European Master in Law and Economics

Excessive Pricing by Dominant Firms in Small Market Economies

by

Nir Ofer

Supervisor:
Prof. Michal Gal

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**Authorship declaration**

I hereby declare and confirm that this thesis is entirely the result of my own work except where otherwise indicated. I gratefully acknowledge the supervision and guidance I have received from Prof. Michal Gal. This thesis is not used as part of any other examination and has not yet been published.

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Nir Ofer

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# Table of Contents

1. **Introduction**  
2. **The Doctrine of Small Market Economies**  
   2.1 Background  
   2.2 Defining Small Economies  
   2.3 Economic Features of Small market Economies  
      2.3.1 Background  
      2.3.2 High Industrial Concentration Levels  
      2.3.3 High Entry Barriers  
      2.3.4 Suboptimal Levels of Production  
      2.3.5 Conclusion  
   2.4 Small Market Economies and Competition Aspects  
      2.4.1 Background  
      2.4.2 The Goals of Competition Law in Small Economies  
      2.4.3 Productive Efficiency and Small Economies’ Tradeoff  
      2.4.4 Structural Remedies vs. Conduct Regulation  
      2.4.5 Conclusion  
3. **Excessive Pricing by Dominant Firms: Core Aspects**  
   3.1 Preface: Excessive Pricing as an Abuse of Dominant Power  
   3.2 Pros and Cons: Intervention vs. Non-Intervention Approaches  
      3.2.1 Against Intervention  
      3.2.2 In Favor of Intervention  
   3.3 Approach Comparison: the US vs. the EU  
      3.3.1 The US - Monopoly Pricing is Not Forbidden  
      3.3.2 The EU – Excessive Pricing as an Abuse of Market Power  
      3.3.3 Conclusion  
   3.4 Fair or Unfair? Measuring Excessive Pricing  
      3.4.1 Background  
      3.4.2 Profitability Analysis  
      3.4.3 Price-Cost Comparison  
      3.4.4 Price Comparison  
      3.4.5 Conclusion
<table>
<thead>
<tr>
<th>4.</th>
<th>The Question of Excessive Pricing in Small Market Economies</th>
<th>35</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.1</td>
<td>Normative Analysis: Are Excessive Pricing Considerations</td>
<td>36</td>
</tr>
<tr>
<td></td>
<td>Influenced by the size of the Economy?</td>
<td></td>
</tr>
<tr>
<td>4.2</td>
<td>Policy Implications</td>
<td>40</td>
</tr>
<tr>
<td>4.2.1</td>
<td>Preface: Small Economies and Excessive Pricing Policies</td>
<td>40</td>
</tr>
<tr>
<td>4.2.2</td>
<td>Structural Remedies for Excessive Pricing in Small Economies</td>
<td>42</td>
</tr>
<tr>
<td>4.2.3</td>
<td>Behavioral Remedies for Excessive Pricing in Small Economies</td>
<td>44</td>
</tr>
<tr>
<td>4.2.4</td>
<td>Guidelines for the Regulation of Excessive Pricing in Small Market Economies</td>
<td>47</td>
</tr>
<tr>
<td></td>
<td>Conclusion</td>
<td>52</td>
</tr>
<tr>
<td></td>
<td>Bibliography</td>
<td>54</td>
</tr>
</tbody>
</table>
1. Introduction

Competition law's most prominent goal is to protect and promote competition in order to increase social welfare. In the previous decades, more and more economies have adopted competition policies in order to achieve, inter alia, the abovementioned goal. Such laws deal with various aspects of market behaviors, which may have anti-competitive implications. This includes mergers, cartels and the abuse of market power by dominant firms. Thus, the existence of competition laws and competition policies is nowadays globally widespread. They are often accompanied by different forms of competition authorities whose role is, inter alia, to inspect the market's competitive behavior and enforce markets' obedience to competition laws, thus implementing the competition policy prescribed by the legislator.¹

Jurisdictions adopting competition policies differ in many aspects, such as the "age" of the economy, its developmental level, external influences, etc. Another aspect is the size of their economy. In the past decade, a new doctrine in competition law emerged, led prominently by Prof. Michal Gal, which examines the impact the size of the economy has on the appropriate competition policy to be adopted. One of the basic recognitions in the doctrine is that very often small economies, in which structures like monopolies and oligopolies are widely common, tend to adopt large economies' competition policies, without making the necessary adaptations, although "the economic paradigms on which the competition policies of large economies are based do not necessarily apply to small economies".² This is true also for the question of excessive pricing by dominant firms.

Indeed, one of the most debatable issues discussed in the realm of abuse of market power by dominant firms is the question of charging supracompetitive prices by those

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¹ See, for instance, the case of Switzerland: OECD Global Forum on Competition (2003), Competition Policy in small Economies - Switzerland (21.1.2003), 3.
Ample research, based to a large extent on large economies, has been carried out in the last decades regarding, inter alia, the question of a firm's entitlement to charge a price well beyond costs, the ways to calculate it, and how to practically deal with it. Two theoretically polar approaches exist: the EU approach, which prohibits such conduct as abusive, and the US approach, which principally rejects intervention. However, both are large economies in nature. Hence, much of the arguments regarding pros and cons of supracompetitive pricing relate to these two large economies, even when dealt with in small economies. Yet, as discussed extensively in Prof. Gal's research, the size of the economy should influence the competition policy adopted, including the question of excessive pricing.

In light of the fact that most of the research regarding excessive pricing, like it generally is regarding competition issues, is based on large economies, in most cases without any special distinction between small and large economies and without really raising the question whether there should be such a distinction; and the observation that smaller markets tend to have unique economic features such as more firms in dominant position, the goal of this paper is to examine whether the size of the economy affects the considerations regarding excessive pricing. If so, how should that practically impact competition policy towards excessive pricing in small economies, as "monopoly pricing regulation is... in many ways, a microcosm of competition policy." The paper begins with a comprehensive theoretical survey: Chapter two presents the basics of the doctrine of small market economies, their economic features and the application to competition law. Chapter three then presents a succinct yet comprehensive survey of the issue of excessive pricing by dominant firms, including the debate in the literature regarding excessive pricing, based especially on large

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6 This is a succinct theoretical survey intended to lay the foundations for the discussion in chapter four.
economies. Based on the theoretical background, chapter four tackles the questions raised above, which are the heart of this paper. First, a normative analysis is performed, showing that the size of the economy indeed influence the considerations regarding excessive pricing, so that, with accordance to Gal's theory, the question of excessive pricing by dominant firms should be analyzed as distinct from large ones. Then, competition policy's practical aspects are surveyed, focusing mainly on regulatory issues and the use of regulation in dealing excessive pricing in small economies. Chapter 5 concludes.

2. The Doctrine of Small Market Economies

2.1 Background

From an economic point of view, the goals of competition law should be efficiency and social welfare. Rutz argues that "the primary goal of competition policy is to promote competition and to ensure that private actors do not restrict competition". Consequently, Gal states that "competition laws are part of a set of legal rules that aim at maximizing social welfare. They do so by determining the rules of the game by which competition takes place and by distinguishing normally advantages competitive behavior from anti-competitive conduct. The basic tool that is used to achieve this aim is the creation of an economic environment in which firms can compete on merit, and consumers can derive the benefits that the market can deliver". Namely, competition

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policy's role is to rectify certain harmful market distortions by setting guidelines and laws\textsuperscript{10} thus to enhance competition, not competitors.\textsuperscript{11}

Competition policies may pertain to various aspects: mergers and acquisitions, cartels, abuse of dominant power, etc. Ample research has been carried out regarding those practices, both on the theoretical and practical sides. Nowadays, having a competition policy and a sort of competition authority to enforce it is a worldwide convention.\textsuperscript{12}

From the ample competition literature and researches it appears that there in no one "right" policy to implement in a certain jurisdiction. Jurisdictions may differ in numerous aspects, including their "age", their legal and commercial culture, their openness to external influences, their developmental level, etc. The unique characteristics of each economy make it practically impossible to establish a totally unified competition policy which is appropriate to all jurisdictions, or "one-size-fits-all" formulations.\textsuperscript{13}

Although there is a great variation in the characteristic of different jurisdictions, many of the jurisdictions do not establish their own self-adapted competition policy, accustomed to their own features and needs, but rather "import" competition approaches from either the US or the EU.\textsuperscript{14} Apparently, small economies, as we define them later on, also usually do not analyze the relevant effects smallness may or should have on their competition policy.\textsuperscript{15} This may stem from economic reasons (saving resources), a

\begin{flushright}
\textsuperscript{10} Chen and Lin, note 7, at 1.
\textsuperscript{11} Ibid, at 2.
\textsuperscript{13} Gal, note 2, at 18; See also Calcgagno, C. and Walker, M. (2010), "Excessive Pricing: Towards Clarity and Economic Coherence", \textit{Journal of Competition Law and Economics} 6(4), 891, 891-892.
\textsuperscript{14} Rutz, note 8, at 2; Ibid, at 257-258
\textsuperscript{15} Gal, note 2, at 8.
\end{flushright}
desire to unify competition policies, etc.\textsuperscript{16} However, by doing so, the unique features of small economies are many times overlooked and thus efficiency is impaired.

Over the last decade the issue of the impact the size of the economy has on the competition policy adopted and implemented in a certain jurisdiction has become more and more prominent, led mainly by Prof. Michal Gal's pioneering work. According to the theory, the size of an economy is bound to influence the competition policy to be adopted and implemented. Thus, the doctrine of competition policy in small economies is nowadays a distinct research area in the realm of competition.

The main justification for such a distinction and thus for the need for an adapted competition policy is the observation that small economies "...face different welfare maximization issues than large ones".\textsuperscript{17} Practically, small economies deal with much greater efficiency problems, which are essentially the basis for the whole independent doctrine of small economies. Indeed, the unique features of small economies lead to the need for a competition law designed specifically for small economies, because although many of the large economies' concepts and principles are appropriate also for small ones, "...the comparative prevalence of concentrated market structures in small economies creates a set of tradeoffs that require a different set of rules to regulate the conduct of market participants efficiently."\textsuperscript{18}

2.2 Defining Small Economies

According to Gal's economic definition, a small economy is "...an independent sovereign economy that can support only a small number of competitors in most of its industries".\textsuperscript{19} This definition does not compel high concentration of all industries within


\footnotesize{\textsuperscript{17}Gal, note 16, at 1441.}

\footnotesize{\textsuperscript{18}Ibid, at 1442.}

\footnotesize{\textsuperscript{19}Gal, note 2 ,at 1}
the small jurisdiction - it is well possible that some industries are very competitive. However, an economy will be considered a small one, provided that most of its markets are highly concentrated and suffer high entry barriers. Practically, no "magic number" for distinguishing between small and large economies exists. However, it appears that the smaller the country's population is, generally the more blatant the "smallness features" are.

According to Gal, market size is essentially shaped by three factors: 1) population size – influences the demand in a given market and thus the profitability of a firm; 2) population dispersion – in a large jurisdiction there can be several small local markets; 3) openness to trade – the influence of economic, geographic, technological, legal and political factors that influence the market boundaries. There is no compulsory overlap between jurisdictional borders and economic borders.

It should be noted that the abovementioned definition of small markets economies has been criticized both on the theoretical and practical aspects and some other definitions has been offered. However, in this paper I shall adhere to the definition and attributes offered by Prof. Gal's economic approach to small economies, which enables competition analysis based on economic discourse in light, inter alia, the fact that economic efficiency is of primary importance in small economies. Therefore, this paper's analysis shall consider "...jurisdictions with absolutely small population and high natural and artificial barriers to foreign trade (e.g. Israel) or jurisdictions with

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24 Gal, note 2, at 3-4.
26 Rutz, note 8, at 4; OECD, note 21, at 3, 6-7, 15.
27 For example, the definition offered by New-Zealand: "those economies that are approaching the minimum size needed to operate a full set of regulatory and competition policies and institutions." (OECD Global Forum on Competition (2003), Competition Policy and Small Economies: Note by the Secretariat (7.2.2003), 4).
dispersed populations and high entry barriers to foreign trade (e.g. Australia)." Accordingly, other different attributes which have also been related to small economies such as political and cultural factors, as well as unique developmental features which may constitute a separate group, will not be discussed.

2.3 Economic Features of Small Market Economies

2.3.1 Background

In the free market, competition is perceived as a tool to achieve various social goals, among which is the prominent goal of social welfare. At the heart of the economic theory we find Adam Smith's metaphor of the "invisible hand", which describes the self-regulating mechanism of the free market and the belief that free competition will bring the most efficient results. According to the model, in perfectly competitive markets, with a large number of firms and low entry and exit barriers, firms are price-takers, as Gal describes: "Competition draws competitors into the market to remove excess profit. It stimulates incumbents to greater productive and dynamic efficiency. It weeds out the inefficient by the objective test of market survival, and it assures the optimal allocation of resources into production activities".

Perfect competition is seemingly the ideal situation, where market forces drive economy toward maximal efficiency to the benefit of all, a situation which is more relevant when analyzing large economies. However, whereas even in large economies this ideal situation does not necessarily prevail and competition is quite often distorted, in the case of small economies, the natural and/or artificial conditions in many of the

29 Ibid, at 15.
30 OECD, note 21, at 7.
33 Such as "small developing economies".
34 See OECD, note 4, at 3.
35 Chen and Lin, note 7, at 1.
36 Gal, note 2, at 13.
markets generally prevent perfect competition or anything close to it from taking place. Thus, a main feature of small economies is their tendency for industries based on monopolies or oligopolies where high entry barriers exist, which we shall now discuss.

Small economies are characterized by their own features, three of which are central: high industrial concentration levels, high entry barriers, and below minimum efficient scale - MES - levels of production, which are attributed to the large size of MES necessary relative to demand. Gal describes this as "the basic handicap of small economies". In smaller markets, demand is smaller, thus fewer MES units can operate in the market and still retain profitability. Due to the limited demand, the market can support fewer firms than a large market would. We shall survey shortly the above mentioned economic features of small markets.

2.3.2 High Industrial Concentration Levels

Scale economies means that in order to be efficient producers, firms have to achieve MES. Since in small economies the demand in most of their industries can support only a small number of efficiently operating firms, achieving economies of scales results in high concentration levels of the market, and a higher tendency for monopolies, relative to large economies. So, in order to work efficiently and to utilize MES, markets in small economies tend to be more concentrated. Researches have confirmed those theoretical assertions finding that in comparison to large economies, small economies tend to sustain fewer firms in each industry. Gal argues that "...industrial concentration levels of an industry are heavily influenced by the size of the

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37 Ibid, at 2, 4.
38 The smallest output a firm can produce so that its long run average costs are minimized.
41 Gal, note 2, at 15-18.
42 OECD, note 21, at 4; OECD, note 1, at 3.
43 Rutz, note 8, at 3; OECD, note 1, at 4.
44 See the studies surveyed in Gal, note 2, at 19.
domestic markets. The smaller the economy, the higher the level of concentration, as most of its markets cannot accommodate many viable competitors..."  
Actually, in small economies the share of market activity enjoyed by the largest firm is generally higher than in large economies.

2.3.3 High Entry Barriers

High entry barriers, which characterize most of the industries in small economies, are "factors that impede or prevent additions of capacity or the entry of new firms into the industry." Thus, an economy which does not suffer high entry barriers cannot be considered a small economy, since it is possible for new players to enter the market and thus exert stronger competitive pressures on existing firms.

The main entry barrier is created by the need of a new entrant to the market to capture a large part of the demand from the existing firms in a relatively short time in order to achieve MES, while this also involves large sunk costs. But although "new entrants must operate at large scale in order to be profitable... small market size prevents firms from producing a large quantity. Inherent difficulties in reaching a large scale reduce or eliminate the incentive to entry by new firms." In practice, small demand creates a substantial entry barrier. Consequently, a small "...market that is protected by substantial entry barriers is clearly not contestable..."

Other factors that may create entry barriers are supply constraints on factors of productions, regulatory constraints in order to protect the local industry, vertically linked markets, cultural variety and so on. Entry barriers thus seem to result in a pure

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46 Chen and Lin, note 7, at 5.
48 OECD, note 22, at 3; Rutz, note 8, at 3; Chen and Lin, note 7, at 4.
49 Chen and Lin, note 7, at 4. See also: Bain, J.S., (1956), Barriers to New Competition, Their Character and Consequences in Manufacturing Industries, Harvard University Press.
51 Gal, note 2, at 22.
52 Paas, note 23, at 96.
business decision of a firm not to enter a small market, since it means a much smaller profit potential compared to large economies.\textsuperscript{55}

2.3.4 Suboptimal Levels of Production

Below-MES levels of production worsen off the problems arising from high industrial concentration levels and high entry levels in small economies. It has been established in studies that many firms produce in suboptimal rates that are below the MES volumes.\textsuperscript{56} Other studies have shown that firms operating in small economies activate below-MES size plants, mostly in those industries where economies of scales tend to be large.\textsuperscript{57} Openness to trade, not discussed in this paper, seemingly counterbalances the impact of the MES problem.\textsuperscript{58}

2.3.5 Conclusion

The literature regarding small economies demonstrates that the limited size of an economy with the abovementioned characteristics adversely influences its economic capabilities and performance. Fewer firms in an industry limit competition and give rise to more non-competitive market structures than a large scale economy would allow. Together with high entry barriers which prevent competition for the market, these market structures bring negative effects in the form of abuse of dominant power, including overpricing of products and services, and thus reduction of efficiency and social welfare.

When realizing the limited role competition has in small market economies due to high levels of concentration and high entry barriers, which mean that efficiency often cannot be achieved through competition and market forces, the important role of a

\textsuperscript{54} OECD, \textit{note} 1, at 5; \textit{Ibid}; Gal, \textit{note} 2, at 22-23.
\textsuperscript{55} Paas, \textit{note} 23, at 96.
\textsuperscript{56} Gal, \textit{note} 2, at 23.
\textsuperscript{57} \textit{Ibid}, at 24.
\textsuperscript{58} For an elaboration see OECD, \textit{note} 22; Pass, \textit{note} 23.
proper competition policy emerges. It can be claimed that not only do small economies need competition law, but they might even need it more, since compared to large economies "the risk of distorted competition is even more pronounced and the need for a competition law more crucial..." and "competition policy in a small economy is thus a critical instrument with respect to determining domestic market structure and conduct and the intensity of competition."

2.4 Small Market Economies and Competition Aspects

2.4.1 Background

As discussed in subsection 2.3, small economies have their own unique features, which put productive efficiency and competition in a conflict. On the one hand, productive efficiency demands that only a small number of efficient firms operate in a given industry. On the other hand, achieving productive efficiency may result in highly concentrated markets, thus in some extent of market power enjoyed by some or all the firms in an industry, which might harm market efficiency and social welfare via high prices, relatively low output levels, rent-seeking etc.

The special characteristics of small economies necessarily implicate explicit negative effects on competition in an industry, including the abuse of dominant power. A small economy generally cannot stay indifferent to those negative effects and should respond in devising its own unique competition policy in order to tackle with those effects. Deriving from the unique characteristics of small economies, Gal emphasizes a number of general competition principles and guidelines she considers important in devising such policies, which we shall now briefly survey, as they have an important

59 Gal, note 2, at 44-45.
60 Chen and Lin, note 7, at 3.
61 Gal, note 2, at 45.
62 Gal, note 16, at 1449-1450
role in our later discussion regarding the "right" policies towards excessive pricing in small economies.

2.4.2 The Goals of Competition Law in Small Economies

As discussed before, the aim of competition policy is generally to facilitate the competitive process. The policy an economy opts for is not the goal in itself, but the tool used in order to achieve the main goals of competition – efficiency and social welfare. Thus, a "good" competition policy should best facilitate the goals of the competitive process. However, in small economies market conditions cause conflicts between certain competition goals, and allocative, productive and dynamic efficiencies are difficult to simultaneously achieve.\(^\text{63}\) Therefore, in small economies "...it is vital that the goals of competition policy be clearly, consciously, and unambiguously defined, and that economic efficiency be given primacy over other goals...small economies should strive to achieve economic efficiency as their main goal because they cannot afford a competition policy that is prepared to sacrifice economic efficiency for broader policy objects."\(^\text{64}\) This practically means that other social goals should be of lesser importance in designing a competition policy for small economies.

Indeed, even though the primacy of efficiency is relevant to large economies as well, its importance in small economies is even greater since, for example, unlike large economies, economies of scale results in a minimal number of actors in an industry, so that competition is minimized as well. And even then, it is doubtful whether allocative, productive and dynamic efficiencies can be achieved at the same time in concentrated industries, and choosing among them results in tradeoffs.\(^\text{65}\) These tradeoffs will be of primacy importance when dealing with regulatory policies towards excessive pricing.

\(^{63}\) Gal, note 2, at 51.

\(^{64}\) Ibid, at 47-48.

\(^{65}\) Ibid, at 14, 51.
2.4.3 Productive Efficiency and Small Economies' Tradeoff

Small economies pose a substantial tradeoff. On the one hand, productive efficiency limits the number of firms that can operate efficiently in the market. On the other hand, this limitation causes higher concentration levels which in turn cause unwanted behaviors of firms in the market. Competition policy has to deal with this tradeoff and settle between both sides of the equation. Since industrial concentration is sometimes essential in small economies in order to achieve MES, it should not be considered as mala per se. It should be carefully examined in order to recognize the contribution it has to the small economy. Yet, high concentration may result in a greater market power, which may bring about abusive practices, such as overpricing of products and services, thus harming allocative efficiency and total welfare. So, "competition policy should thus strive to strike the optimal balance between structural efficiency and competitive vigor so that firms may operate at efficient scales and pass at least some of the benefits of greater efficiency on to consumers." Furthermore, "...small economies should reject a policy that views agreements that have the potential to increase productive or dynamic efficiency as illegal per se. Rather, they should opt for a rule that balances possible efficiency enhancements against the anti-competitive effects of the cooperative conduct and allow arrangements in which the benefits offset the restrictions on competition."  

2.4.4 Structural Remedies vs. Conduct Regulation

The significant tradeoff in small economies between scale economies and concentration levels and its application as described above give rise to the dilemma of the extent to which a small economy should use structural remedies and behavioral remedies to deal with the market dominant structures prevalent in small economies.

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66 Ibid, at 52.  
67 Ibid.  
68 Ibid, at 53.
Indeed, small economies can use structural remedies in order to tackle with dominant structures in order to decrease concentration levels, thus the possibility to abuse market power in the way of collusion, overpricing etc, and hence boost competition. However, whereas using structural remedies may indeed increase competition, it might decrease efficiency stemming from MES of production. Another problem is the fact that structural remedies might not prevent dominant firms from conducting aggressive competition. In addition, ongoing regulation may be needed in order to prevent small firms from growing into large exploitative firms again in order to achieve efficiency, etc.\textsuperscript{69} Gal concludes that "...small economies should generally reject laws that prohibit large size per se or that adopt structural solutions to all market power issues."\textsuperscript{70} However, it does not mean there should not be any use of structural remedies, since it is still possible that structural remedies will enhance efficiency even when used in small economies.

However, even when accepting that the more concentrated structure of the market is important in order to achieve efficiency and structural remedies are generally undesirable in small economies, it does not mean that a small economy should tolerate all the negative implications smallness creates in the market, and may opt for behavioral remedies. As Gal argues, "competition policy in a small economy should thus aim to minimize the undesirable economic effects of concentrated market structures and support the dynamic, long-run market forces that lead to more efficient market structures."\textsuperscript{71} Thus, in cases where the behavior is clearly harming competition and constitutes a blatant abuse of market power, regulation in the small economy should be strict and decisive\textsuperscript{72} and strive to boost efficiency.

\textsuperscript{69} Ibid, at 53-54.
\textsuperscript{70} Ibid, at 54.
\textsuperscript{71} Ibid.
\textsuperscript{72} Gal, note 16, at 1470-1471.
2.4.5 Conclusion

There are unique features of small economies that necessitate the special attention of competition policy makers in small economies. Owing to the high concentration levels and entry barriers in small economies, they are more prone to collusive conduct and abuses of dominant power than large economies are, and the effect on competition and thus on the economy may be relatively greater. Hence, we can say that although basically the mere conduct and negative effect in both large and small economies is similar, the consequences may differ in nature and magnitude. Since the relative influence on small economies may potentially be significantly harsher, small economies should devise their own size-oriented adapted policies, and not use the competition policies used by large economies "as is", just because the "large ones" use them. Since high concentration levels are not a common feature in large economies, those economies can possibly overlook the disadvantages of concentration, and leave most of the influence to market forces, knowing there is a "price" they will pay. This in not the case in small economies that cannot usually rely on market forces when devising their competition policies. This does not mean that rules and policies adopted in large economies are irrelevant in small economies, since many areas of competition law are not influenced by the size of an economy, yet adjustment is required.

73 Gal, note 2, at 56.
74 Ibid, at 55.
75 Ibid, at 56.
3. Excessive Pricing by Dominant Firms: Core Aspects

3.1 Preface: Excessive Pricing as an Abuse of Dominant Power

In order to achieve its goals, competition law has to deal with various types of abusive behaviors. Yet, "competition law condemns the abuse of market power, not the possession of market power per se." There are some prominent behaviors that are considered anti-competitive when practiced by firms who possess market dominance, such as price discrimination, tying and bundling, refusal to deal, predatory pricing and excessive pricing. These practices are prohibited by the EU Article 102 of the TFEU, and in the US by Section 2 of the Sherman Act and the Robinson-Patman Act on price discrimination.

One of the major problems with abusive practices is their ultimate welfare impacts which are very difficult to assess, since besides harming efficiency, they may also contribute to efficiency and social welfare. This tradeoff is of extreme importance when dealing with excessive pricing by dominant firms, which is of a unique nature in the realm of abuse of dominant power, since unlike the other potentially anti-competitive practices mentioned above, it is not based upon the exclusionary behavior of dominant firms, but rather is a question of direct abuse of dominant power towards the consumers and their welfare, inter alia, as a possible result of exclusionary behavior.

Generally speaking, dominant firms in general and monopolistic firms in particular, are characterized by their ability to charge a price which exceeds, sometimes substantially, the price they would charge were the markets competitive and firms were

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76 Chen and Lin, note 7, at 2.
78 Van den Bergh and Camesasca, note 7, at 298.
79 OECD, note 3, at 27.
price-takers. According to the theory, the rise in price causes the transfer of wealth from consumers to dominant firms and a deadweight loss, which is the welfare deducted from society, thus it is deemed "abusive". This is generally true for dominant firms in the markets, although to a greater extent for monopolies, whereas it does not matter how the market power was achieved.

Generally, "from the economic theory of monopoly one could deduce that exploitative practices, most prominently charging too high prices, would be the major concern of the prohibition of abuses by dominant firms." However, excessive pricing by dominant firms is one of the most controversial issues in competition law. This may contradict the abovementioned approach according to which efficiency and social welfare are major goals of competition law. Practically, even though "many regulatory authorities spend much of their time and resources considering whether prices are "too high"... interventions by competition authorities to deal with these problems directly are considered controversial at best." This situation has been described as a "paradox" in the literature.

This controversy is reflected in the two conflicting theoretical approaches represented by two large and highly influential economies – the EU approach which theoretically prohibits the practice of excessive pricing and the US approach which rejects intervention in excessive pricing. Much of excessive pricing research pertains to these two large economies. Many small economies have adopted large economies' policies towards excessive pricing, mainly the EU approach. This is of no surprise, since, as discussed previously, small economies tend to adopt large economies' policies

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80 See: Chen and Lin, note 7, at 1.
83 Van den Bergh and Camesasca, note 7, at 248.
84 OECD, note 3, at 24.
86 See Gal, note 82.
due to the many advantages it encompasses. There is no exception regarding excessive pricing. However, is this approach of adoption correct regarding excessive prices? This question will be discussed extensively in chapter four of this paper, in light of the argument that "the empirical conclusions about the economic characteristics of small market economies should be translated into policy choices and the standard assumptions of competition policy in large jurisdictions should be adjusted to fit the special characteristics of small economies."\textsuperscript{87}

3.2 Pros and Cons: Intervention vs. Non-Intervention Approaches

As mentioned above, although it is clear that using market power to increase prices has negative effects on efficiency and total welfare, the question of excessive pricing is highly disputable. There are many grounds for intervention and non-intervention presented in the literature. We shall now survey some central arguments for and against intervention in excessive pricing practices, especially from the eyes of large economies.

3.2.1 Against Intervention

Surveying the literature there are many grounds for opposing intervention in monopoly pricing and denying the idea of "excessive" pricing. Among those grounds we can find features of the market, regulation difficulties, fairness considerations, etc. However, in most writings we do not find the size of an economy to be considered. However, as elaborated later, the size of an economy is indeed an important factor to consider for excessive pricing policies.

The first main ground for non-intervention, which is well reflected in the US approach, advocates the idea of non-intervention due to the self-correcting nature of competitive markets, especially with regard to excessive pricing.\textsuperscript{88} This is not surprising in light of the fact, inter alia, that the US is a large economy which enjoys sufficient

\textsuperscript{87} Gal, note 16, at 1450.
competition in many of its industries and thus can more willingly support a non-interventionist approach.

The self-correcting feature of the market is rooted in the assumption that when a dominant firm raises prices, it will attract new entrants into the market. To prevent it, the incumbent firm will not "exaggerate" in pricing, since "high prices also provide an important market signal that encourages other firms to enter, which would create competition." Thus, regulation is unnecessary, and even may cause other firms not to enter the market, thus preventing competition.

The possible occurrence of regulatory failure further strengthens the idea of non-intervention, and it goes hand in hand with idea that competition policy in not the effective remedy for every market failure and sometimes it is not the preferable means. This fear is stronger with regard to excessive pricing, since the notions of "fair price" or "excessive price" are deemed abstract. Thus, regulating according to abstract concepts may theoretically cause uncertainty and arbitrariness which possibly cause harm greater than the harm it intends to prevent.

The second main ground against intervention, which relates to the former one, is the difficulty in defining the concept of "fair prices" and identifying excessive pricing, as presented later on. The difficulties are practical ones, on both assessing what the "real" price would be under a sufficiently competitive market, and in assessing what exactly the "excessiveness" or "unfairness" of a price is. It has also been doubted whether authorities, such as regulators or the courts are truly capable of assessing the

91 OECD, note 3, at 32.
excessiveness of prices, and if so, whether it is part of their mission to act as "price regulators", who can distort markets severely.\textsuperscript{93}

The third common ground for non-intervention deals with the chilling effect which regulation of prices may have on firms' incentives to enter competition, innovate and invest. Once a firm knows that there is a price limit it can charge from the consumer, it may distort its investment decisions, knowing, for instance, that the price it will be able to charge later will not suffice to cover its R&D expenses.\textsuperscript{94} It can also be claimed that price regulation ruins firms' aspirations to become the monopolist one day and reap due profits, thus harming potential competition.\textsuperscript{95} In this sense, the outlook about excessive pricing should be dynamic and not statics - the analysis of the situation should consider the preceding processes and the consequences.\textsuperscript{96} A dynamic outlook implies that if a firm worked hard in order to achieve its dominant position, it should enjoy the fruits of its hard work, thus signaling and giving other firms incentives to fight for the market thus facilitating competition.

It has also been claimed that "...confiscating profits deprives the market of its primary incentive to deliver benefits for society"\textsuperscript{97}, while it is only "fair" to let a dominant firm to enjoy its profits if they were justly earned. Another claim is that monopoly profits can be used in funding the investment of national firms in competing in international markets.\textsuperscript{98}

It should be noted that there are more grounds for non-intervention presented in the literature.\textsuperscript{99} However, the abovementioned three are the central ones.


\textsuperscript{94} OECD, \textit{note} 3, at 34.

\textsuperscript{95} Gal, \textit{note} 82, at 362.

\textsuperscript{96} \textit{Ibid}, at 344.

\textsuperscript{97} OECD, \textit{note} 3, at 35.

\textsuperscript{98} OECD, \textit{note} 16, at 2-3.

\textsuperscript{99} See OECD, \textit{note} 3, at 32-35.
3.2.2 In favor of Intervention

Competition theoretically promises better overall efficiency and results for society. In the absence of competition there are negative outcomes for society, including the transfer of wealth from consumers to producers, etc. In this sense, excessive pricing and its consequences is a blatant negative result of the use of market power. Others can be bad service, low product quality, etc.  

Hence, a central mission of competition policy is to prevent practices which make use of market power, thus harming efficiency and social welfare, including by way of regulation.

In contrast to the assumption of self-correction of the market, it has been shown that markets are often not self-correcting, at least not in a reasonable period of time. Sometimes, for example, first-mover's advantages are so strong, that it is impossible for new entrants to enter the market and compete. In other cases, a monopoly is in possession of a unique asset. In those cases, markets are unable to correct themselves, for sure not in a reasonable time frame, and the dominant position prevails for a long time with all the negative consequences it entails.

Regarding, the claim that regulating prices harms the incentives that potential players have for entering the market, it has been asserted that in most of the cases high prices do not suffice to attract new entry into the market, regardless of entry barriers, as Ezrachi and Gilo argue:

"...excessive prices do not attract entry. Therefore, the "self-correcting" reasoning should not serve to justify non-intervention." In contrast, price regulation may attract new entry since potential entrants know what the price will be after entering the market and can calculate their moves accordingly.

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100 Lyons, note 85, at 65.
101 Gal, note 2, at 75.
102 See Ezrachi and Gilo, note 92.
104 See Ezrachi and Gilo, note 92.
Regarding the difficulty in assessing what "fair" and "excessive" prices are, it can be claimed that the difficulty of a task does not mean not doing it. Since excessive pricing is not the only "difficult" assessment to be made in the realm of competition enforcement, competition authorities should tackle with the mission using guidelines, rule of reason, use of a few tests combined, etc. Yet not to abandon the issue of excessive pricing altogether because of its "difficulty", thus letting dominant firms substantially harm economic efficiency and social welfare.

As for the potential chilling effect on competition, innovation and investment, it can be claimed that it cannot serve as a decisive argument against intervention. There will be cases where intervention will indeed have negative effects and others where no influence at all will be found. In this sense, we can think of the very simple case where the industry is not prone to product and process innovation, rendering the chilling effect claim irrelevant. So, if there is a fear that price regulation of profits justly earned by dominant firms causes a chilling effect, intervention should then on the one hand tackle with the abusive behavior, while on the other hand not harm the incentives given to potential players, namely - not a decisive non-interventionist rule.

Other justifications for intervention are perception of the public, perception of the competition authority and more.

3.3 Approach Comparison: the US vs. the EU

This section deals briefly with two approaches to excessive pricing, in the US and the EU, as, theoretically, these two large economies represent two polar approaches towards the regulation of excessive pricing. However, a survey of the various policies towards intervention in excessive pricing discloses a whole range of policies. We can

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105 Ezrachi and Gilo, note 103, at 893-894.
107 Ezrachi and Gilo, note 103, at 897.
108 OECD, note 3, at 36-37.
109 This is not a wholly comprehensive survey of the two approaches, but a general background.
find a completely anti-interventionist approach as in the US and different levels of intervention in the EU and amongst its member states.\footnote{See, for example, OECD \textit{note} 22; OECD \textit{note} 4; OECD \textit{note} 1; Van den Bergh and Camesasca, \textit{note} 7, at 252-253.}

3.3.1 The US – Monopoly Pricing is Not Forbidden

The practice of monopoly pricing is in principle not forbidden under Section 2 of the Sherman Act. The common interpretation of the act bans exclusionary conduct of dominant firms rather than the abuse of monopolistic status. In the case of \textit{United States vs. American Can Co.}, the Supreme Court of the US stated clearly that \textit{"...size and power, apart from the way in which they were acquired or the purpose with which they are used, do not offend against the law."\footnote{230 F. 859, 901-902 (D. Md. 1916) (cited in Gal, \textit{note} 82, at 347).}}\footnote{Gal, \textit{note} 82, at 347.} The consequences, such as monopoly pricing, as long as not stemming from an anti-competitive conduct, are also not forbidden.\footnote{United States v. ALOCA, 148 F.2d 416 (2nd Cir., 1945).}

The approach of non-intervention in monopoly pricing is prevalent in the US due to the common belief that markets forces are strong enough to bring about effective competition and the idea that, as Judge Learned Hand stated in the ALOCA case, \textit{"the successful competitor, having been urged to compete, must not be turned upon when he wins."}\footnote{Gal, \textit{note} 82, at 355.} This means that the profits a monopoly can gain are an important catalyst for market competition and for incentivizing firms to achieve monopoly position in order to reap the profits. Intervention which limits the levels of profits will harm those incentives, thus harming competition, innovation etc. According to Gal, \textit{"...the modern antitrust debate is generally dominated by economic reasoning and a libertarian approach..."}\footnote{Gal, \textit{note} 82, at 355.} Generally, the belief is that long lasting monopolies are not common, since overpricing firms will attract new competitors who wish to share the profits. Thus, to deter new entrants, monopolies will restrain prices. And although it is known today,
that market forces do not always manage to achieve competition in and for the market, for various reasons,\textsuperscript{115} yet "...even when markets are not competitive, it is believed that the costs of regulation are likely to outweigh its benefits\textsuperscript{116}" and thus "...market conduct should not be regulated unless it can be shown that regulation improves economic performance sufficiently to offset its costs.\textsuperscript{117}

Moreover, the US keeps adhering to the non-intervention approach, clinging to the fear that preventing excessive pricing will constitute a negative incentive for firms to invest in new products and services for the benefit of the society, in aim to become monopolies and enjoy high profits, as the US Supreme Court clearly emphasized in the \textit{TRINKO} case.\textsuperscript{118}

In summary, though the US approach has slightly changed over the years, the basic non-intervention approach in excessive pricing still prevails. Gal concludes that "...the U.S views the unregulated economy as essentially competitive, if the creation of artificial barriers is prohibited. This approach places significant emphasis on the working of the market and considers monopoly created by means other than artificial barriers to be relatively unimportant. It also reflects the unlimited role granted to government in regulating markets directly and the social, moral, and political values attributed to the process of competition."\textsuperscript{119}

3.3.2 The EU – Excessive Pricing as an Abuse of Market Power

Generally speaking, EU law prohibits the practice of excessive pricing by firms in dominant position, as article 102 of the TFEU\textsuperscript{120} stipulates. Subsection (a) bans "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions" by an undertaking in a dominant position. In the case of \textit{General Motors} the

\begin{itemize}
\item \textsuperscript{115} See Ezrachi and Gilo, \textit{note} 103.
\item \textsuperscript{116} Gal, \textit{note} 82, at 358
\item \textsuperscript{117} \textit{Ibid}, at 355.
\item \textsuperscript{118} \textit{Verizon Communications Inc. v. Law offices of Curtis V. Trinko, LLP}, 124 S.Ct. 872,879 (2004).
\item \textsuperscript{119} Gal, \textit{note} 82, at 345 – 346.
\item \textsuperscript{120} Formerly article 82 of the Treaty of Rome.
\end{itemize}
ECJ stated that an abuse of dominant position can also include "...the imposition of a price which is excessive in relation to the economic value of the services provided". This is the theoretical foundation according to which excessive pricing by a dominant firm may be deemed as an abuse of dominant power in the EU.

According to Gal, the EU supportive approach towards the prohibition of excessive pricing can be attributed, inter alia, to the structure of the EU – a composition of nations of different cultures, languages, history, beliefs etc, and accordingly, "EC policy is thus based on broad, and sometimes conflicting, aims which are concerned not only with promoting economic efficiency, and a free market economy, but also with achieving broader social and political goals, most notably the creation of a single, integrated European market." Generally speaking, it seems that in recent years a more restrained approach towards the regulation of excessive pricing is taken by the European Commission as such, whereas the authorities in some of the Member States seem more in favor of such intervention. Gal asserts that "...the Commission's practical treatment of excessive pricing is much closer to that of the U.S than a simple linguistic comparison would suggest. Still, there is a significant conceptual difference between the two approaches because in the EC the reticent to intervene is based on practical reasons, while in the U.S it is based on theoretical and ideological ones." Moreover, the EU prohibition of excessive pricing is of interest also in the US, since many US international firms operate in Europe and are thus subject to EU competition law and regulation.

Gal concludes that "EC law reflects a lesser belief in the ability of market forces to erode monopoly and a stronger belief in the ability of a regulator to intervene efficiently

122 Gal, note 82, at 362.
123 Ezrachi and Gilo, note 103, at 874; Van den Bergh and Camesasca, note 7, at 252-253.
124 Gal, note 82, at 376.
125 Akman and Garrod, note 93, at 408.
in setting the business parameters of firms operating in the market. It also reflects a stronger emphasis on distributional justice.”

3.3.3 Conclusion

The rule in the US is a decisive one: no intervention and no regulation of monopoly pricing. Oppositely, the EU law considers the practice of excessive pricing as an abuse of monopoly pricing. The US, a classic large economy, views the markets as basically competitive in nature as long as artificial barriers are not allowed. In contrast, EU law is more skeptical regarding the free market's ability to tackle with monopolies, and demonstrates a belief in regulatory power to handle the market efficiently for the sake of society's welfare. However, in practice "it turns out that the discrepancy between the U.S and European approach to excessive pricing is less distinct than many voices claim...”

3.4 Fair or Unfair? Measuring Excessive Pricing

3.4.1 Background

Basically, excessive pricing by dominant firms may have negative consequences on the consumers who pay significantly more money than they would pay in a sufficiently competitive market, thus transferring wealth from consumers to producers, and on total welfare by creating deadweight loss. Thus, accepting that the concept of excessive pricing is indeed viable and that charging "exaggerated" prices can constitute an abuse of dominant position which requires intervention, raises the question of how to decide what price constitutes an exaggerated price. What is the point at which the excessive price charged by a dominant firm becomes unfair and requires intervention? What is the baseline? Answering those questions is important, since it enables to

126 Gal, note 82, at 346.
127 For elaborated discussion about the EU see also Evans and Padilla, note 81.
128 Gal, note 82, at 346.
129 Terhechte, note 9, at 11; See also ibid, at 382.
initially differentiate between lawful and wrongful pricing by dominant firms, as well as giving practical tools for the calculation of the "wrongful welfare" gained improperly by dominant firms, thus enables to apply enforcement tools by regulators and courts.

Those who support the approach of excessive pricing generally hold that there is a price that a dominant firm can charge and is "fair", although it might exceed the competitive equilibrium point, whereas any price beyond that point is "unfair" and constitutes an abuse. This requires defining of both the benchmark and the point at which excessive prices become abusive. Hence, those who support regulation of excessive pricing necessarily believe those points can and should be traced by regulators and/or by courts.

The excessiveness of prices can somehow feel intuitive. However, an intuitive approach is problematic. First, intuition can be misleading. Even if prices seem excessive, this may not be the case, since some concealed factors may affect pricing. Second, intuition is not practical when devising competition policies. In order to achieve certainty and equality, competition policy should provide with clear mechanisms for the assessment of excessiveness, both for guiding firms as to what they can do or cannot do ex-ante, and for enabling the authorities to sanction intractable firms ex-post.

However, as mentioned before, one of the greatest objections to excessive pricing regulation, even among those who agree that excessive pricing can constitute an abuse of dominant power is the difficulty in assessing what an excessive price is, what an "unfair" price is, and the fear of arbitrariness and uncertainty it might entail.\textsuperscript{130} It is of no surprise then that even in those jurisdictions where excessive pricing as an abuse is recognized, the law does not indicate what it is in practice.\textsuperscript{131} Thus, "the question is how


\textsuperscript{131} e.g., article 102 TFEU.
competition policy authorities and courts could distinguish between competitive prices and unfairly high prices.  

Different competition authorities and courts across the world have used a variety of mechanisms in order to gauge what constitutes an excessive price and which information is needed in order to reach a conclusion. Due to the difficulties arising from each mechanism separately, it has been suggested to use some of them or even all of them combined in order to reach an "optimal" conclusion in each case. This approach has been termed "predominance of evidence" according to which "...no single test can be considered sufficiently reliable and that increased reliability can emerge from aggregating results from different benchmarking tests."  

The OECD has recently offered three categories of mechanisms for assessing excessive pricing: Profitability analysis, Price-cost comparisons and Price comparisons. We shall now survey each briefly, in order to sense the complexity regarding this issue.  

3.4.2 Profitability Analysis  

This test links the excessiveness of a price to high profits. To wit, the greater profits are, the stronger it indicates excessive pricing. However, we can think of a situation where despite very large profits, prices will not be excessive, and vice-versa, where despite low profits, prices will be considered excessive. Apparently, this test adds another vague concept into the equation, the one of "excessive profits", which also requires definition and measurement in order to create certainty and prevent

132 Evan and Padilla, note 81, at 98.  
134 OECD, note 3, at 63. See also Ezrachi and Gilo, note 103, at 892-893.  
135 OECD, note 3.  
136 Ibid, at 63-64.
arbitrariness. Therefore, no much use of it has been made, and we shall not further elaborate about it in this paper.\textsuperscript{137}

3.4.3 Price-Cost Comparison

The price-cost comparison test was first used in the \textit{United Brands} case. This case involves a firm which sold and marketed the Chiquita banana brand, charging different prices throughout the EC Members. In Ireland, the price was almost 100\% lower than in other EC members. The European Commission used the price in Ireland as the benchmark to determine that the prices in the other countries were unfairly high, assuming that United Brands would not sell at prices causing it losses. The European Court repealed the decision for its simplicity and for not considering all the relevant factors for the price difference among the markets, for example cost of production, distribution costs, etc. However, the court did state that "\textit{charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse. This excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of profit margin... The questions therefore to be determined are whether the difference between the cost actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair or when compared to competing products.}"\textsuperscript{138}

So, according to this test, the first step is to perform a price-cost analysis, and then to compare between the price at which the product is sold and the costs of its production.


or compared to other products. If the difference between the cost of production of a product and selling price or compared to other product prices is exaggerated, the price is abusive.

However, this is an unclear test, since this decision does not provide with guidelines as to the point at which prices become an abuse and what margin of profit a firm should be allowed. Another question is what the phrase "cost of production" should refer to: is it the costs of the actual product at stake? Is it the costs of the most efficient firm? And what if the dominant firm is really inefficient and thus sets a much higher benchmark? Should it then be punished for its inefficiency? These questions do not have decisive answers in the literature.

3.4.4 Price Comparison

This is a direct test that compares the price of a product to another product in the same or in another market, using a variety of benchmarks to be used in the price comparison, for example, Geographic price comparison, Price comparison over time and price comparison among competitors.

**Geographic comparison:** In this comparison, we compare between two markets which have enough similar features to conduct a comparison. For example, in the SACEM case, where this test was first adopted, the court ruled that where the price comparison indicated that prices in one place are substantially higher than in another place and there is no objective reasoning for the difference, the difference may indicate abusive prices. In the United Brands case a comparison between the price in Ireland and other Member States was made.

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139 Gal, note 82, at 369.
142 OECD, note 3, at 70-71.
143 Ibid, at 70; Gal, note 82. at 370; Cases 110, 241 & 242/88 Lucazeau vs.SACEM [1989] ECR 2811.
However, this test is problematic since finding a sufficiently comparable market may not be an easy task since the different comparable factors may be numerous (raw material prices, tax rates, marketing costs, elasticity of demand, time span in the market, etc) and a deep and thorough analysis of factors of both markets may be needed. Also, the similar market should be open to competition otherwise the comparison is futile.

Comparison over time means comparing the price and profits of the firm to what they were previously, examining if the firms raised its prices substantially, increased its profits substantially, etc, all without economic justifications.

Comparison among competitors means comparing competitors in the same market. If a dominant firm in the market which holds, for example, 70% of the market share sells its product for $20 while its 30% market share competitor sells the same product for $10, it might indicate excessiveness of pricing.

However, this test also has its strong disadvantages, since the difference in prices may stem from other factors (e.g. reputation) rather than mere abuse of power, which justify the price difference, and might be very difficult to trace and calculate.

3.4.5 Conclusion

In practice, no one decisive test can be agreed upon to determine what "excessive" price and "unfair" price is and there are ample discussions regarding the definition. Even in Europe, where the law has banned excessive pricing for decades, there is no decisive or nearly decisive formula which defines what a "fair" price is and what price should be considered as "abusive".

Indeed, although a few mechanisms have been offered, there is not a single formally adopted preferable test, and the cases themselves are scarce. In this sense, we

144 Van den Bergh and Camesasca, note 7, at 251.
145 OECD, note 3, at 71.
147 See Evans and Padilla, note 81, at 100-103.
shall remember the claims against the use of excessive pricing regulation, among which is the claim that "...imprecision of the legal criteria runs the risk of discouraging legitimate and desirable competition of dominant undertakings." Akman and Garrod argue that in order to achieve deterrence a prohibition should clearly establish the existence or non-existence in breach and that in the case of excessive pricing the test should be well-defined, provide ex-ante legal certainty, be simple to implement and improve welfare. With this in mind, we shall now turn to examine the question of excessive pricing in small market economies.

4. The Question of Excessive Pricing in Small Market Economies

In the previous chapters we have surveyed the main features of small economies and the core aspects of excessive pricing. We have seen, inter alia, that small economies have their unique economic features, among which are high concentrations levels and high entry barriers, that make many markets in small economies fairly incontestable, more prone to dominant market structures and thus to anti-competitive conducts of incumbent firms. We have seen that the question of excessive pricing has its own uniqueness within the realm of abuse of dominant power. Excessive pricing itself is not an exclusionary behavior, but could be a result of such a behavior. In addition, excessive pricing is not easy to define and calculate and is a controversial issue, even in jurisdictions where it is acknowledged.

With these theoretical foundations we shall now examine the research issues of this paper. The first, the normative question whether the size of the economy influences the considerations regarding excessive pricing, so that excessive pricing deserves a distinct

149 Akman and Garrod, note 93, at 408.
perspective when dealt with in small economies. The answer to this question, which is in the affirmative, leads to the next issue, which examines the competition policy small economies should adopt regarding excessive pricing.

4.1 Normative Analysis: Are Excessive Pricing Considerations Influenced by the Size of the Economy?

In light of the theoretical background set in previous chapters, the first question is whether the considerations regarding the issue of excessive pricing as an abuse of dominant power are influenced by the size of the economy, so that the issue of excessive pricing in small economies should be dealt with distinctively from large economies. We should start by remembering that according to Gal's theory, as surveyed in chapter two, in general, size does influence competition issues in small economies.

As discussed above, the unique economic features attributed to small economies, mainly high concentration levels and high entry barriers generally mean greater market power enjoyed by firms in that market, since many markets in small economies tend to be highly concentrated and there is usually only a limited number of competitors in each industry, if any. Indeed, contestability is low due to the high entry barriers which grant the incumbent firms more power over the market. Fewer players mean also more collusion and cartels, since there is less coordination needed, as well as the tendency of firms in oligopolies to explicitly or implicitly cooperate. Thus, it is of no surprise that excessive pricing, as well as abuse of dominant power in general, is of greater concern in small economies than it is in large economies.

Indeed, as discussed in chapter two, small markets' tendency for higher entry barriers prevents the erosion of dominant power by the incumbent firms, sometimes

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150 Chen and Lin, note 7, at 5.
151 See section 2.4.
152 Rutz, note 8, at 14.
altogether and for an indefinite period of time.\footnote{Ibid.} In the meantime, concentration tends to be very high and many small markets are dominated by dominant market structures, especially monopolies and oligopolies, which often make use of their dominant position and abuse their power, including by way of excessive pricing.

With regard to excessive pricing, owing to the smallness of the economy, dominant incumbent firms have the capacity to abuse their market power relatively "stronger" than in large economies, a result of two main factors: The first, due to their dominant position they can generally charge higher prices than they would in large, non perfectly competitive markets economies, and certainly than they would in perfectly competitive markets, since competition is minimal. The second, they can generally do so for a longer period of time, since entry barriers are very high. Unlike large economies, in small economies "new entrants must operate at large scale in order to be profitable... small market size prevents firms from producing a large quantity. Inherent difficulties in reaching a large scale reduce or eliminate the incentive to entry by new firm",\footnote{Chen and Lin, note 7, at 4. See also: Bain, note 49.} and thus, in practice, small economies generally remain incontestable for longer, sometimes indefinite, periods of time.\footnote{Ezrachi and Gilo, note 104, at 881-882; Gal, note 16, at 383.}

Therefore, in small economies excessive prices are generally more "excessive", and for a longer period of time. From an economic point of view, this means that the relative harm to efficiency from excessive pricing is, sometimes significantly, greater in many of the markets in small economies than in large economies. The potential transfer of surplus from consumers to producers is greater and the deadweight loss caused to total welfare is relatively more substantial.\footnote{Rutz, note 8, at 14}

Large economies, for example the US, can stay somewhat more "indifferent" to abuse of market power in general, and for excessive pricing in particular, both since in...
most of their markets competition is stronger and thus market forces result in more efficient outcomes, at least partially, and also since in large economies the negative effect of the abuse is "swallowed" in the overall competitive market activity. However, this is generally not the case in small economies, where "the fringe is the center".\textsuperscript{157} Namely, negative implications of abuse of dominant power have relatively greater implications on the economic activity. The tradeoffs existing in small economies are much more blatant, so the relative influence on social welfare is stronger. Therefore, it turns out that the assumption of the self-correcting nature of markets, which is a prominent consideration against intervention in large economies, does not hold for most of the markets in small economies.\textsuperscript{158}

Regarding the difficulty in defining and assessing excessive pricing, apparently the same concerns exist regardless of the size of the economy. The fear of uncertainty, arbitrariness and wrongful definitions is generally relevant to any size of market. However, with regard to small economies two conflicting factors join the equation. On the one hand, markets in small economies are usually much smaller than in large economies including the number of firms. This makes it easier for the authorities to deal with excessive pricing and reduces costs. On the other hand, as we have seen, in small economies "the fringe is the center". Consequently, setting the line erroneously may have relatively much harsher effect on smaller economies where the tradeoff is conspicuous, whereas in large economies the negative effect of an erroneous line is balanced in the overall activity of the economy. Thus, authorities generally need to be much more careful and accurate in assessing and defining excessive pricing, which is more challenging and costly. So, the concern regarding small economies is influenced in both directions as a result of the size of the economy. At the bottom line, I think that the same answer applies for this concern regardless of size – assessing and defining

\textsuperscript{157} Gal, \textit{note} 2, at 251.
\textsuperscript{158} \textit{Ibid}, at 90.
excessive pricing is a challenge, but this challenge should not deter the authorities from tackling with excessive pricing.

Regarding the fear of a chilling effect of regulation on investment and innovation, the potential "disincentive effect"\textsuperscript{159} exists both in large and small economies. In both, theoretically, incentives may be distorted and the desire for innovation, research and development might be impaired.\textsuperscript{160} However, it seems that size does influence this concern. In small economies markets are more concentrated and governed by dominant firms. Thus, regulation might deter firms more strongly.\textsuperscript{161} On the other hand, when dominant position is based upon economies of scale, "...dominant position will most likely be unavoidable, and the disincentive effect may not be significant."\textsuperscript{162} Generally, since in small economies the deterrent effect on dominant firms might be stronger, it is important to trace the origin of the dominant power, so that if it has been achieved due to superiority, intervention should decrease so as not to harm innovation and investment.\textsuperscript{163}

In conclusion, the answer to the question whether the size of the economy influences the considerations regarding small economies, so that the issue of excessive pricing deserves a different perspective when dealing with small economies, is in the affirmative. The unique features of small economies, their influences on market structures, the tradeoffs which are more dominant in small economies, etc, indeed influence considerations regarding excessive pricing, mostly the assumption that markets are self-correcting and thus do not require intervention, which turns to be generally irrelevant in most of the markets in small economies. Thus, excessive pricing should be viewed in a perspective which realizes the impact of those unique features of

\textsuperscript{159} Ibid, at 70.
\textsuperscript{160} Ibid.
\textsuperscript{161} Ibid, at 76.
\textsuperscript{162} Ibid.
\textsuperscript{163} Ibid, at 81.
small economies, give them the adequate importance and take them into account when establishing the competition policy towards excessive pricing in small economies.

So, after concluding that size indeed influence the considerations regarding excessive pricing and thus this issue should be treated distinctively in small economies, especially in light of the fact that the self-correcting assumption is virtually irrelevant to most of the markets in small economies, we shall now tackle with the practical implementation of this conclusion on excessive pricing policy in small economies by way of regulation.

4.2 Policy Implications

4.2.1 Preface: Small Economies and Excessive Pricing Policies

From chapter two we have learned that small economies also need competition law. Their smallness does not imply the redundancy of competition law. In contrast, owing to their unique economic features, competition policy has a substantial role in small economies164 and competition authorities to implement and supervise those policies are of high importance.165 In sharp contrast to large economies, "...market forces alone cannot achieve efficiency in small markets... Competition policy in a small economy is thus a critical instrument with respect to determining domestic market structure and conduct..."166

Indeed, in a small economy, characterized by high concentration levels and high entry barriers, we cannot trust the "invisible hand" to tackle with monopolies and oligopolies efficiently and to advance sufficient competition in the market in due time. Therefore, the need for competition policy which specifically tackles with excessive pricing and carefully planned regulation designated to deal with it is of high importance, in order to prevent the long-term negative consequences of dominance on the one hand,

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164 Chen and Lin, note 7, at 3, 5.
165 OECD, note 4, at 2.
166 Gal, note 2, at 45.
while not harming the incentives for competition, investment and innovation in the market on the other hand.\textsuperscript{167} As Gal argues, "given that the market's invisible hand has a much weaker self-correcting tendency, the costs of improper design and application of competition laws might be higher in both the short and the long run."\textsuperscript{168} Indeed, balancing between productive efficiency and competitive conditions in small market economies is not an easy task. This necessitates competition policy tailored especially for small economies in general,\textsuperscript{169} and even to a larger extent for excessive pricing in particular.

This paper started with the goals of competition policy. Competition policy should promote and facilitate competition in order to enhance social welfare. With accordance to Gal's theory, in small economies economic efficiency should be of primary importance. In the previous section we have concluded that the size of the economy does influence excessive pricing consideration, so that the question of excessive pricing should be treated distinctively in small economies. Consequently, we shall now examine several policy issues and guidelines applicable for small economies regarding excessive pricing, in order to enhance social welfare. This examination of intervention as a tool for dealing with excessive pricing in small economies shall concentrate on three main issues: structural remedies, behavioral remedies and general regulation guidelines as part of a policy towards excessive pricing in small economies.

It should be noted that tackling with excessive pricing through the realm of abuse of market power is not the only way to deal with excessive pricing and it might even be debatable whether competition laws are the preferable way to do so. However, despite flaws that can be found regarding regulation, I deem balanced and calculated regulation to be an important and efficient tool when dealing with excessive pricing in small economies.

\textsuperscript{167} Akman and Garrod, note 93, at 409.
\textsuperscript{168} Gal, note 2, at 5.
\textsuperscript{169} Ibid, at 4.
economies, since it gives jurisdictions a powerful and effective tool to deal with this abuse if used mindfully and carefully. So, while realizing that other approaches of tackling with excessive pricing, which this paper does not decisively negate, do exist, in this paper I shall discuss mainly regulatory intervention as part of competition policy towards excessive pricing.

4.2.2 Structural Remedies for Excessive Pricing in Small Economies

Structural remedies are "...those that are designed to make changes to the structure of the market." Generally speaking, when it comes to dealing with excessive pricing, many opinions in the literature advocate structural remedies rather than a direct intervention in pricing, in the sense that structural remedies deal with the fundamental cause of the problem rather than going the "easy" way tackling with symptoms. The OECD, following Siragusa, categorically states that "...tackling the problem at its source instead of regulating price will always be preferable." This opinion goes hand in hand with the general notion that large economies prefer structural remedies, and the fear of uncertainty and arbitrariness the regulation of excessive pricing might entail.

However, considering the theoretical foundations of the doctrine of small economies and the issue of excessive pricing, it is clear that the above stated OECD opinion is written utterly from the eyes of a large economy and regardless to the features of small economies. Indeed, whereas in large economies there is more space for such a decisive argument – and even that is arguable – there is little space for such a claim regarding small economies. Gal's argument that "...small economies should generally reject laws that... adopt structural solutions to all market power issues", seems the right approach regarding excessive pricing is small economies. Clearly, a

170 Paas, note 23, at 97.
171 OECD, note 3, at 78.
173 OECD, note 3, at 79.
174 Paas, note 23, 102.
175 Gal, note 2, at 54.
decisive adherence to structural remedies for dealing with excessive pricing in small economies does not seem appropriate.

As discussed in chapter two, a significant tradeoff exists in small economies between scale economies and the consequences of high concentration levels. The OECD opinion stated above totally ignores this tradeoff since it is generally of less importance in large economies. Yet, it is of huge importance in small economies, as Gal observes. Indeed, it is possible to use structural remedies in order to deal with overpricing by the prevalent market dominant structures in small economies, such as monopolies and oligopolies, in order to reduce prices. Yet, the "toll" of structural remedies in small economies is potentially relatively higher, since structural remedies, although potentially increasing competition in the industry, thus leading to more competitive prices, may also significantly lower efficiency stemming from MES of production or just be futile since trying "...to reconstruct an inevitable monopoly is pointless and inefficient."  

Take, for example, a very typical structural remedy – divestiture. Generally, divestiture may theoretically help enhance competition and thus bring a decrease of prices without the need to "regulate prices" directly. However, in small economies divestiture may well decrease efficiency stemming from MES of production. Moreover, in small economies divestiture will even be relatively more risky, since "...there is no clear direct relationship between market share and prices and hence it is not clear what level of assets should be transferred to competitors to achieve the desired downward effect on prices."  

Although it is also true for large economies, in small economies the potential negative impact is relatively greater since deviation from the right extent of

176 Ibid, at 253.
177 OECD, note 3, at 79.
divestiture can affect efficiency more severely than in large economies "...as divestitures are usually irrevocable".\textsuperscript{178}

Moreover, we should take into account that continuous regulation and monitoring may be required in preventing small firms from becoming large exploitative firms once again in order to achieve efficiency,\textsuperscript{179} thus overpricing again. So, in the case of excessive pricing it might be more economical to invest in regulating prices and using behavioral remedies such as price caps which are more flexible, rather than in an everlasting inspection of firm growth, with all the arbitrariness, inaccuracy and uncertainty it entails and the high costs that follow.

It should be noted that it is of course possible to use structural remedies in small economies in order to tackle with excessive pricing, and this paper does not negate them altogether. However, since structural remedies may also create significant negative impact in small economies, they should be used only when erosion of dominant position is unlikely in reasonable timeframe\textsuperscript{180} and when it is assured after a thorough examination that they will enhance efficiency and in particular achieve the goal of price reduction.

4.2.3 Behavioral Remedies for Excessive Pricing in Small Economies

We have seen that in large economies the preference is toward structural remedies and behavioral remedies are less often used.\textsuperscript{181} However, in small economies structural remedies may negatively affect welfare, thus there is more space for behavioral remedies.

One major possible problem with behavioral remedies is that they may require continuous monitoring and inspection.\textsuperscript{182} Nevertheless, while this is true also for

\textsuperscript{178} Paas, note 23, at 101.
\textsuperscript{179} Gal, note 2, at 53-54.
\textsuperscript{180} Ibid, at 83.
\textsuperscript{181} Paas, note 23, at 102.
\textsuperscript{182} Ibid, at 102-103.
structural remedies, behavioral remedies give more flexibility - which is of major importance in small economies where efficiency tradeoffs are substantially more influential - without making structural changes to the market which are potentially more permanent and irrevocable, might harm efficiency relatively greater, and their economic implications are generally difficult to predict. Moreover, in order to enforce behavioral remedies effectively in small economies, they can be designed to be easily inspected by consumers,\(^{183}\) who can then assist in their enforcement, something which is generally irrelevant when dealing with structural remedies.

Take for example price caps, namely – limiting the price a firm can charge. This kind of a behavioral remedy can be deemed, prima facie, very cumbersome, since it entails both the need to adjust price caps as circumstances change and the need to monitor the market for possible violators. However, in small economies, where usually there are only few firms in most of the markets, this is seemingly an easier task than in large economies. A possible problem is that in order to comply with the price cap, firms may act manipulatively in order to reach the same profits, like by reducing quality.\(^{184}\)

Thus, "...regulation should include all aspects of the regulated product",\(^{185}\) including product's quality, for instance. So, the relevant authority can dynamically state price caps for products and services. However, realistically, even in small economies where there are few firms, price caps may constitute a cumbersome solution when numerous products and services exist in the market, and costs may outweigh the benefits. A general solution could be to limit the use of price caps only to certain products and services, according to importance criteria set by the authorized authority and/or the government. In any case, price caps should be used only when it is clear, after a thorough examination, that the predicted benefits will outweigh the predicted costs.

\(^{183}\) OECD, note 3, at 76.
\(^{184}\) Ibid; Gal, note 2, at 80.
\(^{185}\) Gal, note 82, at 80.
Another behavioral remedy is a rate of return remedy. If a rate of return is set, the firm needs to adjust its prices as rate of return changes, for example when production costs are decreasing.\(^{186}\) Generally, the same criticism attributed to price caps is relevant also to the rate of return remedy. For example, the need for a dynamic adjustment of the rate of return may be very burdensome and costly. Moreover, it requires firms to dynamically examine whether they meet the rate of return, which also can be very costly and cumbersome. In addition, it requires the authority to monitor and inspect whether firms are abiding by the rate. In contrast, it can be claimed that in small economies there are generally fewer firms in most of the markets, so that inspection is less challenging. Also, it can be used for selected products and services after a thorough cost-benefit examination.

A general claim regarding both of the abovementioned behavioral remedies could be that setting the line at an erroneous point may cause harm to the efficiency of the economy, especially in small economies where tradeoffs are relatively more blatant. As this claim is logical, it is important that the mechanism for defining the price caps or the return rates be meticulously formulated and kept up-to-date, something that seemingly requires a specialized institution as later on discussed.

Another claim could be that setting price caps or rate-of-return levels in advance can harm investment incentives and firms' incentives to try and corner the market. However, as discussed above, it has been shown that the possibility for excessive prices does not attract entry.\(^{187}\) In contrast, it may even be more reasonable to assume that knowing the post-entry prices a firm can charge may facilitate competition, since it gives firms clarity and certainty. This is true especially in small markets where firms may fear that demand will not be able to cover the investment, let alone allow for profits, and thus refrain from trying to enter the market altogether. However, the

\(^{186}\) OECD, \textit{note} 3, at 77.

\(^{187}\) See Ezrachi and Gilo, \textit{note} 103.
opposite outcome, according to which behavioral remedies will cause potential entrants to direct their investment to other markets is also possible. Therefore, it is clearly essential to assure that the use of behavioral remedies is not such that causes more harm to efficiency than the efficiency gained by the behavioral remedies.

In sum, it seems that although behavioral remedies are not the perfect solution for excessive pricing abuses and have their flaws, and although the enforcement of structural remedies might be easier a mission than of behavioral remedies which needs to be more dynamic and thus is more costly, yet behavioral remedies for excessive prices in small economies have their advantages over structural remedies, since they are generally more flexible and adjustable, a characteristic that is very important in small economies where tradeoffs are conspicuous. Flexibility thus enables to control and reduce the welfare costs caused by excessive pricing, while minimizing the potential harm to investment and innovation.

4.2.4 Guidelines for the Regulation of Excessive Pricing in Small Economies

We have seen in chapter three that the objection to regulation of excessive pricing can be strong and in the US it is decisive. Even in the EU, where excessive price regulation is acceptable, it is not blatantly used and the legal cases where it has been discussed and decided upon are relatively few.

It has been claimed that markets are self-correcting and thus do not need intervention and that competition authorities and courts are not able and should not act as price regulators.\textsuperscript{188} Fears of harming incentives for competition, investment and innovation have also been the raised as well as the problems in defining and assessing excessive pricing. However, as we have seen in subsection 4.1, the size of the economy influences considerations regarding excessive pricing, especially the self-correction assumption,

\textsuperscript{188} Akman and Garrod, \textit{note} 93, at 426.
which generally does not hold in small economies. Nevertheless, in practice, it seems that as part of the general tendency of small economies to adopt large economies' polices, the question of excessive pricing in small economies has also been "swallowed" in the general adoption tendency, including the "debate" regarding intervention in excessive pricing, so that the issue is not granted with the adequate attention by small economies' policy makers.

Practically, as the previous sections shows, it appears that whereas the US and the EU can advocate no regulatory intervention or partial intervention due, inter alia, to the large size of their economies and the irrelevance of the economic features of small economies - and even that is controversial- considerations in small economies are influenced by their size, so that small economies generally cannot afford an indifferent or "hesitant" attitude towards excessive pricing and should generally be more decisive and focused in their treatment of excessive pricing.

Regulation of excessive pricing can constitute a useful and important tool in small economies, where markets are usually controlled by dominant firms with high barriers to entry, so that high prices which deprive social welfare prevail for indefinite periods of time. Thus, it seems that Rutz approach according to which "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 in industries that are not already subject to regulation by sector-specific authorities", is189 a more appropriate one in the context of small economies when it is balanced and well planned.

A proper and carefully designed and implemented regulation of the markets in small economies is of an extreme importance since "in the absence of appropriate regulation, market forces will not, in many cases, sustain a desirable degree and form

\[189\] Rutz, note 8, at 14.
of competitive discipline among firms in the economy. This idea is even more important when it comes to excessive pricing, since "...the actual effect on consumer welfare of regulatory interventions on the pricing policies of dominant firms depends on the ability of competition authorities to and courts to establish whether or not prices are excessive in practice". Clearly, small economies should strive for appropriate and useful regulatory means to deal with excessive pricing, which is not an easy task at all as presented in chapter three. Consequently, the "ideal" regulatory competition policy regarding excessive pricing would be one that could restore all or some of the social welfare erased by excessive pricing, yet not harm firms' incentives to compete, invest, innovate, etc. In small economies this mission is especially challenging. The tradeoffs are conspicuous and as Gal asserts, efficiency should be the main goal. Thus, the difficult mission of balancing between the goal of reducing prices in order to enhance efficiency and social welfare, while not impairing firms' incentives to invest and innovate, should constantly be heed by the regulating authorities.

Given the problematic definition and calculation of "excessive" and "unfair" prices, as well as the importance of the efficiency goal and the tradeoffs existent in small economies, it is clear that small economies should not adopt a deterministic rule regarding the legality of excessive pricing. They should not be perceived as per se legal or per se illegal. Small economies should generally opt for a "rule of reason" or a "case by case" rule. Flexibility is of high importance as discussed above. However, in order to sustain clarity, certainty and to prevent arbitrariness, it is important that small economies outline as precise guidelines as possible for the definition and calculation of excessive pricing "...by setting clear rules of conduct and ensuring their effective

190 Gal, note 2, at 45.
191 Evans and Padilla, note 81, at 98.
192 Compare: Akman and Garrod, note 93, at 407.
application in practice”,\textsuperscript{193} so that it is clear which pricing policies by dominant firms amount to an abuse.\textsuperscript{194}

In this regard, from a theoretical point of view it would seem important that in small economies regulation of excessive pricing be of ex-ante nature by specialized competitive authorities rather than of ex-post nature usually by courts, so that firms know in advance what constitutes an abuse "...before they make their pricing decisions, which informs them of which prices will be an infringement of the law or which will not."\textsuperscript{195} Gal asserts that "delegation of the remedial power to the competition authorities to perform ex ante regulation... solves many of the problems inherent in regulation by the courts."\textsuperscript{196} As discussed in detail in this paper, one of the main causes for entry barriers is the smaller demand in small economies which makes it hard to achieve MES in a relatively short time period. Ex-post regulation may worsen the situation, since it may create uncertainty which might even further deter the already deterred firms from trying to enter the market. Thus, it seems that ex-ante price regulation would fit small economies better, since it can inform potential competitors of the potential profits they would be able to make, reduce uncertainty and thus facilitate competition in small economies. However, in practice, ex-ante regulation can pose serious difficulties. For example, it is doubtful whether it is possible to gauge what is a "fair" price and what constitutes and abusive price before firms even entered the market and for numerous products and services. Furthermore, it is clear that also ex-ante regulation can create uncertainty when a firms needs to make a decision whether to enter the market and invest. Therefore, ex-post regulation should not, and practically cannot, be totally excluded when dealing with excessive pricing in small economies. Not all situations can

\textsuperscript{193} Gal, note 2, at 255.
\textsuperscript{194} Akman and Garrod , note 93, at 409.
\textsuperscript{195} Ibid.
\textsuperscript{196} Gal, note 2, at 145.
be captured in advance,\textsuperscript{197} so that ex-post regulation may be necessary. It should be used when, for example, a firm in the market charges excessive pricing for long periods of time with no economic justification or superior performance,\textsuperscript{198} as is certainly probable in small economies due to the various factors discussed earlier in this paper. Yet, the use of ex-post regulation should carefully be made and via clear tests and guidelines in order to refrain from uncertainty and the relatively greater potential negative consequences in small economies.

The possible complexity of implementing these interventionist guidelines in small economies raises the question as to the nature of the institutions to be in charge of excessive price regulation. Owing to the special features of small economies and the specially tailored competition policy needed, as well as the difficulty in defining and assessing excessive prices, this mission seems too complex to be granted for a non-specialist institution, and should be deposited in the hands of designated authorities, or a specialized division within an existing authority "...as otherwise what has been gained by the creation of optimal competition policy will be lost by misguided enforcement.\textsuperscript{199}"

Indeed, since in small economies there are substantial tradeoffs and the relative negative influence on efficiency is potentially greater, in order for small economies to properly deal with excessive pricing towards achieving efficiency and prevent abuse by dominant firms, it seems that the regulating role should be granted to a designated specialized authority.\textsuperscript{200} In Switzerland, for instance, this role has been granted to the "Price Surveillance Authority" dealing uniquely with excessive pricing.\textsuperscript{201} Such designated authorities should facilitate the achievement of efficiency through regulation better than general competition authorities, while gathering experience and specialty on a case by case basis. Such specialized authorities will also be able to better assist the courts when

\begin{itemize}
\item \textsuperscript{197}Ibid, at 55-56.
\item \textsuperscript{198}Gal, note 82, at 383.
\item \textsuperscript{199}Gal, note 2, at 255.
\item \textsuperscript{200}Rutz, note 8, at 15.
\item \textsuperscript{201}See Rutz, note 8.
\end{itemize}
dealing with excessive pricing cases. In this sense, it seems important that courts dealing with excessive pricing issues will also be specialized in this field. Obviously, it should be guaranteed that the costs saved by a specialized authority outweigh the costs of its operation. 202 Hence, the claim that in small economies "the costs of maintaining a competition authority will always be minor compared to the gains to society in terms of greater wealth and more alternatives", 203 seems inappropriate.

In summary, competition policy based on regulatory intervention in excessive pricing is obviously not flawless. However, it seems that when this kind of policy is carefully designed and implemented, while balancing between the goal of tackling with abusive pricing and its negative consequences on the one hand and the "disincentive effect" on the other hand, it can be useful and efficient a tool in tacking with abusive pricing. Bar-Gill's approach, stated with regard to another legal area, according to which "the real question is whether the total benefit of the regulatory intervention outweighs the total cost of regulation" 204 - namely, performing a cost-benefit analysis regarding the implementation of the proposed regulation – seems as the suitable approach when dealing with excessive pricing regulation in small economies.

5. Conclusion

This paper deals with the question of excessive prices in small market economies. On the normative aspect, I have shown that the size of the economy does influence the considerations regarding excessive pricing. Due to the unique characteristics of small economies, the question of excessive pricing should be observed differently in small economies.

202 Gal, note 2, at 71; OECD note 1, at 5.
203 OECD, note 4, at 3.
economies than in large ones and deserves a different perspective. The special economic characteristics of small economies, mainly high concentration levels and high entry barriers, which lead to a greater tendency towards dominant market structures and the abuse of market power, including by setting abusive prices for a longer periods of time, necessitates special attention to excessive pricing in small economies and a somewhat different analysis, to be interwoven into a designated policy.

Obviously, the non-interventionist approach towards excessive pricing that prevails in the US does not fit small economies. In small economies the market will most probably not correct itself, not in the short run, and often not in the long run, if ever. Regulatory intervention policy is thus a possible method for dealing with overpricing in small economies, and although it is not flawless, when balanced and carefully designed and implemented, it can serve as an effective means to deal with excessive pricing in small economies. Practically, small economies often cannot make use of structural remedies, since the number of firms in the market is small and the use of structural remedies may severely influence the subtle tradeoffs described above and have a wide impact on other competition consideration. However, despite the debate surrounding the definition and calculation of excessive pricing and the fear of uncertainty, vagueness and arbitrariness, small economies can take decisive means to tackle with excessive pricing. They should do it carefully, using, inter alia, behavioral remedies, which are more flexible, and generally through specifically tailored regulation and specialized institutions, on a case by case basis, while refraining from harming those incentives which motivate firms towards competitiveness, innovation and investments, and after all the potential costs and benefits are taken into account, thus achieving the goal of enhancing efficiency and social welfare.
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