

Book Review:

What If Richard Posner Were Australian?

Michal S. Gal

Competition Policy for Small Market Economies

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Reviewed by Spencer Weber Waller

There is a proud tradition in science fiction where the author varies one key factor in history and spins out its consequences in the modern world or even the future. Examples include what if the Roman Empire never fell or what if certain inventions had been discovered much earlier.¹

Professor Michal Gal of Haifa University in Israel in her excellent book, *Competition Policy for Small Market Economies*, has embraced a version of this exercise and asked the provocative question of whether the size of an economy matters in formulating sound antitrust policy.² In short, what if you embrace the goals of the Chicago School of antitrust but apply those tenets to a small market economy—does anything change?

For Professor Gal, a lot changes. The fundamental difference in a small market economy is a higher degree of concentration due to the combination of small market size and economies of scale that sometimes only permit a couple of efficient firms in any national market, and the higher and more persistent set of barriers to entry that tend to preserve the high concentration endemic to small market economies. The implications of these features of small market economies on competition policy are the focus of Gal's book and her thoughtful and often surprising prescriptions for a well-crafted competition policy for such countries. What she recommends is a competition policy that is sometimes more lenient than the current antitrust regime in the United States, and sometimes more stringent. Market forces, she argues, cannot be counted upon to erode market power that tends to persist in such an environment.

Professor Gal begins with a survey of the empirical evidence of the economic characteristics of small market economies.³ She then focuses on the general implications of such small economies

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¹ FREDERIC BROWN, *WHAT MAD UNIVERSE* (1977) (satirical account of a world in which space flight was discovered in 1903 by a scientist with a sewing machine); KINGSLEY AMIS, *THE ALTERATION* (1976) (bolstered by the victory of the Spanish Armada in 1588, the Roman Catholic Church continues to dominate world events into the 20th Century); DOUGLAS JONES, *THE COURT MARTIAL OF GEORGE ARMSTRONG CUSTER* (1976) (Custer survives the Battle of the Little Bighorn only to be tried by the Army for insubordination); RONALD W. CLARK, *THE BOMB THAT FAILED* (1969) (a vision of a Second World War protracted by the failure of the Manhattan Project and the subsequent Allied invasion of Japan); KEITH ROBERTS, *PAVANE* (1968) (Catholic Church dominates this version of the 20th Century, where advocates of electricity and other illegal technologies are fomenting revolution); PHILLIP K. DICK, *THE MAN IN THE HIGH CASTLE* (1962) (in a post-WW II U.S. divided and occupied by Axis powers, a popular subversive novel depicts a world where the Allies have won); WARD MOORE, *BRING THE JUBILEE* (1953) (because of a time traveling historian, the South wins the Battle of Gettysburg and hence the Civil War).

² MICHAL S. GAL, *COMPETITION POLICY FOR SMALL MARKET ECONOMIES* (2003).

³ *Id.* at 13–45.

for competition policy.⁴ She starts from her Chicago School roots, arguing that “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 objectives.”⁵ If anything, smallness intensifies the primacy of efficiency and exacerbates the conflicts between allocative efficiency and other goals that are somewhat muted in a larger economy, such as the United States or the European Union.⁶

Gal recommends against pursuing a regime in which high concentration is undesirable per se: “Accordingly, a small economy . . . should be sympathetic toward the enhancement of output by individual firms, through either internal growth, mergers, or joint ventures, which allows for the exhaustion of economies that were not exhausted by the previous market structure and could not be exhausted in less anti-competitive ways.”⁷ She also recommends against any per se rules governing agreements that have the potential to increase productive or dynamic efficiency. Her ideal competition policy for horizontal agreements would not differ drastically from that of the United States, where only a tiny and dwindling handful of hard-core cartel practices are condemned per se. Similarly, she is suspicious of structural remedies that would deprive the market of aggressive and efficient dominant firms.⁸

Up to this point, the reader can note a great deal of congruence between Gal and much of Judge Posner’s antitrust writings.⁹ But Gal then goes in an unexpected direction that shows how standard law and economics analysis can lead to unexpected results in different market settings.

Gal cautions:

Given the prevalence of dominant firms in small economies and the length of time it might take market forces to erode them, a small economy cannot afford to leave the regulation of monopoly power to market forces alone. Competition policy must focus particularly on deterring the creation and maintenance of artificial barriers to entry in order to permit new firms to enter and to expand in monopolistic industries and increase competition.¹⁰

The reader may be surprised at Gal’s specific recommendations for regulating single-firm dominance and its close cousin, natural monopoly, in a small economy. Gal would define dominance there by somewhat lower market share levels than in larger economies because of the high prevalence of scale economies and oligopolistic interdependence in smaller markets. In her view, monopoly may have to be tolerated because of minimum efficient scale in small economies, but conduct regulation should be more prevalent than in larger economies. Small market economies should be even more vigilant about prohibiting the creation of market power, rather than merely its abuse, because of the durability of such power once in place.¹¹

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⁴ *Id.* at 46–57. This chapter builds on Professor Gal’s previously published work in the field. See Michal S. Gal, *Size Does Matter: The Effects of Market Size on Optimal Competition Policy*, 74 S. CAL. L. REV. 1437 (2001).

⁵ GAL, *supra* note 2, at 48.

⁶ *Id.* at 49–50.

⁷ *Id.* at 52.

⁸ *Id.* at 53–54.

⁹ See, e.g., RICHARD A. POSNER, *ANTITRUST LAW* (2d ed. 2001).

¹⁰ GAL, *supra* note 2, at 54–55.

¹¹ *Id.* at 109–10 (summarizing Gal’s recommendations for single firm dominance).

Similarly interesting recommendations flow for natural monopolies, including endorsement of a limited version of the essential facilities doctrine based on welfare considerations rather than the protection of specific competitors.¹² For oligopolies, Gal not only advocates banning facilitating practices when likely to produce substantial anticompetitive results but also advocates government support for industry mavericks that could destabilize long running industry structures to improve allocative and even productive efficiency.¹³

Gal offers a similarly provocative analysis of merger policy in small market economies. She argues that mergers are a major tool for realizing potential efficiencies in oligopolistic markets and strengthens the case for adopting a total welfare approach that balances producer and consumer welfare. Rigid structural presumptions should be avoided, and mergers should be evaluated against the benchmark of how competition actually exists in the market, and not against some theoretically competitive model. Efficiencies, she says, should be considered using a sliding scale requiring higher burdens of proof with greater likelihood of competitive harm. Small market economies are urged to support the creation of a global merger control regime and greater cooperation with other jurisdictions to counteract the limited tools to combat extraterritorial mergers with anticompetitive effects. The main surprise here is a cogent argument that conglomerate mergers bear substantial scrutiny in smaller markets because of the persistence of large scale conglomerates operating in long term “live and let live” arrangements with their few significant competitors across markets.¹⁴

This book is impressive in its substantive depth and scope. Professor Gal has both read and reflected on an unbelievably rich set of sources. She has studied and commented upon virtually all the leading law and economics literature dealing with antitrust, as well as the case law of the United States, Canada, the European Union, Australia, New Zealand, Israel, and many other jurisdictions. The reader quickly is convinced of the richness and sophistication of competition policy around the world that is unfairly ignored in the United States.¹⁵

The only weakness in the book is the relatively limited attention that Professor Gal gives to the institutional aspects of competition enforcement. As William Kovacic has written so compellingly, the institutions that enforce competition law may well be more important than the content of the law.¹⁶ If the enforcers are not properly staffed, funded, trained, and equipped, the most perfect competition law may well go for naught. Similarly, if the judiciary is not expert enough, honest enough, or independent enough, neither the best law nor the best enforcers will matter. Gal's recommendations often will require a degree of sophistication that may simply be beyond the ability or resources of all but a handful of competition authorities of the small market economies she

¹² *Id.* at 152–53.

¹³ *Id.* at 192–93. For more on the relatively unexplored role of maverick firms in antitrust, see Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. REV. 135 (2002).

¹⁴ *Id.* at 247–48.

¹⁵ See Spencer Weber Waller, *Comparative Competition Law as a Form of Empiricism*, 23 BROOK. J. INT'L L. 455 (1997).

¹⁶ William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 CHI.-KENT L. REV. 265 (2001); William E. Kovacic, *Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy*, 74 ST. JOHN'S L. REV. 361 (2000); William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK. J. INT'L L. 403 (1997); Roger Alan Boner & William E. Kovacic, *Antitrust Policy in Ukraine*, 31 GEO. WASH. J. INT'L L. & ECON. 1 (1997); William E. Kovacic, *Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe*, 44 DEPAUL L. REV. 1197 (1995) [hereinafter Kovacic, *Designing and Implementing*].

seeks to advise. It is not a question of talent or dedication, but simply a matter of money to adequately staff a competition authority (and judiciary) to enforce the kind of competition laws Gal recommends.

Perhaps the result will be that small market economies with the most sophisticated and well funded competition authorities will pursue the line Gal recommends and a handful of others will aspire to do so over the next decade. The rest will have to settle for a simple set of per se rules of illegality and de facto rules of per se legality for everything else until they can step up their level of resources to add a more nuanced rule of reason analysis based on more economic reasoning.¹⁷

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Gal's work has important implications beyond the obvious question of what kind of competition laws are best for small market economies to adopt. It is a convincing retort to the small but forceful body of literature that argues that lesser developed and transition economies should not both- er with competition policy, but rather rely on free trade and foreign investment to maintain a com- petitive economy.¹⁸ The book will also cause one to stop and pause before suggesting (or requiring as the EU has done with its new and future members) that another jurisdiction should do things the way it is done back home.

But there is a deeper and more profound issue that lurks between the lines of Professor Gal's sometimes surprising conclusions of how the dictates of the Chicago School apply in a small mar- ket economy setting. The normative goals and assumptions of the Chicago School simply do not lead to the hands off, nearly laissez faire, prescriptions advocated for the U.S. market. While Gal shares with the Chicago School a condemnation of hard-core price fixing and a willingness to relax per se rules for many other horizontal restraints, she agrees with little else. In stark contrast, for small market economies she argues that even the exclusive focus of consumer welfare as meas- ured by deadweight loss (rather than wealth effects or more political goals) requires a more inter- ventionist policy in areas such as regulation of dominant firms and non-horizontal merger policy.

The implication is that the version of law and economics associated with the Chicago School (indeed any economic school) is not universal, but historically and geographically contingent and highly dependent on market conditions. In short, it is not the same everywhere, which is precise- ly the point of Gal's book. The fair implication of Gal's thesis is that the most true Chicagoans can say is that their version of law and economics calls for a particular policy response in a particu- lar market setting and at a particular point of time. These are not enduring truths but context bound recommendations. This is a sobering realization that calls for a greater degree of humility than is normally found in antitrust advocacy. It is a testament to Gal and the persuasiveness of her the- sis that her writings can cause the reader to pause and reflect not just about how antitrust should operate in other settings but also how it should operate in our own. ●

¹⁷ Boner & Kovacic, *supra* note 16, at 40–43; Kovacic, *Designing and Implementing*, *supra* note 16, at 1217–18; Spencer Weber Waller & Rafael Munte, *Competition Law for Developing Countries: A Proposal for an Antitrust Regime in Peru*, 21 CASE W. RES. J. INT'L L. 159, 178–81 (1989) (recommending new enforcement regimes adopt limited number of simple per se rules).

¹⁸ See e.g., A.E. Rodriguez & Malcolm B. Coate, *Limits to Antitrust Policy for Reforming Economies*, 18 Hous. J. INT'L L. 311 (1996); A.E. Rodriguez & Mark D. Williams, *The Effectiveness of Proposed Antitrust Programs for Developing Countries*, 19 N.C. J. INT'L L. & COM. REG. 209 (1994).