Some challenges to successful competition enforcement in an EU candidate country – case of Croatia

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Introduction

- Croatia
  - Stabilisation and Association Agreement (SAA)
    - Interim Agt, 2002; fully in force since 2005
  - EU candidate country since 2004
- Competition Agency (AZTN)
  - Est. in 1997; independent parliamentary agency
  - Also in charge of state aid control
  - All sectors except banking
- Competition Act (ZZTN 2009)
  - In force since 2010
  - Thoroughly aligned with EU rules

Framework for alignment with EU rules

- SAA (Art 69)
  - Harmonisation of domestic legislation with acquis
- SAA (Art 70)
  - Application of criteria arising from application of EU rules to agts, abuse, state aid if effect on trade exists
- Membership negotiations
  - Incentive for legislative reforms and more enforcement

Interpretation of Art 70 SAA

- Attempts to declare unlawful application of rules not published in *Narodne novine*
- Administrative Court: divergent practice
- Constitutional Court
  - Confirmed application of EU rules as "auxiliary means of interpretation, not as primary source of law" (*PZ Auto*, 2008)
  - Obligation to harmonise domestic legislation with EU rules: application of harmonised domestic rules must be "in acordance with the meaning and in the spirit" of the rules which served as origin

Expansion of scope of Art 70 SAA

- SAA
  - EU rules applicable to agts, abuse, state aid + effect on trade
- AZTN practice
  - Effect on trade not part of the analysis: application to domestic situations also
  - Application to assessment of mergers also
- ZZTN 2009
  - "in application of this Act, in particular in case of *lacunae* or doubt about interpretation of the law, pursuant to Article 70 SAA, criteria arising from the application of EU competition rules shall be applied accordingly"
- Confirmed by Constitutional Court
  - Application of harmonised domestic rules must be "in accordance with the meaning and in the spirit" of the rules which served as origin

Enforcement constraints

- 1997-2010
  - No direct fining powers
  - Misdemeanour courts
- Since 2010
  - Direct fining powers + leniency programme

- Competition culture
  - E.g. role of trade associations: price increase announcements

Fight against cartels

- 1997-2007: low-key enforcement
  - 5 cases in 11 yrs only
  - Explicit collusion; direct evidence, self-incriminatory statements (naive cartels); trade associations
  - Significance of cases
  - Ineffective fining system
    - E.g. misdemeanour court pronounced no fine because “no damage arising from conduct of undertakings”
- 2008-2010: more active enforcement
  - 5 cases in 3 yrs
  - Increase in amount of fines pronounced by misdemeanour courts

Main achievements

- Rounded legislative framework
  - Precisely regulated investigation powers
  - Precisely regulated criteria for fining
  - Leniency programme…
- Discussion can now move from legislative solutions to implementation of the law
- More awareness: firms ask for a more proactive approach by ATZN

Main challenges

- Before 2010
  - Legislative solutions
  - Level of awareness
  - State aids in the spotlight
  - “Soft-enforcement”: emphasis on advocacy
- After 2010
  - Administrative capacity
  - Financial resources: budgetary constraints
  - “Regulation by deterrence“ (Gal, 2004)
  - Full use of enforcement instruments on disposal

Private enforcement

- No specific rules
  - Application of general contract law rules
- Jurisdiction over damage claims
  - Commercial courts (Art 69/2 ZZTN 2009)
- Abuse of procedural rights (*Zagreb Airport/Croatia Airlines*):
  - AZTN decision on abuse of dominance
  - Dominant undertaking sued for damages the firm that suffered from abuse
  - Commercial Court rejected the claim for damages relying i.a. on AZTN decision

Great expectations

- Proclaimed priorities translated into practice
- Focus on “big” cases: consumer relevance
- Leniency - more cartels to be caught?
- Less advocacy, more stringent fining
- More rigorous economic analysis
- Use of investigative powers