Competition Law in Central and Eastern Europe

A Practical Guide

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Preface

We are proud to present you with a publication about competition legislation in Central and Eastern European countries. We have made an effort to include all matters that are of key importance for people professionally involved in this area (whether in law firms, corporations, the academia or the judiciary) – thus the strong emphasis on issues related to unilateral and multilateral practices restricting competition. It has also been our goal to present these matters in a broader perspective. Therefore, each chapter is preceded by a brief introduction illustrating the evolution of competition law in the given country, also in the context of private enforcement and criminal prosecution of competition infringements. Furthermore, we have focused on national competition authorities – their organization, structure, budgets, and patterns of activity. Such information is certainly helpful in fitting the general discussion into the specific reality of the given country, while also providing a certain insight into the actual capacity of bodies appointed to protect the freedom of economic activities.

Considering the practical character of this publication, we have tried to make sure that each of the authors is a specialist in competition legislation and recognized as an expert on the respective national market.

We had a certain problem with defining Central and Eastern European countries. The concept, promoted in the 1980s by three great intellectuals of the region (Milan Kundera, Czesław Miłosz and István Bibó), is most commonly used to describe the former Communist block states which in the 1990s entered the path of extensive economic and political transformation. Almost all these countries are considered in our publication. We have further concluded that following this exact key in an orthodox way would be unreasonable and the book could only attract more attention if we present competition legislation in force in countries neighbouring the region thus defined – this is the reason for the presence of Austria, Turkey and Kazakhstan in our publication.

To encourage you to read the book, we would like to present some general remarks based on the analysis of information gathered in the specific chapters.

From One Common Root

The competition legislation in most countries of the region has a history of about twenty years, meaning that these laws were implemented already during the first years of transformation, almost immediately after the fall of the iron curtain (most commonly in early 1990s). Naturally, the rather crude arrangements adopted at that time would be updated during the following years (often multiple times), both in relation to advancing liberalization of the economy and due to the occurrence of new institutions with the aim of preventing non-compliance more efficiently (e.g., leniency programs). Accession of each particular country to the European Union also worked as a natural catalyst for legislative change.

In most cases, the antimonopoly legislation would be based to a significant extent on arrangements existing in the European Union.[1] Moreover, interpretation of national regulations, including where they are applied autonomously and not alongside the EU framework,[2] is often based on the case law of European courts or on various instruments developed by the European Commission. This tendency would most often stem from the case law of national competition authorities and courts themselves, which are willing to learn from the legacy of EU bodies.[3]

In some countries, EU legislation applies directly to purely local (national) cases because the national regulations make EU legislation applicable as national law[4] (this, by the way, seems to be a very practical arrangement, better than copying EU legislation into national law with the result being in many cases merely a better or worse translation of the respective EU instrument).

A certain difference can only be perceived in this respect in former Soviet republics, where the impact of EU legislation is smaller for obvious reasons, although obviously many legal theories and principles are construed in the same way.[5] It will certainly be most interesting to observe how the competition law regimes in these countries are affected by the establishment of the Customs Union covering Belarus, Kazakhstan and Russia, and particularly whether or not this organization will be able to have a similar influence on harmonization of not only the legislations themselves but also their practical interpretations.[6]

1. Interestingly, this rule is also true for countries which are not yet EU Member States (Turkey, Serbia) and for some countries which do not even aspire to the European Union (such as Kazakhstan).
2. One must bear in mind that if a case has an EU dimension, typically both EU and national competition law will apply to it in the Member States. The provisions of Regulation 1/2003, establishing the convergence rule, guard the consistency of these two legal frameworks (this is especially true with respect to agreements restricting competition). However, where EU legislation is not applicable due to the lack of effect on trade between Member States, decisions are passed on the basis of national law exclusively.
3. Such an approach can be observed *inter alia* in Austria, Croatia, Estonia, Lithuania, Latvia, Poland, Slovakia and Slovenia.
4. Such an arrangement exists, e.g., in Romania and Slovakia.
5. Still, high convergence with the EU competition law has been recognized for example for Kazakhstan.
6. Foundations for this reality have been laid with the 2010 adoption of the Agreement on common principles and rules of competition.

Competition Authorities

The vast majority of Central and East European countries has adopted frameworks in which a specialized authority, part of the state administration, is responsible for enforcement of competition law. This authority gives rulings (decisions) which can be appealed against to a court. Interestingly, countries in which competition authorities are collegiate bodies prevail.[7]

There are different perspectives on competition authority independence. Whereas in many countries there are arrangements forbidding other state authorities to interfere directly with the competition authority's actions or guaranteeing its decision-making independence, only several of the jurisdictions have introduced tenure for their competition authorities, and only tenure can be perceived as a sign of actual independence.[8]

Still, it would be difficult to point out a prevailing model of a competition authority's range of competence. In some cases, these bodies focus only on combating anticompetitive practices, but there are also states where the competition authority would have more extensive competences, such as state aid, market monitoring and product safety watch.[9]

A matter deserving attention (and merit) when appraising the various competition authorities is certainly the increasingly widespread tendency to produce guidelines and clarifications to aid understanding of the national legislation.[10]

Private Enforcement: Still More a Theory than Practice

In the vast majority of the legal frameworks under consideration, there is an option to pursue private enforcement of competition infringement claims without having to wait for a prior action of the relevant authority. In some cases, such private enforcement is enabled by special regulations of the national competition law, in others it is pursued under the general rules of civil law. There are also mixed systems in which at least a basic range of regulation is present in competition legislation and is supplemented by the general civil law.

Typically, if a case has already been finally resolved by a competition authority, such a decision is binding upon the court in a civil procedure (at least with regard to the conclusion that a breach of the law has occurred) – this issue is either regulated directly by positive law or arises from case law.

7. This arrangement has been adopted, *inter alia*, in Bulgaria, Croatia, Latvia, Kazakhstan, Romania, Serbia, Slovenia, Turkey, Ukraine and Hungary. One-person authorities exist, for example, in the Czech Republic, Estonia, Poland, Russia and Slovakia.
8. The tenure principle has been adopted, *inter alia*, in Bulgaria, Croatia, Romania and Serbia.
9. A broad range of competences has been vested in competition authorities from such countries as Bulgaria, Croatia, Poland, Russia, Romania and Hungary.
10. Such guidelines (soft law) are published, among others, by the authorities from Bulgaria, Croatia, Czech Republic, Kazakhstan, Poland, Russia, Romania, Serbia, Slovakia, Turkey, Ukraine and Hungary.

Unfortunately, the existing legal mechanisms in the vast majority of cases are definitely insufficient to make sure that private enforcement of competition claims becomes a popular trend. Admittedly, one may identify several countries in which there is a body of such claims that does reach the courts, but there are definitely more countries where suits of this type would only appear occasionally, or there would not be any of them.[11] Among the most frequently reported problems is proof of loss (particularly for customers who resold goods originally purchased by them for an overstated price due to the distortion of competition on the market) and loss quantification. Some authors also point to the issue of inexperienced judges appointed to hear such cases, and these tend to be very complex.

Therefore, it seems that – at least in most cases – private enforcement remains an unexplored opportunity for reaching a higher efficiency in elimination of anticompetitive practices. Moreover, going forward, there are no reasons for an optimistic outlook and one should rather expect that the *status quo* will be maintained[12] (at least for some time). But the European Commission's proposal of June 11, 2013 for a Directive on damages actions for breaches of EU Competition law may spur necessary and awaited changes in EU Member States legislation.

Criminalization: The Beginning of a Long Way

The case is similar with the criminalization of competition law. Even though such arrangements have been implemented in most cases (and in some countries, liability – at least in nominal terms – is surprisingly broad, i.e. it goes beyond collusive behaviours,[13] and in some cases it only covers bid rigging[14]), in practice these laws are enforced extremely rarely, or they even become a dead letter.[15] No criminal responsibility whatever is envisaged only in Lithuania, Latvia and Ukraine.

Still, it does not seem that this lack of enthusiasm to pursue competition law infringements in criminal court should give rise to any particular concerns. Rather, it

11. Problems with private enforcement have been reported, *inter alia*, for Belarus, Croatia, Czech Republic, Estonia, Latvia, Poland, Russia, Romania, Serbia, Slovakia and Hungary.
12. Austria is a notable exception, as these cases have a relatively long tradition there and they would more and more frequently surface in practice. There are some cases of this kind pending in Slovakia, related to illegal practices of that country's competition authority (however, no similar activities have been reported in other areas of the economy). Interesting arrangements have been adopted in Turkey where, like in the U.S. system, triple damages can be pursued and they may be considered an encouragement for the slightly above average activity in the field (cases involving refusal of supply prevail in this context). Another interesting example is the attempt taken in Hungary at stimulating the activity of private parties, where quantification of cartel-caused losses is now based on certain presumptions.
13. Such a broad range of responsibility for breaches of competition rules can be encountered in the legislative frameworks of Belarus, Estonia, Kazakhstan, Romania, Slovakia, Slovenia, among others. Interestingly, Romanian legislation stipulates criminal responsibility for such acts as, *inter alia*, revealing a professional secret, while the only penalized behavior in Serbia is abuse of dominant position. All collusive behaviors are penalized in the Czech Republic.
14. Croatia, Poland, Hungary etc. penalize only bid rigging.
15. One of the exceptions to this rule is Russia, where a tendency can be observed for a closer cooperation between the national competition authority and law enforcement authorities, which translates into a larger number of criminal cases.

seems that such measures, which are certainly drastic, can only be applied more extensively when, first, the quality of competition case law improves significantly and, second, when the instruments already available to competition watchdogs (such as leniency programs, settlements, commitments) are put to full use.[16]

In conclusion, the information gathered in this publication gives a certainly interesting view on the rapid changes affecting competition law regimes in this part of Europe in recent two decades. We encourage you, on our own behalf and for the entire team of authors, to thoroughly read the entire publication.

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16. Interestingly, it was exactly the concerns about the functioning of a leniency program that caused the Croatian competition authority to object against extensive criminalization of competition-restricting practices.