordination or market power abuses that

21 Kovacic and Lopez-Galdos, studied the different stages that a Competition Agency pass through in order to achieve a successful maturity or failure, along with the rates at which the competition policy is implemented, a whole complex process which they have called "Competition systems' lifecycles". See Kovacic William E and López-Galdos Marianela "Lifecycles of competition systems: explaining variation in the implementation of new regimes" (2016) 79 *Law and Contemporary Problems*.

22 Gal "The Effects of Smallness and Remoteness on Competition Law - the Case of New Zealand", above n 10.

in the end can hurt consumers, and overall, worsen the current situation. The Polynesian Competition Agency has mentioned in this regard that:²³

First, the small size of the Polynesian market means that, for many products, domestic demand is insufficient for local companies to reach a minimum optimal production size. This has a negative impact on production costs and investments, as the tightness of the market reduces the utilisation rate of production capacity and weakens the return on invested capital. Second, the tightness of the market leads local firms to concentrate their production and marketing resources in order to increase their production efficiency. However, this concentration process can be detrimental to competitive intensity (...) As the OECD points out, the limited number of players in most narrow markets can also facilitate the maintenance of cartels and collusive agreements: the repeated interactions between this small number of players reduces the need for the detailed contractual arrangements necessary to support the establishment of a cartel. (Authors' translation).

This dilemma deepens when the youth of the agency and the protectionist measures implemented by the government, which reinforce the restrictive effects derived from the market's natural structure, are added to the equation.

Ennis and Piffaut have identified six challenges faced by the French Polynesian Authority: i) creating a competition culture and training officials; ii) setting appropriate standards; iii) developing a proper prioritisation system that allows picking the right cases; iv) ensuring a proper budget; v) dealing effectively with the bargaining power of multinational companies; and vi) preserving political independence.²⁴

At this point, the Authority does not address capacity building or structural challenges; it concentrates mainly on policy and market structure concerns.

A Lack of Competitive Pressure, Exclusivities, and Supply Model

As mentioned above, 44% of the final price offered to the consumer remains a distributor's surplus (importers-wholesalers and retailers), probably due to a detrimental lack of competitive pressure.

While the small size of the market already favours a certain concentration of local producers, this phenomenon is accentuated by the high level of protection they enjoy (particularly in the food industry). This leads to rent-seeking behaviour and high

23 French Polynesian Competition Authority, above n 12.

24 Ennis, Sean, Piffaut, Henri "Insular Economies: An overview of the national case law" (September 2023) Concurrence, available at: <https://www.concurrences.com/en/bulletin/special-issues/insular-economies-research-program/insular-economies-an-overview-of-the-national-case-law>

prices. In other words, producers and distributors are not encouraged to improve the quality, diversity or price of their products.

Competition law generally focuses on competition in a market. However, as economic studies have shown, one of the main sources of competition concerns for small jurisdictions is the impact of high levels of aggregate concentration in their markets.²⁵ In particular, oligopolistic coordination within and across markets, along with barriers to entry, may increase.

In the case of French Polynesia, Concentration is reinforced by the vertical integration of the main importers, producers, and distributors. Goods are imported in one of two ways. On the one hand is what is called the 'short channel', in which a retailer is supplied directly by the foreign manufacturer on its warehousing platforms, possibly via its own central purchasing office. This channel is mostly used in the commercialisation of the distributors' own brands. On the other hand is the 'longer channel' which involves a broker or brand agent who negotiates the terms and supplies the Polynesian distributor; this is the most common way in which the goods are supplied. The latter channel allows economies of scale and provides services to distributors (supply, shelving, advertising, promotions, after-sales service).

Importers often benefit from exclusive import rights for one or more brands, either *de jure* (formalised by a written contract) or *de facto* (without a formal agreement, but with the supplier selecting a privileged distributor who alone has access to the brand's entire product range, its advertising budget or product training). This limits intra-brand competition between importers.

However, in a small, concentrated economy where inter-brand competition is structurally weak, the incentive to pass on economies of scale is also limited. Importers benefiting from such exclusivity have little incentive to exploit inter-brand competition.

Their market power is even greater if the exclusive importer is also a retailer, which is mostly the case in the Polynesian market. This is why, as a precautionary measure, there is a general ban on this type of exclusive agreement in French overseas territories. However, French Polynesia is an exception. Since 2018, such agreements are not covered by the ban.

In the retail sector, the leading operator can take advantage of this to set reference prices for the whole market at a high level, based on the consent of the most affluent consumers. The other brands match these prices and therefore have no incentive to compete on price.

25 Micha S Gal *Competition Policy for Small Market Economies* (Harvard University Press, 2003).

The aforementioned vertical integration, along with the exclusivities, poses different challenges to the Authority. First, even though the exclusivities could represent some efficiencies or cost savings when increasing the buying power of the distributor, allowing it to get better deals, they could also impose a block on the few existing distribution channels, stalling the incentives and ability of other competitors' brands to enter the market. Therefore, absent the prohibition, the agency is loaded with the burden of investigating and proving the anti-competitive nature of the agreements in each case; in practice this may be difficult. The authors recognise that there is no point in a blanket prohibition of exclusivities. Nonetheless, as we explain below, in a small market, especially in one so remote as the Polynesian, policymaking should defer any measure that aids in maintaining open markets and eliminating unnecessary barriers. So, despite the efficiencies that could be generated, these agreements could imply a contractual or de facto closing of the distribution channels, eroding the chances to foster inter-brand and intra-brand competition.

B Creation of Proper and Applicable Standards for the Jurisdiction

We have already mentioned that the remoteness and size of the market are reflected in a set of features which create the need to attune the applicable standards and analyses to the particular needs and characteristics of these types of economies. In other words, the standards and analyses applied in mature jurisdictions cannot be directly transplanted to French Polynesia without a prior refining and adjusting process.

The above is especially true in the merger review process where an improper threshold can lead the Authority to spend already scarce resources in reviewing transactions. Where the risk of a false negative can cause a great harm, given that the self-correcting force of the market is weaker than in big and developed economies,²⁶ but also where the risk of a false positive can deprive the market of the dynamic efficiencies necessary to move forward in the development process. Simply put, a judgement error can have a longer-term and more profound impact on the Polynesian economy in comparison with developed ones.

Thus, the Polynesian Authority decision-making process becomes very complicated. On the one hand, it must be careful not to block deals that, though they increase concentration, are necessary to achieve beneficial economies of scale. On the other hand, it must block or impose conditions on deals that are likely to create irreparable damage or a profound risk of competitive harm to the market.

26 Gal *Merger Policy for Small and Micro Jurisdictions*, above n 9.

It is also important to consider that the existing regulatory barriers deepen the impact on competitive pressure already affected by the natural features of the Polynesian market. Therefore, a proper and assertive assessment requires a complex dynamic analysis, balancing, and consideration of up- and down-stream markets, along with the possible conglomerate effects when applicable.

The French Polynesian law introduced an unusual instrument in its toolbox: the *ex ante* control of retail outlets. To maintain a sufficiently competitive environment in the retail sector, the Authority has the power to control the creation and modification of commercial space. Any creation, extension, or modification of a commercial outlet of more than 300m² requires prior authorisation from the Authority.

The instrument aims to examine whether the transaction is likely to create or strengthen a dominant position. Following this analysis, the Authority may approve, prohibit, or condition the transaction on measures that protect competition.

To limit the risk of error and improve the process, the Authority has a tool that allows the parties to submit and negotiate commitments at the assessment stage of the procedure. If the Authority identifies competition concerns, it invites the parties to propose remedies to address them before the decision phase to achieve the best outcome for the market.

In a recent decision, the agency blocked the construction of a Carrefour hypermarket of more than 1,800 m² in Pao Pao, on the island of Moorea. This is the first prohibition issued by the Authority in the retail development sector. According to the Authority, the transaction raised competition concerns. It was likely to crowd out several competing projects, thereby affecting the competitive landscape in the area, and to strengthen the Wane group's leading position in the food retail market. In addition, the operator's vertically integrated structure and the fact that its buying centre also supplied competing retailers in the area raised, in the Authority's opinion, concerns regarding discrimination and self-preferencing risks. In this case, the remedies that were offered did not meet the expectations of the Authority. This a tool that raises sensitive issues, and the Authority needs to find the balance on a case-by-case basis.

C Oligopolist Coordination and Social Ties

Another big challenge is addressing oligopolistic coordination. In this sort of behaviour, in principle, the prohibition on restrictive agreements does not apply. Given the interdependent relation among oligopolistic agents, parallel conduct

without prior agreement is not prima facie forbidden.²⁷ However, despite its apparent legality, such behaviour, very common in small, marginal economies,²⁸ could discourage entrance and impact competition, driving the prices up without rendering any particular benefit to the consumer or society.

In that sense, this type of behaviour represents a difficulty that competition agencies have to deal with primarily in three manners: i) through merger control; ii) through regulation (directly or through advocacy and promotion of proper measures before the competent authority); and iii) through close scrutiny that prevents illegal behaviour, facilitating the coordination or restrictions for entrance. Finding regulatory solutions to overcome such threats to competition is no easy task, but lowering barriers of entry is a must to increase competitive pressure and the health of the Polynesian market.

Strong social ties and interest groups connected to political power are another problematic feature derived from a small population and even smaller business and political classes. While such links are a normal and important aspect of social life, they can also serve to dampen competition. Social and family links between competitors or conglomerates increase even more the risk of coordination and illegal behaviour and can stall agency tools or initiatives. For example, leniency programmes are often ineffective where market participants are linked in more than economic ways. Also, these ties foster and strengthen the lobbying activity and the rent-seeking behaviour of these privileged groups towards the imposition of protectionist measures and barriers by the government.²⁹

IV POSSIBLE SOLUTIONS

The first concern that is reflected in the above-mentioned challenges, and generally in small market economies, is the creation of competition,³⁰ or in other

27 See Donald F Turner "Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal" (1962) 75 Harvard Law Review 5. The authors recognise that there is some discussion on the matter, however, there is now sufficient theory about mere interdependent behaviour which means it could be administered as a theory of harm for a Competition Agency. There must be other elements additional to the parallel behaviour that renders the coordinate behaviour illegal. See William E Kovacic, Rober C Marshall, Leslie M Marx, Halbert White "Plus Factors and Agreement in Antitrust Law" (2011) 110 Michigan Law Review 6. See also, William H Page "Objective and Subjective Theories of Concerted Action" (2013) 79 Antitrust law Journal 2.

28 Gal *Competition Policy for Small Market Economies*, above n 27.

29 A E Rodriguez and Mark D Williams "The Effectiveness of Proposed Antitrust Programs for Developing Countries" (1993) 19 NCJ Int'l 209, available at: <https://scholarship.law.unc.edu/ncilj/vol19/iss2/1>

30 Budizinski, Oliver, Beigi Maryam HA *Generating instead of protecting competition, The economic characteristics of developing jurisdictions*, above n 5.

words, increasing output. It cannot be ignored that competition is not an end but a means to maximise living conditions for the public, which, in the case of developing countries, is equal to growth or development. Thus, competition policy and enforcement in those jurisdictions should aim to promote growth, innovation, and allocative efficiency or redistribution effects in the long run.³¹

With that in mind, it is important to emphasise that, given the complex situation already described, the implementation and improvement of a successful competition policy does not rest exclusively on the shoulders of the French Polynesian Competition Authority. It requires profound fiscal and customs policy reforms along with an investment in basic infrastructure, such as the Papeete port, to maximise conditions in the market. However, this does not mean that the Authority is powerless in front of the challenges it is facing. On the contrary, there are concrete actions that the Authority can take to push the necessary shifts and improve the competition conditions.

A Aggressive Policy Advocacy

At this early stage of the competition system, probably the most important task for the Authority is to build widespread knowledge around the competition law and its benefits. Not only in the general public and business community, but also, and specially, inside government. It is extremely important to generate awareness in high and senior public officials; decisionmakers and policy makers must take the subject into consideration. Along with this, it is a must that the Authority identify problematic regulations that could be obstructing the competition process, especially the ones posing unnecessary barriers, and then push for reforms.

It could be persuasive for the heads of government if the Authority showed them the high cost that society must bear in terms of prices (especially in public procurement), lack of quality and on the development process, due to inefficient regulation. Naturally, this a task that requires time and persistence, but is one of the outmost importance.

In this respect, the Polynesian Authority has been very active. It has issued important opinions analysing the structure of the national markets and identifying courses of action to be taken to improve conditions on imports and distribution mechanisms in the agricultural, industrial, oil, and energy sectors.³² With great success, the Authority raised the interest of the government so that it incorporated most of the recommendations presented by the Authority to an inter-ministerial

31 Kovacic, Willia E "Competition Seminar Potificia Universidad Catolica de Ecuador" (22 November 2023).

32 Available at <https://autorite-concurrence.pf/avis-liste/>.

committee in its negotiations with the oil companies. The dialogue between the government and the Competition Authority increases the chances of the Authority's success in achieving the structural shift needed. The quality of the opinions also helps build the Authority's legitimacy and establish its position as a technical body.

Ties with the international community are important too. In January 2023, the Authority organised the Tahiti Competition Days, which brought together local stakeholders, practitioners, international experts and, for the first time, representatives of competition authorities from Pacific countries. It was a successful three-day training and exchange focused on competition law in French Polynesia and the Pacific region. It helped to strengthen the expertise of local lawyers in this field, with the long-term aim of reducing the need for local companies to hire expensive lawyers from abroad.

The aforementioned is encouraging. Nonetheless, it is important to build persistence and resiliency, not only because there is a long road ahead but also because once the Authority starts to generate successful changes, it is only natural that many powerful groups and individuals will oppose strongly when they see their comfortable business position threatened.

B Lenient Merger Review

Once the Authority has achieved some of the necessary regulatory shifts, incumbent players will be exposed to international competition, forcing them to improve in terms of price and quality. In the interim, it is advisable for the Authority to allow national players to grow and achieve scale economies. From this perspective, merger review should focus on identifying the mergers that represent a high risk for the market and spare the resources that would be consumed in a broader review, to use them in other areas that could render more benefits essential for effective advocacy such as enforcement procedures and market studies.

In this sense, the thresholds triggering the notification process must be adjusted to address only meaningful transactions that can pose a competitive risk to the market. In the same way, as Gal has explained,³³ to avoid the unnecessary consumption of resources, only problematic transactions must pass on to the second stage of the analysis procedure. This means that, in principle, structural indexes should not play a major role in the decision to pass the transaction to the second stage unless it represents an unacceptable level of concentration. This is especially tricky given that measures such as the Herfindahl-Hirschman Index (HHI) must be attuned to the realities of a small market.

33 Gal *Merger Policy for Small and Micro Jurisdictions*, above n 9.

The dynamic analysis must consider the size and resources available in the market. Thus, when assessing the entry possibilities, it is worth considering that this process is longer in remote and small economies, and if there is a likelihood of entry, it is possible to be more lenient or tolerant towards the levels of concentration.³⁴ Also, it is convenient to apply a balancing approach that "recognizes that a merger should be permitted if the benefits resulting from a merger are greater than its disadvantage and offset its anti-competitive effects".³⁵ Conglomerate effects should also be considered, as they can play a much more important role than in big jurisdictions.

Finally, it is important to include in the analysis foreign subsidies that could be affecting imports and driving the prices artificially down. When this is the case, achieving economies of scale and efficiencies that help producers drive the cost down could be the only way to stay in the market and to overcome this kind of market distortion.

C Aggressive Enforcement Policy

The enforcement policy is key to the success of the system. There should be a special focus on detecting any legal conduct discouraging entry, either by agreement or unilateral conduct. Hardcore cartels directly on prices, of course, are important. However, emphasis is placed on exclusionary and rising rival cost conduct given that the priority of the Authority should be on keeping the market open and fostering innovation.

Aggressively is also important to create incentives for the leniency programme to work, particularly in such small jurisdictions as the Polynesian one in which close social and family ties can strongly discourage the use of this tool.

In this respect, the French Polynesian Competition Authority has taken important steps. In the telecom sector, for example, there is a precedent in which the Authority investigated the biggest provider on the grounds of abuse of dominant position; the procedure was closed by accepting the commitments presented by the company. This procedure was extremely important since the sector was historically dominated by state-owned monopoly enterprises, and the entry of new operators resulted in a significant fall in price.³⁶

More recently, the Authority investigated and sanctioned a cartel in the mortuary industry during the pandemic, which increased the prices of funeral services for

34 Ibid.

35 Ibid.

36 <https://autorite-concurrence.pf/decision-n-2018-pac-01-du-6-juin-2018/>.

people who died from COVID-19. More than a thousand families, most of them in vulnerable conditions, were affected by this agreement.³⁷

D The New Pacific Island Network of Competition Consumer and Economic Regulators (PINCCER) can Help

On November 2023, the competition agencies of Australia, the Cook Islands, Fiji, French Polynesia, Kiribati, New Caledonia, New Zealand, Papua New Guinea, Samoa, Solomon Islands, Tonga, and Vanuatu created the Pacific Network formed to promote competitive markets (PINCCER). The network is:³⁸

...designed to enhance the capabilities of competition authorities by allowing them to speak with one voice in the Pacific region, and providing them with a forum for exchanging experiences dedicated to promoting competition in the markets under their jurisdiction.

The establishment of PINCCER has at least three potential advantages for the APC. The first is that the collective efforts of PINCCER participants can enable the APC (and other PINCCER members) to achieve results that may be unattainable through the work of individual national competition authorities (NCAs). The resource constraints discussed above require ingenuity in devising alternative approaches to carrying out the mandate of the competition laws of each jurisdiction. For example, rather than having each NCA undertake a market study or perform other research projects the PINCCER network could pool resources in ways to draw upon the capabilities of each and share costs that might be unbearable for a single authority. The PINCCER network also could supply a platform for developing common strategies, in advocacy and law enforcement, to address phenomena that affect many or all the network's members. Regional networks have a special capacity to enable members to focus in a single-minded way on issues of distinctive importance to the region; something that often is generally not possible in the context of participation in multinational networks with a diverse global constituency.

A second potential advantage comes from the network's capacity to accelerate learning by each member. Learning from experience, good and bad, is a vital means for organisations to progress. Mastering the cycle of experimentation, assessment, and refinement is fundamental to the success of institutions in competition policy and other fields of endeavour. Networked collaboration enables each member to

37 <https://autorite-concurrence.pf/decision-n2022-pac-01-du-5-septembre-2022/>.

38 New Caledonian Competition Authority "Pacific competition authorities create collaborative network to promote the competitive functioning of markets" Press Release, November 2023, available at: https://www.concurrences.com/IMG/pdf/communiqué_pinccer.pdf?115477/c8c1cf44f1e6c101cb88db4517ad24eccc1e004322f7cf2d9636330266bb71aa

benefit from the experience of all members; to reach beyond the experience base of an individual NCA and absorb learning from multiple organisations. For a competition authority, the common learning can take the form of pooling knowledge about economic problems, investigation and enforcement techniques, and solutions for management challenges (eg methods of setting priorities and selecting projects to carry them out). The network also supplies a forum in which members can discuss how to cope with political pressures and the interagency frictions that arise in every jurisdiction.

The third advantage is to enable the PINCCER members to have a more effective voice in dealing with the rest of the competition policy world. Smaller economies, including the island states of the South Pacific, can easily be overshadowed by the larger economies and jurisdictions that figure most prominently in the development of competition policy. The PINCCER network provides a means to amplify the voice of the member authorities and draw attention to their programmes and their views on competition policy.

E Assess and Incorporate Comparative Experience

Comparative learning is one of the main benefits that the Polynesian Competition Authority can receive from the PINCCER. Among the network's members, there are agencies that have already collected a great amount of experience, especially, in dealing with the size and remoteness concerns. New Zealand is a good example worth considering.

By 2022, it had a population of around 5 million,³⁹ much bigger than French Polynesia but still small, its location is very remote even from Australia, its principal commercial partner, and its markets are highly concentrated.⁴⁰

New Zealand, has embraced this situation by opening its economy to foreign trade, reducing barriers to imports and exports,⁴¹ along with applying competition policy and enforcement. It has adjusted the law and standards to face the challenges posed by the specific features of the jurisdiction, for example, s 1A of the Commerce Act 1986 recognises the promotion of competition as one of the main goals for the long-term benefit of the consumer.⁴² This implies the recognition of dynamic

39 Statistics can be found at The World Bank Database, available at: https://databankfiles.worldbank.org/public/ddpext_download/POP.pdf

40 Evans "Competition Policy in Small Distant Open Economies: Some Lessons from the Economics Literature", above n 11.

41 Ibid.

42 Gal "The Effects of Smallness and Remoteness on Competition Law - the Case of New Zealand", above n 10.

efficiency as a preponderant objective. In the same way, New Zealand has tuned its merger review standard, recognising that high concentration is an inherent feature of its jurisdiction. Thus, New Zealand has created safe harbours that tolerate a HHI higher than the traditional markers used in the US or the EU, and they have even allowed mergers to monopoly when the existence of potential competition that can discipline the merged entity has been identified.⁴³

This experience could become very handy for French Polynesia to make the necessary adjustments to improve competitiveness in its market.

V CONCLUSIONS

Small and remote economies possess inherent features that must be taken into account when designing and applying their competition law. Due to their size, they cannot support many agents producing efficiently, which often makes them highly concentrated. Thus, lowering barriers and openness are extremely important, given that they help to increase the output, create competitive pressure, and improve the consumer welfare in the long run.

French Polynesia is facing a high cost of living condition, which is probably caused not only by its size and location but also by the high regulatory barrier that shields its industry from foreign trade. Therefore, its Competition Authority has much work ahead to successfully implement a competition policy that can properly address the situation. Even though it has made important achievements in the six years since it was created, the Authority still needs to persuade the government to undertake profound shifts in fiscal, customs, sanitary, and phytosanitary policy to effectively improve the competition conditions in the market.

The experience of other countries could play a very important role in that process. In that sense, the creation of PINCCER is a great step that could help the Authority learn from comparative experience and as a group address effectively common problems and concerns across the region.

43 Ibid.