

The interface between EC competition law and the competition laws of the new Member States

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This paper discusses the interaction between European competition law and the competition laws of the new Member States. The scope of this paper is limited to eight of the ten new Member States: the eight Central and Eastern European countries (CEECs). It reviews how competition laws developed in these countries from the early 1990s to present and assesses the leverage of European competition law in the new Member States. On the one hand, the paper examines to what extent national competition laws have been adapted to EC competition law and whether this adaptation could efficiently deal with the specific market failures inherent in transition economies. On the other hand, it analyses the enforcement of national and EC competition law in the CEECs in relation to the Commission and other NCAs.

First, the analysis focuses on the implementation of competition law and reviews this from a new perspective. It does not discuss whether faithful implementation of EC rules has taken place but whether this implementation has been justified from the point of view of these countries' social and economic goals. It discusses the extent to which the candidate countries were obliged to bring their competition law regimes in harmony with that of the EC and what leeway they were provided to diverge from the EC rules. Moreover, it elaborates on what the political and economic reasons were that made these countries to converge with or diverge from EC competition law. The analysis evaluates whether the adoption of EC-kind competition rules has been an effective and sufficient market-disciplining tool in these transition economies or the legal and economic needs of firms and consumers would have called for different measures.

On the basis of the above insights the paper examines what the possible cost-benefit and policy implications are for the interaction between the two jurisdictional levels (EC-CEECs) within the enforcement framework of Regulation 1/2003 and whether these implications could differ from the interaction between the EC and the old Member States. This will be demonstrated through the possible implications the present proposal on private enforcement of competition rules raise.

This study presents a critical assessment of the harmonization process of competition law in the CEECs and the decentralized enforcement system of EC competition law. The central query is whether the centrally proposed substantive rules applied in a multiple variety of institutions can result in uniform and consistent law application as well as in equal gains and losses for the jurisdictions.

Table I. Competition laws in the CEECs

	First competition law legislation	Current competition law
Czech Republic	1991: Act No. 63/1991 Coll., on the Protection of Economic Competition, as amended by Act No. 495/1992 Coll.	Act No. 143/2001 Coll. of 4 April 2001 on the Protection of Competition and on Amendment to Certain Acts as amended by Act No. 340/2004 Coll., of 4 May 2004, Act No. 484/2004 Coll. of 5 August 2004, Act No. 127/2005 Coll. of 22 February 2005 and Act No. 361/2005 Coll. of 19 August 2005 Act No. 215/2004 Coll., amending certain relationships within the area of state aid, and altering the Act on the promotion of research and development
Estonia	1993: Competition Act of June 16, 1993	Competition Act Passed 5 June 2001 (RT ¹ I 2001, 56, 332), entered into force 1 October 2001, last amended by 24.01.2007 entered into force 15.03.2007 - RT I 2007, 13, 69;
Hungary	1990: Act No. LXXXVI of 1990 on the Prohibition of Unfair Market Practices	Act No. LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices
Lithuania	1992: Law on Competition	Law on competition 23 March 1999 No. VIII-1099 Vilnius (As amended by 15 April 2004 No. IX-2126) Law on Monitoring of State Aid to Undertakings of the Republic of Lithuania No. VIII-1689 (
Latvia	1991: Competition and Restriction of Monopolies Law	Competition Law of 04.10.2001 Law of 22.04.2004 "Amendments to the Competition Law" Law on Control of Aid for Commercial activity, adopted on 19.12.2002, in force starting from 01.01.2003
Poland	1990: Act of February 24, 1990 On Counteracting Monopolistic Practices and the Protection of Consumers' Interests	Act of 15 December 2000 on competition and consumer protection (Journal of Laws No. 03.86.804) Act of 30 April 2004, on the procedural issues concerning public aid (Journal of laws 2004, No 123, item 1291)
Slovakia	1994: Act No. 188/1994 Coll. on the Protection of Economic Competition, as amended by Act No. 240/1998 Coll. and Act No. 121/2000 Coll. (the Czechoslovak Competition Act of 1991, Act No. 63/1991 Coll. on the Protection of Economic Competition, as amended by Act No. 495/1992 Coll., became the first Competition Act in Slovakia after split in 1993) ¹	Act No. 136/2001 Coll. on the Protection of Economic Competition and on Amendments and Supplements to Act of the Slovak National Council No. 347/1990 Coll. on Organization of Ministries and Other Central Bodies of State Administration of the Slovak Republic, as amended by Act No. 465/2002 Coll., Act No. 204/2004 Coll. and Act No. 68/2005 Coll. State Aid Act No. 231/1999 Coll., as amended by Act No. 434/2001 Coll., Act No. 461/2002 Coll., Act No. 203/2004 Coll., Act No. 82/2005 Coll.

¹ Pittman explains that the Czech and Slovak laws, transformed from one law into two identical laws on the occasion of the "velvet divorce" of the two countries, were given significant amendments that went into force in November 1993 and August 1994. The Czechoslovak Competition Act became the law in the Czech Republic and has been amended in 1993, while in the Slovak Republic the old Czechoslovak Act was replaced by a new law in 1994. Pittman (1997) p.1-2

		and Act No. 518/2005 Coll.
Slovenia	1993: Act No.65 Law on Competition Protection	Prevention of the Restriction of Competition Act, Official Gazette of the Republic of Slovenia, No. 56/1999 Monitoring of State Aid Act 1999, the State Aid Control Act (OG, RS, no. 1/2000)

Table II. Substantive competition rules of the CEECs

	Prohibition of cartel agreements equivalent of Article 81 EC	Abuse of a dominant position equivalent of Article 82 EC	Undertakings with special or exclusive rights Article 86 EC	Merger control
Czech Republic	Article 3 No notification Article 6 de minimis	Articles 10-11		Articles 12-17 Both MD and SIEC test
Estonia	Article 4 Notification De minimis Article 5	Article 13, Article 16	Article 14	Articles 19-29 SIEC test
Hungary	Article 11 No notification Article 13 de minimis	Articles 21-22		Articles 23-32 MD test
Latvia	Article 11 Notification	Article 13		Article 15-16 MD test
Lithuania	Article 5 No notification	Article 9		Articles 10-14 MD test
Poland	Article 6 Notification De minimis Article 7	Article 9 Notification		Articles 13-23 SIEC test
Slovakia	Article 4 No notification procedure, Article 6 de minimis guidance letter Article 6(7)	Article 8	Article 39	Articles 9-13 MD test
Slovenia	Article 5 No notification procedure Article 6 de minimis	Article 10		Articles 11-13 MD test

Table III. Enforcement modalities in the CEECs

	Remedies and sanctions		Private enforcement	Leniency
	Pecuniary fines	Criminal sanctions		
Czech Republic	Article 22, 23 administrative pecuniary fines		Section 373 of the Commercial Code	Program concerning the application of leniency to imposition of fines pursuant to the Article 22 of the Act No. 143/2001 Coll., on the Protection of Competition in the cases of prohibited agreements
Estonia	Articles 73-78	Article 79 imprisonment up to 3 years	Article 78 Competition Act Art. 1043 and 1045(1)(7) or 1045(1)(8) of Law of Obligations Act	Article 205 of the Criminal Procedure Act
Hungary	Articles 78-79	Article 14 Hungarian Criminal Code Imprisonment for bid-rigging up to	Article 93	Article 78 (8) Notice No. 3/ 2003, on the application of a leniency policy amended by Notice No. 1/ 2006
Latvia	Articles 12,14, 17		Article 21	Regulations of the Cabinet of Ministers of 19.10.2004 No. 862 'Procedure for the calculation of fines for violations referred to in Article 11 (1) and Article 13 of the Competition law', amended by Regulations of the Cabinet of Ministers of 25.04.2006 No. 318
Lithuania	Articles 40-44		Article 46	Article 43 Article 50 for infringements of Articles 81, 82 EC
Poland	Articles 106-108, 110-113 personal fines		Civil Code	Article 109
Slovakia	Articles 38 (1-10)	Criminal Code	Commercial Code (the Act No. 513/1991 Coll., as amended ²)	Article 38 (11-12)
Slovenia		Fines (corporate and individual) Articles 52-54	Article 44	No leniency programme

² Article 42 of the Slovakian Competition Act provides explicitly only for the right of consumers to bring a civil law action against the undertaking in breach of competition rules. Actions may concern a claim to terminate unlawful conduct and restore lawfulness (Section 42).

Table IV. Scope of competition laws and the competences of the competition authorities

	Scope of Competition Act	Competences of competition authority
Czech Republic	Restrictive agreements, abuse of dominant position, concentration control	Competition Act, state aid, public procurement
Estonia	Restrictive agreements, abuse of dominant position, concentration control, undertakings with special and exclusive rights, state aid, unfair competition	Competition law (both cartel rules and unfair competition law)
Hungary	Restrictive agreements, abuse of dominant position, concentration control, unfair competition, deception of consumers (unfair manipulation of consumer choice)	Competition Act, Act on Business Advertising Activity (shared jurisdiction with the courts). Act on Trade (supervision of commercial undertakings with market power)
Latvia	Restrictive agreements, abuse of dominant position, concentration control, unfair competition	Competition law, advertising law
Lithuania	Restrictive agreements, abuse of dominant position, concentration control, unfair competition	Competition law, Law on advertising (misleading and comparative advertising)
Poland	Restrictive agreements, abuse of dominant position, concentration control, trade practices injuring collective interests of consumers (unfair contract terms, unfair misleading advertising, incomplete untruthful information)	Competition law, consumer protection, state aid
Slovakia	Restrictive agreements, abuse of dominant position, concentration control, undertakings with special and exclusive rights	Competition law
Slovenia	Restrictive agreements, abuse of dominant position, concentration control	Competition law

Table V. Competition authorities in the CEECs (data 2006 except where otherwise indicated)

	Competition Authority	Budget	Appointment of head of agency	Personnel	Decision making
Czech Republic	Office for the Protection of Competition, established in 1991 as Czechoslovak Federal Competition Office and then renamed in 1996 ³	Approved by Parliament	nominated by the Government and appointed by the President of the Republic	123	Office: investigation, enforcement, adjudication appeal to Chairman of the office
Estonia	Competition Board, established in 1993 Subordinated to the Ministry of Economic Affairs and Communications	Approved by the Minister	nominated by the Secretary General of Ministry of Economic Affairs and Communications and appointed by the Minister	47	Competition Board investigation Adjudication: court
Hungary	Office of Economic Competition GVH, established in 1990	Approved by Parliament No income from fines and fees (EUR 7.061.531)	Nominated by the Prime Minister approved by the president	116 post of "chief economist" created in 2006	Competition Office investigation Competition Council adjudication
Lithuania	Competition Council, established in 1999	Decided by Parliament upon proposal by Government No income from fines and fees (EUR 104263)	Appointed by the president of the Republic upon nomination of the prime minister	63 lawyers and economists	Administration of Competition Council: investigation Council: Adjudication, enforcement
Latvia	Competition Council established in 1998	No income from fee and fines (In 2005 EUR 731,298)	Appointed by the Cabinet of Ministers upon recommendation by the Minister of Economics	53	Council: investigation, enforcement, adjudication

³ There was initially a federal agency and two national offices. As a result of the election of 1992 and the split of Czechoslovakia into two independent republics, in the Slovak Republic the Anti-monopoly Office remained the same. In the Czech Republic, the office became the Ministry for Economic Competition. and the head of the Ministry was a member of the government. After the elections of 1997 the Ministry for Economic Competition became an independent Competition Office. Munková (2004) p.68

Poland	Office of Competition and Consumer Protection established in 1990 as Antimonopoly Office	Approved by Parliament No income from fines and fees (EUR 324.310)	Appointed and supervised by the Prime Minister	280 lawyers (137) economists (64) others	Office : investigation, enforcement, adjudication
Slovakia	Antimonopoly Office established in 1991 as Czechoslovak Federal Competition Office ⁴	Approved by Parliament (EUR 1.564.400)	Appointed recalled by the president of the Republic on the basis of the proposal of the government	66 lawyers (20%) economists (63%) other (17%)	Antimonopoly Office investigation, enforcement adjudication Council of the Office appellate to decisions of the Office
Slovenia	Office for Protection of Competition	Ministry of the Economy			

⁴ Slovak Antimonopoly Office was established by Act No. 347/1990 Coll. on Organization of Ministries and Other Central Bodies of State Administration of the Slovak Republic (Section 26) on 28 August 1990. It was the 'national' Slovak antimonopoly office that remained the same after the split of Czechoslovakia on 1 January 1993, not the 'federal' office.

TABLE VI. The legal basis and obstacles of private enforcement in the CEECs (Source: Ashurst, National reports (2004))

	Legal basis in national law	Difficulties of implementation
Czech Republic	Sections 757, 373 Commercial Code, (Act No.513/1991 Coll.)	no case claiming damages for competition law infringement lack of competent courts specialized in competition law, rules of burden or proof method of calculating damages lack of collective/consumer actions
Estonia	Article 78 Competition Act Claim may be based on Art. 1043 and 1045(1)(7) or 1045(1)(8) of Law of Obligations Act	no specific provisions for claims for breach of competition rules no practical experience lack of specific competition law related provisions (ground for unlawfulness; necessary degree of fault; what are the justifications; causation) existence of state fee upon bringing an action
Hungary	Article 93 of the Competition Act	no specialized courts no practical experience leniency – private enforcement interplay difficulty to prove infringements problems of standing for indirect purchasers (prove causal relation in respect of the caused losses)
Lithuania	Article 46 of the Law on Competition	proving damages and causation complex and expensive litigation better education of judiciary and businesses lack of specialized court standing for consumer organizations to make use of collective actions
Latvia	Article 21 of the Competition Law	evaluation of amount of damages length of court proceedings complexity of competition cases problems of standing for indirect purchasers (prove causal relation in respect of the caused losses)
Poland	No specific statutory legal basis Civil Code general provisions for liability in contract, or in tort	costs and timing of administrative and court proceedings low level of knowledge among businesses amendments of relevant legislation, education.
Slovakia	Sections 757, 373 Commercial Code (Act No. 513/1991 Coll. As amended) the Civil Code (Act No. 40/1964) Civil Procedure Code (Act No. 99/1963 Coll.)	no case law, uncertainty in the application of rules, no specific regulation of damages for breach of competition rules long cumbersome court proceedings, lack of specialized competent courts calculation of damages lack of collective actions no reduced court fee scheme for competition damages claims
Slovenia	Article 44 of the Slovenian Prevention of the Restriction of Competition Act which allows a person who has suffered damages by an action prohibited under the Act to claim compensation in accordance with the rules of the legislation governing obligations.	no publicly available final court decisions long delays of court proceedings not sufficient general awareness of competition issues no specialized exclusively competent court no plaintiff-favourable manner of damage calculation (e.g. by taking into account also the defendant's profits)

