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Europeanization, Regional Cooperation and the Challenges of Legal Transplants in Competition Law

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In April 2023, a Memorandum was signed between the competition authorities of eight Member States (Poland, Czechia, Estonia, Hungary, Latvia, Lithuania, Romania and Slovakia) and the competition authorities of the newest EU candidate countries Moldova and Ukraine for regional cooperation in the field of competition policy. The main objective of this initiative was to promote and enhance regional cooperation in the enforcement of competition policy and national laws. The participants aimed to exchange their experience and best practices through working groups, study visits, workshops and informal meetings regarding, among others, pending market proceedings and research. The works within the framework of the understanding will be chaired by way of a rotating presidency, starting in 2023 with the Polish competition authority, UOKiK.

Regional cooperation of competition authorities is not a new kid on the block, however, the Memorandum of regional cooperation in the field of competition policy (MoU) signed in April 2023 by eight East-European Member States and two EU candidate countries certainly has some "*pre-accession-support*" traits. Moreover, it comes in the turbulent times of ongoing war and economic implications, with rising concerns over competition law enforcement in digital markets.

Generally, regional cooperation of competition authorities is a well-established set of practices that pursue the goals of sharing experience, resources, and information to better address cross-border anti-competitive practices, especially of global companies. The UNCTAD and the OECD set the pace and frameworks for the cooperation of competition authorities of neighbouring countries with the aims of ensuring efficient and effective enforcement of competition rules by young competition bodies, maintaining competition law compliance of international companies, supporting experience and information transfers so that resources of competition authorities are steadily developing and not wasted on duplicated efforts. It is presumed that the young and ill-equipped competition authorities would benefit from best practices and the power of more mature competition authorities. At the same time, the latter would enjoy better information exchange and support in investigations of cross-border anti-competitive conduct.

The MoU follows this same general trend and envisages the informal exchange of non-confidential general information on investigations, best practices and views on policy issues, assistance in investigations, market studies and reviews, etc. At the same time, there are specific points of cooperation between European Competition Network (ECN) Participants and non-ECN Participants concerning voluntary informal notification of opening a proceeding potentially

relevant to a non-ECN Participant and vice versa.

However, besides the declared forms of cooperation, the sense of the MoU also presumes setting the stage for the future joining of the EU by Ukraine and Moldova and their competition authorities entering the ECN.

Both Ukraine and Moldova received EU candidate status in June 2022. In the process of EU accession, approximation of national legislation with the EU *acquis* is one of the cornerstones to the negotiation. The prospect of the future opening of accession negotiations means that the approximation of national laws remains a key priority for both Ukraine and Moldova as well as for other candidate countries who wish to join the EU.

Hence, the Memorandum should be seen in the light of the EU's enlargement policy and the accession process of Moldova and Ukraine as well as the Western Balkans. From the enlargement perspective, the Memorandum touches upon the central issue of competition law enforcement, which remains a critical point within the accession and enlargement process and has also raised important questions with regard to current Member States signing the Memorandum.

Accordingly, in this contribution, we examine the challenge of competition law enforcement in terms of institution-building and administrative capacity as a cornerstone to the accession process in light of its centrality within the EU and its Member States in the enforcement of EU competition law.

Competition law as a building block of the accession process and enlargement conditionality

While competition law has always been a core pillar of European integration and features among the crucial EU requirements set for the candidate countries, the so-called Copenhagen criteria, enforcement and institutional capacity have become a core benchmark later on in the enlargement process, which has received less attention.

While the EU's eastward enlargement is generally seen as an important mechanism for Europeanization, the area of competition law is, perhaps, the strongest illustration of this process. It was the enlargement process that induced the adoption of an identifiable body of competition law in the candidate countries of Eastern Europe and Western Balkans and lead to the continuous alignment of domestic laws with legislative and policy developments in EU competition law. While competition was non-existent in Central and Eastern Europe (CEECs) and the Western Balkans, a clear and comprehensive set of competition rules developed in the shadow of accession. As administratively planned market activities and the central allocation of resources gradually made a place for free competition and trade, these countries had to build competition laws from scratch and, more importantly, create a competition culture. In the process of economic and political transition competition law has played a significant role: competition law and policy were of great importance in creating a functioning market economy in these countries. It supported and stimulated the economic changes and introduced competition law control mechanisms demonstrating these countries' commitment to the free market economy, competition advocacy and fair market practices. In light of these countries' wish to join the EU, the EU Treaty rules seemed to be an obvious reference point. From 1990 on, all the CEECs and many countries in the Western Balkans adopted new competition acts and they gradually aligned the legislation to the EU rules.

The legal and institutional framework of EU accession and the legal basis for aligning domestic competition laws with that of the EU were laid down in bilateral agreements between the EU and the countries that aspired to join the EU. These were the so-called Europe Agreements for the candidate countries from Central and Eastern Europe and the Stabilisation and Association Agreements for the Western Balkans. Both Moldova and Ukraine concluded an Association Agreement already in 2014 with the EU on this same topic. In these agreements, the EU prescribed legal and institutional requirements with which the contracting state had to comply with. These ‘approximation clauses' compelled rigorous transposition of the *acquis communautaire* into domestic laws. All Association Agreements contain various provisions recognising the importance of free and undistorted competition in their trade relations, the need for comprehensive competition laws which effectively address anti-competitive agreements, concerted practices and anti-competitive unilateral conduct of undertakings with dominant market power and provide effective control of concentrations and for an operationally independent authority with adequate human and financial resources in order to effectively enforce the competition laws.

Competition law enforcement and institutional capacity

If one looks at the lessons learnt in previous enlargement rounds of 2004, 2007 and 2013, they indicate that EU leverage was the most noticeable and direct on the statutory enactments of substantive law. The experience from the previous rounds of negotiations showed that the mere adoption of EU legislation does not guarantee that the country has made quality progress in effectively implementing EU law including "European" values and norms and hence, whether it influenced the consolidation of democracy and market economy in these countries.

In fact, these rounds showed that there was a significant difference between the black letter of the law and its active enforcement. Falkner and Treib found that the then-new Member States formed "the world of dead letters" characterized by politicized transposition processes and systematic enforcement problems coupled with weak civil society participation.

These imperfections of conditionality, such as the lack of rigorous monitoring of implementation as opposed to the literal transposition of EU rules, lead to a new approach in the EU's enlargement governance in 2007, 2013 and 2020. The approach in 2013 in the enlargement policy adopted a methodology based on a structured framework of accession negotiations and stricter pre-accession monitoring than previous enlargement rounds. The new 2020 methodology introduced a more comprehensive methodology focusing on the economy and the rule of law with a stronger political steer.

Hence, throughout the three rounds of eastward enlargement, the EU's enlargement policy has gradually come to focus on implementation and actual enforcement of the adopted legislation. Institution-building became a critical aspect of law enforcement in the candidate countries as the incorporation of the *acquis communautaire* required that institutional integrity was purposefully developed in these countries. The notion of ‘administrative capacity' was introduced by the 1995 Madrid European Council and later established by subsequent accession meetings as a requirement. The accessions of Bulgaria, Romania and Croatia confirmed the EU's increased intervention with regard to reinforcing administrative capacity in these countries to enforce future EU law. All SAAs with Western Balkan candidate countries also contain clear provisions and obligations on the candidate countries to ensure that an operationally independent authority is

entrusted with the powers necessary for the full application of competition rules. Accordingly, the obligations of the candidate countries not only include the transposition of the competition and state aid *acquis*, but effective enforcement of the competition and state aid rules and the strengthening of the administrative capacity through well-functioning competition authorities.

There is perhaps no better context than the requirements and conditions of accession that show the central and fundamental role of competition authorities as public enforcers in not only guaranteeing effective enforcement of competition law but also as a *sine qua non* of the modern *Rechtsstaat*, as essential as the highest court, which guards against the arbitrary use of private or government power and safeguards individual rights in competition law matters. While competition authorities are technocratic expert organisations that are required to separate politics from administration, and they must be legally and functionally separated from market parties and from the legislative and executive powers, they fulfil 'court-like' functions. They protect the legal position of undertakings as well as citizens' rights to economic activity and free choice in markets. Within the EU, effective enforcement of competition law is not only crucial for safeguarding undistorted competition within the internal market but also forms part of effective judicial protection as laid down in Article 19 of the Charter of Fundamental Rights (CFR), relevant to both defendants and complainants in the competition context. In the accession processes, the Europeanization of these countries' laws interacts with market, constitutional and institutional reforms that together should lead to successful membership. Hence, the position of competition authorities and competition law enforcement was at the centre of accession negotiations that took place at the intersection of economic and political conditionality.

The fact that candidate countries are required to align their laws and institutions as much as possible to that of the EU legal order, means that the national laws and policies remain inconsequential if governments do not have the capacity to implement them, no matter how representative or democratically formulated such policies would be. Effective and credible implementation of government laws requires capable organizations that can detect problems, set priorities, allocate resources, and carry out the requisite implementation of policies to deliver public goods and services efficiently and effectively. This is even more so in countries in political and economic transitions. Institutions matter for economic development as the institutional frameworks create incentives for behaviour in their indirect interaction with substantive rules. The institutional embeddedness of competition rules involves important procedural and institutional complexities that influence effective law enforcement. Substantive rules and policies are mediated through the institutions that investigate, enforce and adjudicate legal issues and the decision-making processes that these institutions employ. In EU competition law, the adoption of the ECN+ Directive proved that institutional and procedural differences were likely to generate widely different substantive outcomes, even with a similar legislative mandate.

The institutional capacity of the Antimonopoly Committee of Ukraine and the Moldova Competition Council

By signing the Memorandum, the Antimonopoly Committee of Ukraine's intention was clearly to strengthen its strong points further and overcome its own weaknesses. Upon signing the document, the Chair of the AMCU, Mrs Olga Pishchanska, stressed the need to foster the implementation of EU competition law. This has been undoubtedly the focus of the Ukrainian competition authority for the last few years, as EU-funded experts have documented.

In 2022, upon granting the EU candidate status to Ukraine, the European Commission gave somewhat positive remarks on Ukraine's approximation of the rules and enforcement practices in the area of anti-competitive conduct and merger control with the EU *acquis*. This year, the AMCU has been busy drafting legislation implementing the General Block Exemption Regulation, striving for maximum alignment with the EU standards. At the same time, it is highly disputable whether Ukraine's economy would benefit from strict and complicated state aid regulation in times of war and post-war restoration.

Hence, the AMCU's enforcement remains focused on anti-competitive practices that are easily identified and investigated, such as anti-competitive actions of public, state, and municipal authorities and bid-rigging. Digital markets are mostly *terra incognita* for the AMCU due to a lack of resources and lack of focus on markets, which are strategically crucial for the country in times of war (electricity, natural gas, housing and utilities, fuel, medicines, etc.), and due to the absence of a digitally-focused legal framework for market investigations and enforcement. This is evidenced by the cleared Microsoft/Activision Blizzard merger, where deep investigation and reasoning were lacking. Hence, regional cooperation with more mature competition authorities could enhance the AMCU's practices in terms of enforcement and enlarge its openness to incorporate European experience and practices into its own decisions.

While Moldova has already undertaken specific and clear commitments regarding the transparency of the competition law and policy and its implementation as well as the functional independence of the institutions concerned under the Association Agreement between the Republic of Moldova and the European Union, the Report of the EU on Moldova's application for EU membership emphasized that competition policy is an area where approximation to the EU *acquis* is still limited. There is a need to strengthen effective mechanisms of market monitoring, surveillance and enforcement.

While the substantive competition rules seem to have been largely aligned with the EU's competition rules, institutional and enforcement challenges remain. In this regard, it must be underlined that the Association Agreement was silent on how Moldova's competition policy should be administered. However, regarding state aid, the Deep and Comprehensive Free Trade Area (DCFTA) explicitly obliged Moldova to establish an independent authority that would have the power to authorise state aid schemes, as well as the power to order the recovery of state aid, that has been unlawfully granted. Hence, these issues require going beyond the question of formal institutional organisation. Since 2012, with the support of the EU and its Member States, the efforts of the Moldovan authorities have been oriented towards strengthening the enforcement and effective implementation of their national Competition Law, including capacity-building in the Competition Council. The institutional capacity of the Competition Council needs reinforcement, for example, concerning appointments of top-level officials to the Competition Council and making case decisions independently from the Moldovan Government and Parliament.

Conclusions

The large and critical literature on legal transplants and Europeanization warns that borrowing of laws and legal institutions ensue problems of legal transplanting, namely that transplanted legal institutions do not take place in a legal cultural vacuum and their reception largely depends on the legal and non-legal context of the receiving country. Legal transplants of the European

harmonization process and Europeanization outside of the EU have been viewed with much criticism due to the complexity of their implementation into very different cultural, legal, political and socio-economic settings of the receiving Member States. Competition authorities are key actors in the regulation of the economy. Entrusted with the task of implementing competition law, they have a key role to play in modern democracies and they are instrumental in modern market economies. Still, comparative research enables a deeper analysis of economic integration through law by not only analyzing the broader legal context of various rules but also by assessing the historical, cultural, political, social and economic context of those societies that are implementing the transplants.

The current Memorandum and the project that lies behind it carry exactly the potential of such a comparative learning curve. However, the receiving countries may need to be very conscious of those pitfalls that some of the transplanting EU Member States' current political, social and economic contexts currently carry and their implications sometimes for serious enforcement backsliding.

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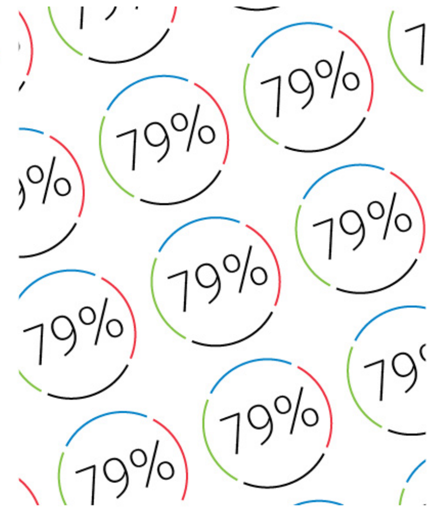

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