

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

Kati Cseres

Universiteit van Amsterdam

"Comparative Perspectives on Multi-Jurisdictional
Antitrust Enforcement"

15 June, CCP, UEA

Overview

- Enlargement v. accession: two tales of the same story
- Importing the *acquis*
- Converging substantive rules
- Institutional economics and questions
- Enforcement modalities
- Private enforcement
- Redefining demarcation lines of enforcement?

Enlargement and accession

- Two tales of the same story
- Different aims
- Harmonization v. adaptation
- Market correcting mechanisms v. market building
- Different costs and benefits
- Substantive law
- Institutional framework

The impact of enlargement on EC competition law

- Aim: improve enforcement methods
- Regulation 1/2003, Recital 1 : “In the light of experience, however, that Regulation (17/62) should now be replaced by legislation designed to meet the challenges of an integrated market and a future enlargement of the Community.”
- Before: procedural autonomy, institutional neutrality
- Enlargement pushed open the discourse on enforcement
- It made lack of Community blueprint on enforcement and of institutional design visible

The impact of accession on competition law in the CEECs

- Aim: “join the club” and obtain “school certificate”
 - Guard association and guarantee full integration
 - Build market economies
- Overall positive impact through stabilizing democracy and market economy
- Why do actors comply with external requirements?
- Rational bargaining model: weighing benefits of accession and costs of adoption
- Social learning model: appropriateness of EU rules, legitimacy

Importing the *acquis*

- Formal and informal influence of EU on lawmaking and institution building
- Legitimacy and efficiency questions
- “External governance”
- Success of rule transfer: quality of rule, quality of rule transfer and of rule making
- Transition economies clearly in need for fair trading rules
- Top down legislative process, legislation without participation and political deliberation
- In favour of statutory enactment *vis-à-vis* institution design

Substantive rules I.

- EU Agreements, White Paper, Regular Reports 1997-2003
- No legal obligation to “copy/paste”
- Accurate (faithful) implementation
- Leeways for national law: Article 3 Regulation 1/2003
- Article 3 (2): Convergence for Article 81 EC BUT leeways: group exemptions, *de minimis*
- Art.3 (2): Stricter rules for Article 82 EC
- Art.3 (3): Stricter rules for merger control

Substantive rules II.

- Restrictive agreements:
 - *De minimis* except Latvia, Lithuania
 - Notification maintained: Estonia, Latvia + Slovakia guidance letters
- Abuse of a dominant position:
 - some attempts for stricter rules: HU, CZ
 - “quasi-regulators” in liberalized sectors (lack of proper legislation, lack of other enforcement agency)
- Merger control: variations between MD and SIEC test
- State aid: most problematic negotiation chapters

Substantive rules III.

- Unpleasant U-turns
- Hungary:
 - BER no reaction to real competition problems
 - Vertical agreements: no condemnation except for RPM
 - “Does it make more sense to condemn all vertical restraints and then block exempt 90% *à la* Brussel, or to accept 90% and then condemn only 10% *à la* Budapest?”
- High degree of convergence
- Why maintain co-existence of closely aligned rules?
- Why does it matter who enforces the law and at what level?
- Aims and distributive effects should be the same

Institutional economics

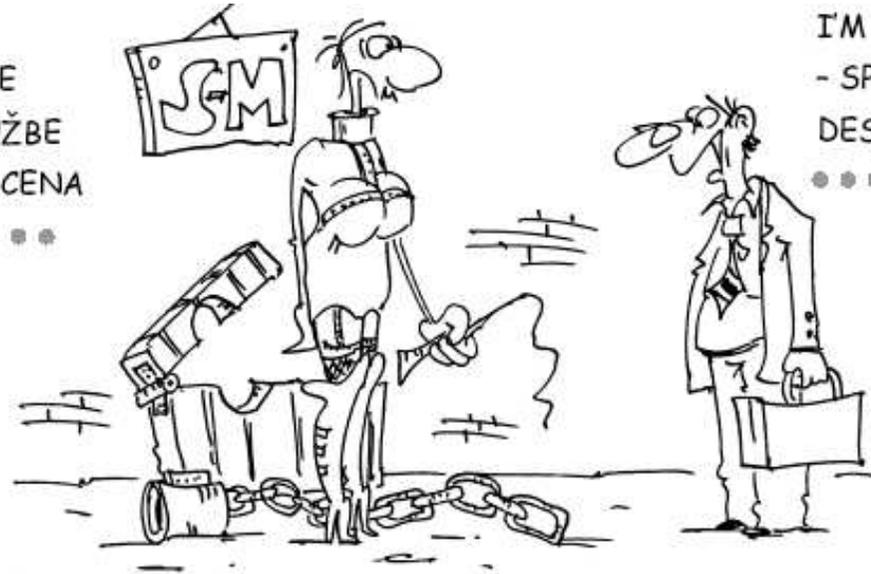
- Stiglitz: capability of economy's institutional apparatus to generate wealth for its citizens
- Stage of development indicates how far an economy has advanced to generate institutions necessary for well-functioning market economy
- Douglas North: crucial to understand the influence of economic institutions on economic performance
- Effect of measures on economic performance depends on reaction of individuals and organizations
- Similar measures will lead to different outcomes because of diverging informal rules and informal constraints result
- Competition policy should be analyzed in different institutional frameworks

Institutions: puzzling experience in CEECs



Institutions: puzzling experience in CEECs

OPAKUJEM VÁM, ŽE
K ŠPECIÁLNEJ SLUŽBE
PATRÍ ŠPECIÁLNA CENA



I'M TELLING YOU AGAIN
- SPECIAL SERVICES
DESERVE SPECIAL PRICES!



Institutions: puzzling experience in CEECs



COMPETITORS OF ALL COUNTRIES UNITE!

Competition agencies in CEECs

- Formal, informal rules and informal constraints
- Integrated legislations (competition law, unfair competition law, fair trading rules, misleading advertising)
- Integrated agencies with double mission: GVH (HU), LV, LT, EE, OCCP mega-agency (PL)
- Relatively independent, funding, expertise: spillovers
 - Taking up broader tasks
 - increased role in the regulatory field

Enforcement modalities

- Public enforcement: effective and credible
- Detection: leniency programmes except in Slovenia
- Investigation: increased powers, cartel units
- Increasing corporate fines
- Personal sanctions
- “From Hollywood to Hong Kong – Criminal antitrust enforcement is coming to a city near you”
- Private enforcement
- **Wide diversity of agency design**
- Independence, transparency, decision making procedure

Convergence table May 2007: voluntary process of approximation of national antitrust legislation to EC Regulation No 1/2003

MAIN POWERS IN EC REGULATION NO.1/2003	PERCENTAGE OF FULL CONVERGENCE OF MS LAWS (A)	PERCENTAGE OF CONVERGENCE OF MS LAWS TAKING INTO ACCOUNT AMENDMENTS PROPOSED OR STILL UNDER CONSIDERATION (B)	(A + B) [*]	PERCENTAGE OF NON-CONVERGENCE OF MS LAWS
1) Legal exception system	63%	11%	74%	22%
2) Parallel application	85%	7,5%	92,5%	7,5%
3) Structural remedies	31%	8%	39%	41%
4) Interim measures	81%	7,5%	88,5%	7,5%
5) Commitment decisions	70%	15%	85%	11%
6) Seal business premises, books and records	70%	0%	70%	22%
7) Inspection in non-business premises	67%	7%	74%	22%

Private enforcement I.

- Outsourcing enforcement to private individuals
- “Double delegation” to private actors in CEECs: double barrier?
- Legal basis in competition law: EE, HU, LT, LV, SL
- 1 pending follow-on case in LT on abuse of a dominant position
- “I think it is one of these dead ones - and nobody knows when it will come out. ”

Private enforcement II.

Special CEE barriers

- Ambitious legislation without actual enforcement
- Long cumbersome court procedures
- Lack of legal certainty and confidence in judicial system
- Lack of financial resources and economic/legal expertise
- Low degree of awareness of competition rules
- Private parties do not “risk” going to court
- Weak party autonomy, low levels of consumer organization
- Asymmetric division between private and public law/institutions

Private enforcement III.

- Channel strong elements (resources) of effective public enforcement into private enforcement
- Courts are not ready for their task as enforcers
- NCAs as amicus curiae: HU, EE
- Burden on NCAs to meet enforcement “quota” higher than in other NCAs?
- Introduce stricter sanctions: criminalization: EE, HU, SL
- Commission steps in more often?
- Commission allocates more resources?

The way forward

- Research: Institutional economics
- Study competition policy in institutional context
- Policy: share policy formation not only enforcement burden
- Revisit Article 10 EC
- Let social learning model work and make use of ECN
- Voluntary, spontaneous harmonization
- Sustainable laws and institutions
- Governance structure