B O O K R E V I E W S

Jurgita Malinauskaite, *Harmonisation of EU Competition Law Enforcement*, Springer, 2020, p. 285

The purpose of the publication is to present the process and the level of harmonisation of European competition law in Central and Eastern European Countries (hereinafter; CEE Countries). The author describes comparative legal studies in detail, analyses EU conceptual framework of harmonisation (also from the historical perspective) and compares the institutional framework of the National Competition Authorities in CEE Countries. Finally, the author verifies the level of harmonisation of public and private enforcement of EU competition law.

The book is cross-sectional and provides a broad look at harmonisation of EU competition law enforcement. It is also a well laid out paper, starting with a brief theoretical background of comparative law, inter alia, the description of Watson's positivism or Legrand's pessimism. The author analyses different approaches to comparative law based on specific subject areas (that is comparative competition law); or in the context of specific jurisdiction/s, or regions (that is comparative law in CEE Countries). A variety of approaches to the comparative law discourse, for instance comparative law and legal philosophy or comparative law and legal history, are also described.

Although the above analyses could seem a bit theoretical, such an introduction is understandable due to the subject of the book. The author's research is based on the assumption that a thorough comparative study of national legal measures plays an essential role for the purpose of harmonisation, in order to bring the various national approaches closer to each other. Research on EU harmonisation demands, in particular, an understanding of the economic analysis of law, which presumes that legal rules should be designed to promote efficiency.

The book presents the comparative nature of EU law. The author explains that EU law is influenced by the legal traditions of its Member States. However, the substantive competition law provisions in the Treaty of Rome were mainly designed by the two founding countries –Germany and France. CEE countries implemented *acquis communautaire* rather than creating it. Further on, the author adds that while EU law is regarded as a laboratory of different flavours deriving from the legal systems of the Member States, especially German and French, the influence from US antitrust law should not be overlooked. Some obvious examples of legal constructs which inspired certain aspects of EU competition law are, inter alia, the adoption of a leniency policy

for cartel 'whistle-blowers', the drastic increase in fines imposed on cartels, merger-specific efficiencies, and the 'effect' doctrine.

Although the EU has employed harmonisation as a tool to achieve the intended result – that is integration, the book places an emphasis on harmonisation as a process (as a learning process) at both European and national levels, instead of a means to achieve an intended result. While for the internal market with a level playing field to work, harmonisation is employed to achieve intended results, the correct application may not necessary occur any time soon, as this new measure acts as an 'irritant' which triggers the whole process. Therefore, the author argues that it is more rewarding to address harmonisation not as a tool for the intended result, but rather as a process. Perceiving harmonisation as a process, an aim in itself, makes it difficult to assess its progress. Without setting a specific point of reference, for instance, better consumer protection in the e-commerce sector, the success of harmonisation is hard to measure.

The book contextualizes harmonisation as a process, which in the EU happens through the dialogue and cooperation between two levels – national and supranational. Responsibility for the success of harmonisation depends on the proper transposition and application not only on the national, but also the supranational (EU) level.

Different means of vertical and horizontal harmonisation are analysed. Not only EU Regulations and Directives, but also Recommendations, Opinions, Guidelines, and other soft law instruments can have a factual harmonizing effect. However, while the European Commission is bound by its own Notices, Guidelines and any deviations must be clearly justified, no such obligation exists for the NCAs. This, according to the author, can lead to legal uncertainty for individuals, as well as a lack of effectiveness and consistency of EU competition law. It is worth emphasizing here that while in theory such a non-binding effect can be harmful to harmonisation, usually the NCAs follow the customary habit of obedience anyway.

On the horizontal level, the book describes a variety of transposition methods. There is a choice between the 'copying method of transposition', also known as literal transposition, and the 'elaboration method of transposition'. Secondly, there is an option between a minimalistic and a non-minimalistic method of transposition, such as 'gold-plating'. According to the author, the duty of sincere cooperation is the most important rule in the relations between the EU and national institutions, which can be seen as a panacea for problems with the transposition of EU measures into national legal orders. The procedure of preliminary rulings (Art. 267 TFEU) also plays a significant role for harmonisation.

One of the observations provided in the book is that once CEE countries joined the EU, their national courts did not shy away from using EU law and referring cases to the CJEU for clarification based on the preliminary reference procedure. This thesis seems to be true when it comes to EU competition law provisions, the establishment of which is the exclusive competence of the EU. However, it does not seem to be appropriate to make this observation cover the rest of the legal sphere. For instance, German courts are the leader in the number of questions referred for a preliminary ruling, while Germany's neighbour – Poland, one of the CEE countries, ranks only

10th (2018). Polish judges admit that they still have too little knowledge of how to use this instrument.

In light of the principle of subsidiarity, the book provides an assessment of the comparative efficiency between a European and national intervention in pursuing a certain objective. Even though Member States can challenge any EU measure, including Directives, before European Courts, as practice shows, judicial review under the Article 263 TFEU procedure on the principle of subsidiarity is virtually absent. The author provides interesting observations that the comparative efficiency calculus is not a technical assessment but rather a political evaluation made by EU institutions in pursuing a certain policy with different objectives and interests to be taken into account. In light of the Commission v Germany case[1], the CJEU has been criticised for acting with 'double standards' when reviewing EU law based on the principle of proportionality. The legislation of a Member State is the subject to greater scrutiny.

Importantly, the author emphasizes the need for harmonized procedural rules, which may ensure 'uniform' application of EU competition law where harmonized substantive rules are enforced by the NCAs and/or national courts across the EU pursuant to the same procedural rules, therefore, increasing transparency and legal certainty. Harmonisation may also be necessary to internalize external effects. However, the book argues that it is almost a 'mission impossible' to achieve sameness of procedural rules, which are rooted in legal traditions and characteristics of the different legal systems of the Member States. Furthermore, it is highly difficult to establish one single instrument that suits all, for instance due to the differences between big undertakings and SMEs.

The author points out that differences between procedural rules may still remain in the Member States even after the transposition of binding EU law. This is because of the minimum harmonisation standard provided by, for example, the Antitrust Damages[2] and the ECN+ Directives[3].

A thorough historical background of the harmonisation of EU competition law enforcement is provided. The book analyses the harmonisation processes in the newer post-socialist Member States, namely from the 2004 accession onwards. The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, Bulgaria, Romania and Croatia have been selected. The economic background of CEE countries is described historically. The author argues that life behind the 'iron curtain' had left these countries far behind 'western' EU Member States with modern economies. During their transition to market economies, CEE countries had to set up capital

[1] Judgment of the Court of 3 October 1985 in Case 28/84: Commission of the European Communities v. Federal Republic of Germany.

[2] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance.

[3] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

markets and create banking, financial and monetary systems; they needed to re-draft their laws to allow for new forms of economic organizations, new sorts of transactions and obviously new patterns of ownership (by including private ownership). Although in comparative legal studies a division into CEE countries and Western-European countries is justified, a thorough description of economic changes makes it necessary to distinguish the transformation models of the individual CEE countries, which were very different from each other.

Four development stages of EU harmonisation of competition law enforcement and procedural issues are distinguished: the first enforcement Regulation 17/62, the modernisation Regulation 1/2003, and the two recent directives (namely the Antirust Damages Directive and the ECN+ Directive). The author describes those stages in detail from a historical perspective. Apart from formalised harmonisation, the book also discusses the so-called 'soft' harmonisation via tools, such as the European Competition Network (ECN), the Association of European Competition Authorities (ECA) and the Commission's support to national courts. The internal market objective is playing a key role in EU harmonisation initiatives, which is visible for instance in the justification for the Antitrust Damages Directive.

The author points out the lack of harmonisation on the procedural level. Initially, there was no call for harmonisation in the context of procedural and enforcement rules in competition law at all. However, national procedural autonomy is subject to the twin principles of equivalence and effectiveness. The book offers interesting observations by emphasising effectiveness in recent legal acts intended to empower Member States' competition authorities to be more effective enforcers. The author notices that the Antitrust Damages Directive and the ECN+ Directive introduced a new dimension of harmonisation in EU competition law, which is minimum harmonisation. Moreover, the current development of EU competition law enforcement turns back to public enforcement and aims to enhance the powers of the NCAs. Other aspects of cooperation such as mutual assistance or limitation periods are also covered by the ECN+ Directive.

Harmonization is also hindered by differences in the fines imposed by NCAs for the infringement of EU competition rules. Penalty systems notably vary across Member States due to different national proceedings (that is, administrative, criminal, or quasi-criminal). Differences occur also in the methodologies for calculating fines applied and, finally, in the entities that can be held liable. For instance, several NCAs cannot hold parent companies liable for infringements committed by subsidiaries under their control.

Next, the author discussed in detail the institutional frameworks of the NCAs in CEE countries. The layout of the book is coherent and consistent, as such a review of the institutions in Member States allows to verify how recently implemented harmonisation instruments (directives) function in practice. For instance, Germany (which is not a CEE country, however, is a good example), went beyond the requirement of the Antitrust Damages Directive by acknowledging as an irrefutable fact of an infringement the decisions issued by the NCAs of other Member States, thus, placing 'trust' in the decisions of other Member States.

It is strongly emphasised that the NCAs of CEE countries faced difficult tasks unparalleled in the West, as they had to facilitate a competition process during the transition from a socialist to a market economy. Many of these countries, including Poland, established current NCAs as part of market economy reforms. All Member States, but in particular CEE countries, are struggling with the problem of their NCAs' structural, operational, functional, and financial independence from the state authorities. According to the author, it is doubtful whether NCAs can attain full independence and impartiality, as they must be constrained in some ways by the markets and by the state. In light of the above, institutions of particular Member States are examined. Due to the fact that the book covers the subject of harmonisation of EU competition law enforcement in a cross-sectional manner, the discussed problems are sometimes presented a bit briefly. In my view, all of the NCAs in the EU, not only in CEE countries, struggle with the same problem of independence.

Independence and impartiality are not the only issue. Independence cannot survive without a requisite level of accountability, as accountability mechanisms make it possible to assess whether the competition authority has reached the general objectives set for it, and if it used public resources accordingly. The author argues that the ECN+ Directive places an emphasis mostly on the independence of NCAs while not acknowledging their accountability. Another challenge for the Member States is to ensure that their NCAs have the human, financial and technical resources that are necessary for the effective performance of their duties and exercise of their powers when applying Articles 101 and 102 TFEU.

Further on, the author describes other dilemmas related to the functioning of NCAs. For instance, there is a question what policies should be prioritised (consumer or competition protection), which is of relevance, among others, for the Polish Competition Authority (UOKiK). The UOKiK has been criticised for its evident focus on consumer protection, in particular in the banking and telecommunications sectors, with insufficient attention being placed on antitrust enforcement[4]. Furthermore, there are also different views on single-functional or multi-functional NCAs. This is interesting, for example, in light of the recent ideas in Poland to delegate the powers of the Polish Financial Ombudsman to the UOKiK.

After covering the institutional background, the book provides an overview of the competition law enforcement systems in CEE countries. All of the NCAs have a wide range of investigative powers similar to those of the Commission and can adopt (substantive) decisions in line with Article 5 Regulation 1/2003 themselves. All of them also introduced national leniency regimes following a voluntary harmonisation inspired by the earlier EU Leniency notice and the ECN leniency model, and have the legal basis for granting full or partial immunity to an undertaking that participated in a secret cartel. Differences in the adaptation of particular solutions by CEE countries

[4] See: M. Martyniszyn and M. Bernatt (2020). Implementing a Competition Law System, Three Decades of Polish Experience (May 1, 2019). *Journal of Antitrust Enforcement*, 8(1), 165–215.

are also marked in the book. Fining policies and issues related to mutual assistance are described in detail.

Private enforcement to this date has been one of the most debated and researched field in competition law. The author does not overlook this area and provides broad analyses of the transposition of the Antitrust Damages Directive in CEE countries, including issues related to disclosure of evidence, limitation periods, joint and several liability, passing-on defence, presumption of harm, consensual dispute resolution or collective redress.

In summary, the book is certainly worth reading. The layout is well thought out. The author's analyses based on her own data sets are highly valuable.

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