

Smyrnova K. Modern tendencies in legal regulation of competition and international legal instruments of competition policy

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The concept of competition is so ambiguous that it is not covered by any universal definition. This is an economic category, and a set of legal tools that are designed to market regulation in compliance with competition. This is a method of management, and thus the existence of equity capital when one is competing with other capital. The presence of competition ensures the development and establishment of the economy. Competitiveness in the market manifests itself in the battle for the consumer through the quality and quantity of goods or services. On the one hand, competition acts as an economic mechanism of regulation of proportions of production of a certain type of goods, on the other - one of the conditions for the functioning of the market.

Contemporary globalization has become one of the key factors that contributed to the transformation of the economic and legal systems of the world, the integration processes within regional organizations. For the modern world-system we will conceptualize globalization as, in part, changes in the intensity of international and global interactions relative to the local or national networks. However, the processes of globalization have, along with the positive effects, also

many negative aspects.

One of the most effective measures for the prevention of the negative consequences of globalization & avoidance of law conflicts is the convergence of the legislation on protection of economic competition, is putting together a summary of national laws regulating the activities of global companies.

The impact of globalization on competition is two-sided. Throughout the globalization process, governments have negotiated safeguards to ensure the reciprocal open access that will allow their home firms access to other geographic markets. At the same time, governments have negotiated escape hatches that allow them to impede access of foreign firms to their home geographic markets¹.

An appropriate condition for the functioning of a market economy is its effective legal regulation. Legal regulation of relations of competition in order to establish the bona fide relationship undistorted entities in the market is one of the fundamental principles of a free market economy. The competition law establishes rules of behavior of undertakings in the market, protects them from unlawful anti-competitive actions of other entities and / or public authorities.

The presence of competition in the market leads to an increase in economic efficiency so that consumers receive the appropriate share of wealth. Thus, we can conditionally display concept «antitrust welfare», which comes also to economic efficiency and well-being of consumers and competition in the market.

Competition law mostly covers national jurisdiction. The growth in the number of antitrust regimes in the past 25 years has been nothing short of phenomenal. In the 1980s approximately 20 countries had some form of antitrust regulation. Now over 120 jurisdictions boast an antitrust regime². Many of these jurisdictions seek to regulate anti-competitive behaviour for the reason that competition is primarily intended to increase a market's allocative, productive and

¹ Stephen Martin Globalization and the Natural Limits of Competition Industrial Organization: A European Perspective. Oxford: Oxford University Press, 2001.

² In accordance with the data of International Competition Network (ICN), an organization that was founded in 2001 as a result of compromise between the States on the establishment of an international mechanism to regulate competition.

dynamic efficiencies, thereby increasing innovation, offering consumers better prices, services and choices and improving economic welfare. Although the introduction of competition law and policy has spread remarkably quickly in recent years, it is developing at vastly different paces and in different ways.

At the legislative level, there are two models of competition regulation – American³ and European⁴ law models. Both provide for the establishment of special administrative bodies empowered in the markets, the economy, the protection of competition. Both seek to protect competitors' access to the market. However, if the American system puts much emphasis on the prohibition of monopolies, the list of which is gradually improving, the European system was originally developed as a system for monitoring the market associations. The European model legislation provides control over monopolies and is aimed at combating the abuse of monopoly nature. A comparative analysis of the differences between the competition laws of the European Union from the U.S. can be noted that EU competition law aims to protect consumer rights, while American law – protecting competition (and economy) itself⁵. Unlike the U.S., the main objective of EU competition policy within the economic integration of member states is enforcement of fairness access to free movement of four factors (goods, services, capital and labor). The differences between the American and European models of competition law influence international trade agreements, which they conclude with other countries. Thus, the "horizontal principles" of competition policy are more important for US trade deals. The latter also prefer competitive obligations precisely in the sectoral chapters in contrast to European agreements, which also focused on the special section on competition policy.

³ Sherman Act in 1890 and the Clayton Act of 1914 are the result of long-term accumulated codification of American and British common law in the fight against monopolistic activity.

⁴ Art. 101-109 TFEU, numerous Regulations within the EU

⁵ Wood D. International Harmonization of Antitrust Law: The Tortoise or the Hare? [// Chicago Journal of International Law. – 2002. – 391. – P. 19. – http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3062&context=journal_articles

The lack of uniformity is also in the substantive provisions itself relating to the elements of prohibited behaviour. As for the concept of prohibited agreements and concerted practices, there is consensus regarding the prohibition of hard core cartels, such a consensus is not achieved in other merit. While Section 2 of Sherman Act (USA) promulgates prohibition of monopolization and attempt to monopolize, Article 102 of the Treaty on Functioning of the European Union bans abuse of dominant position. The most striking differences can be found in assessment of merger, when, according to Clayton Act (USA) it is examined whether the given merger may substantially lessen competition, or tend to create a monopoly in any line of commerce or in any activity affecting commerce in any section of the country, in the European Union it is examined under the Council regulation⁶, whether the merger significantly impedes effective competition in the internal market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, and finally in South African jurisdiction it is firstly determined whether or not the merger is likely to substantially prevent or lessen competition, and if so then whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain (benefit) or can be justified by substantial public interest (e.g. employment, international competitiveness, competitiveness SMEs owned by historically disadvantaged persons⁷)⁸.

From the legal point of view, the substantial difference between trade policy in the strict sense and a competition policy is that in case of trade policy international legal regulation obliges an empowers states, while in case of competition policy it is essential to oblige and provide rights for non-state entities and that is why the method of the legal regulation shall be different.

⁶ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (O.J. EU L 24, 29.1.2004, p. 1 – 22)

⁷ Competition Act No 89 of 1998, § 12A.

⁸ For further comparisons see e.g. UNCTAD: Model Law on Competition. p. 13 et seq.

Those attempts were based on doctrinal suggestions of internationalization of competition policy, especially K.Meessen offered to add to the national level of competition regulation the existence of supranational institutions, or even a court⁹, W. Fikentscher showed the necessity to introduce a "single code of competition"¹⁰; D.Wood found benefit from the harmonization of competition rules only in the field of harmonization of the rules of concentration (merger), as the concentration of yourself as a general rule is not prohibited, and lies in the plane of the collision of procedural rules in different jurisdictions¹¹.

We can assume the existence of the main factors that lead to the existence of competition policy at the global level. Among them there are the following: first, the existence of competition with the "foreign element", i.e. the existence of competition between enterprises in different jurisdictions at a national market; secondly, the fact that the blurring of borders in business, which is shown together undertakings from different countries, their mergers or other forms of concentration; Thirdly, the very globalization of trade leads outside the closed integration formations. Thus, in recent years there has been the transformation of antitrust policy of "internal" policy as an important element of international economic relations.

Competition Law today is the fastest growing sphere in the European Union law. This is largely due to the dynamics of the evolution of the EU internal market, which requires the creation of optimal conditions for competition throughout its territory.

While globalization of competition law is a relatively new phenomenon in the international legal practice, the creation of traditional diplomatic platform for the establishment of an international framework for competition is a much longer

⁹ Meessen K. M. Antitrust Jurisdiction under Customary International Law / K. M. Meessen. – 1984. – P. 809.

¹⁰ Fikentscher W. Competition Rules for Private Agents in the GATT/WTO System. / W. Fikentscher. – 1994. – P. 295–296.

¹¹ Wood D. International Harmonization of Antitrust Law: The Tortoise or the Hare? [// Chicago Journal of International Law. – 2002. – 391. – P. 19. – http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3062&context=journal_articles

story. Historically there was an attempt to achieve political will to introduce competition issues (especially restrictive practices) within the Draft Havana Charter. However the US objected to these attempts to internationalize competition (antitrust) policy and so the Charter failed and the International Trade Organization never actually materialized¹². A further attempt to internationalize competition law occurred when the UN Economic & Social Council (ECOSOC) recommended the inclusion of a draft convention that would have established an international agency with responsibility for receiving and investigating complaints about restrictive business practices. But the US again rejected this convention. The main reason for the rejection these attempts was the concern that disparities in domestic laws and policies were so significant that the role and function of any such international organization would have been redundant¹³. Within Singapore WTO round of negotiations a significant development occurred with respect to the ‘globalization’ of competition policy with its inclusion on the agenda a special issue on it. However although the EU, Canada, Japan supported a WTO competition agreement, but the US again remained opposed to a multilateral agreement. The stalled Doha round of trade liberalization talks demonstrates that the WTO cannot reach an agreement on a range of trade liberalization issues.

There is no rule of international law on global (universal) level that would oblige states to enact competition law (*hard law*), and also no provision obliging states to harmonize competition law.

On the regional level like the EU, a common competition law has been relatively successful. While EU Member states have maintained or introduced their own domestic competition laws, they are required to interpret those laws in a manner consistent with the overarching EU laws. So, this attempt was quite successful & became a phenomenon in respect of unified application of

¹² Dabbah M.M. *The Internalization of Antitrust Policy*. – Cambridge University Press, 2003. – P. 248.

¹³ Wood D. *The impossible Dream: Real International Antitrust*, 1992. *University of Chicago Legal Forum* 277, P. 284-285.

competition laws on the regional international level. It is difficult to envisage a similar approach being agreeable in a global context.

So, antitrust policy is also an important element of the major international economic organizations (UNCTAD, OECD, EFTA, etc.). The activities of many of these organizations focus on providing solutions, recommendations used national competition authorities voluntarily. It may be noted that such cooperation within the framework of "soft" law is more realistic and promising¹⁴.

However, in the sphere of *soft law* it is possible to find several documents that recommend establishing national competition legislation, and also its content. The work of the UNCTAD is much more aimed to harmonization of national competition legislations and within that work the Intergovernmental Group of Experts on Competition Law and Policy elaborated a Model Law on Competition.

The UNCITRAL is another of the UN organizations that indirectly dealt with the problem of competition, but it did it only within the frame of provisions concerning public procurement so it represents a solution of a particular problem not competition itself as a whole.

Competition policy is also dealt as a particular condition for economic development by the OECD. The OECD contributes to harmonization of competition law in two ways: the first one is adoption of several recommendations that can serve as minimal standards for national legislation, and the second one is organizing regular meetings, discussions, roundtables and elaborating comparative studies and also peer reviews on application of competition policy in member states.

As a result of refusal of closer cooperation in the competition policy on the basis of a international treaty by the USA, the International Competition Network (ICN) was established as an informal and open association of national competition authorities and also other subjects concerned in this topic. The cooperation within

¹⁴ Стахеєва Г. О. Контроль за концентраціями між суб'єктами господарювання в системі антимонопольного права Європейського Союзу : монографія / Г. О. Стахеєва. – Одеса : Фенікс, 2014. – 224 с.

the ICN is based on comparisons, discussions and technical assistance, especially to the countries that are introducing competition legislation. The ICN does not promulgate any regulations, directives or documents of *soft law*, so its goal is to provide a platform for voluntary exchange of experience of application of competition law and seeking for the most effective solutions¹⁵.

The process of harmonization of competition laws is leading on regional level. The following can serve as examples of an obligation to enact competition rules, whether directly or indirectly: South African Development Community (SADC) where member states shall implement measures that prohibit unfair business practices and promote competition within the Community; West African Economic and Monetary Union (UEMOA) where the establishing treaty agreements directly prohibits restricting competition within the Union, abuse of dominant position on common market and public aids; North American Free Trade Agreement (NAFTA), and similarly e.g. Free Trade Agreement between the Government of Chile and the Government of Mexico, in which every party to the agreement is obliged to adopt or maintain measures to proscribe anticompetitive business conduct and take appropriate action; Free Trade Agreement between the Governments of Central America and the Government of Chile and Free Trade Agreement between the Governments of Central America and the Government of the Dominican Republic in which are parties are obliged to ensure that the purpose of the agreement shall not be disrupted by anticompetitive business practices, shall aim at common competition rules and shall seek to create the mechanisms that facilitate and support the development of competition policies; The Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) is an example of regional *soft* harmonization where member countries shall examine the scope for taking action to harmonize requirements relating to such matters as, inter alia restrictive trade practices and where appropriate, encourage government

¹⁵ Building Blocs for effective anti-cartel regimes. Defining Hard Core Cartel Conduct – Effective Institutions – Effective Penalties published in 2005, Setting of Fines for Cartels in ICN Jurisdictions published in 2008.

bodies and other organizations and institutions to work towards the harmonization of such requirements.

In order for competition authorities with different enforcement systems to co-operate effectively and efficiently, it is imperative that the co-operating parties have a good knowledge of their respective substantive and procedural rules, including confidentiality and disclosure rules, and understand the differences in their legal systems and any existing limitations or constraints. It is for this reason that the 2014 OECD Recommendation on international co-operation recommends to “make publicly available sufficient information on their substantive and procedural rules, including those relating to confidentiality, by appropriate means with a view to facilitating mutual understanding of how national enforcement systems operate.”

Notifications of competition investigations and proceedings can be important to establishing effective co-operation among competition authorities. Notifications make the notified party aware of the notifying party’s enforcement activity and trigger subsequent co-operation activities, such as co-ordination or consultations.

Co-operation agreements often include a provision allowing a competition authority in one jurisdiction to take an enforcement action for the enforcement of the competition authority in another jurisdiction.

The ability to exchange information is crucial for competition authorities to co-operate effectively. Competition authorities highlighted that the ability to exchange information, particularly confidential information, can substantially contribute to more effective co-operation and competition law enforcement and this has been the central area of the competition authorities’ discussion on enforcement co-operation.

Co-operation agreements include provisions encouraging the competition authorities to co-ordinate enforcement activities with their counterparts in parallel investigations. Co-ordination provisions typically consist of (1) a general statement on co-ordination, (2) factors to be considered when deciding whether to co-

ordinate their actions, (3) how they co-ordinate each other and (4) a termination clause.

Negative comity principle is included in co-operation agreements as a mechanism for “avoidance of conflicts” and fourteen out of the fifteen co-operation agreements reviewed have negative comity provisions. Those provisions have some variations, but usually consist of (1) a general principle of negative comity requiring a party to consider the important interests of the other party, (2) obligations of a party taking the enforcement activity which may affect important interests of the other party, and (3) factors which a party should consider in assessing appropriate measures to address the conflict. In addition to those, some agreements may mention (4) where an important interest of a party is reflected and (5) how a party's important interests may be affected.

Twelve out of the fifteen co-operation agreements reviewed include a positive comity provision, according to which a party can request the other party for its enforcement actions when the anticompetitive activities are carried out in the latter party's territory and affect its important interests. The texts of positive comity provisions are very similar to one another and usually consist of (1) a general principle on positive comity, (2) the request for enforcement action, (3) how the requested party responds to the request, and (4) the voluntary nature of positive comity activities.

That's why the second generation of international (bilateral/multilateral) agreements aimed at the closer cooperation of NCAs in their fact findings & cooperation within investigations. Co-operation agreements include also provisions on consultation, regular meetings, confidentiality communication.

At the end of the 1990s, competition policy becomes part of international economic relations, *de facto*, as evidenced by the appearance of bilateral agreements (mainly inter) on cooperation for the protection of competition. These agreements not only capture the general principles, but also address the practical issues.

The lack of uniform standards for the competition is viewed in the regulation of different aspects. If the area of prohibition of anticompetitive agreements and concerted practices, there is consensus in the legal regulation bans "hard" cartels, in other respects, such a consensus is absent at the level of national regulation. It is proved that competition policy is subject to legal multilateral and bilateral cooperation more. Co-operation among countries can improve the overall effectiveness of competition enforcement and also reduce jurisdictional disputes. Indeed, these twin goals -- enforcement effectiveness and conflict avoidance-- are inseparably intertwined, because resentment over jurisdictional disputes can be an important obstacle to the kind of co-operation that can help avoid such disputes while improving enforcement effectiveness.

There are two ways of solving a gap in international competition regulation (especially avoidance of conflicts of laws and exchange of non-confidential information): i) concluding a special dedicated agreement on competition issues or inserting special 'competition clauses' in international trade agreements; and ii) concluding of Memorandum of Understanding.

In particular, the EU has concluded several agreements on bilateral cooperation with some third countries (which, in particular, the U.S.¹⁶, Canada¹⁷, Japan¹⁸, Korea¹⁹) to optimize the information and concrete evidence of cartels, which are located outside the EU, however, causing loss of the EU anti-competitive activities. For example, by virtue of the provisions of the agreements between the EU and the U.S. to cooperate in matters of disclosure cartels in 1991 and 1998 agreements (first generation), the European Commission and antitrust

¹⁶ Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws // Official Journal. – 1998. - L173, 18/06/1998, p. 28

¹⁷ Agreement between the European Communities and the Government of Canada regarding the application of their competition laws // Official Journal. – 1999. – L 175.

¹⁸ Agreement between the European Community and the Government of Japan concerning cooperation on anticompetitive activities // Official Journal. – 2003. – L 183

¹⁹ Agreement between the European Community and the Government of the Republic of Korea concerning cooperation on anti-competitive activities // Official Journal.- 2009. - L202, 04/08/2009, p. 36

U.S. agencies such as the Ministry of Justice and the Federal Trade Commission can exchange any significant information on the cartel agreement, which they learned, and which may affect the interests of either the U.S. or the EU, and help each other in enforcement activity.

There were concluded several Memorandum of Understanding (for example recently signed EU-South Africa 2016, Brazil 2009, China 2012, India 2013, Russia 2011), but there are not considered to be international agreements, so there are no obligations by 'hard' law, only voluntary manner.

There is a trend of the second generation of dedicated agreements concluded by the EU with the third countries. These agreements elaborate a combining of negative and positive comity (for example, EU-Switzerland dedicated agreement 2014; EU-Korea agreement 2009; EU-Japan agreement concerning anti-competitive activities 2003).

The EU competition law entered into international relations by bilateral and multilateral agreements. The impact of European competition law was extended beyond the EU frontiers by establishing European Economic Area since the Agreement on EEA contents the same rules as the TFEU. Despite extensive international practice attempts to harmonize antitrust policy consensus on unifying the world did not come. Only the competition policy of the European Union today serves as a model for supranational regulation of competition, which has not reached the level of any other international organization.

From the point of view of harmonization of law, agreements that spread European competition "spirit" to other states are much more interesting. In the first group of such agreements there are association agreements (Turkey, Croatia and Macedonia) and agreements with countries of Western Balkan (Albania, Montenegro). These agreements oblige parties to establish rules that avoid impeding trade between given country and the EU as a result of business restrictive practices. Similar provisions can be found in the other group of agreements that were signed within the EU-Mediterranean Partnership (Algeria, Egypt, Israel,

Jordan, Lebanon, Morocco, Tunisia, Palestine Liberation Organization). Relations with African, Caribbean and Pacific countries is a specific form of partnership where the Cotonou Agreement takes in mind the different level of economic development in application of competition rules. Finally, the EU also established “competition” relations with several other states, but in this case the approach is more individual than systematic with different intensity of legal binding, from agreements on cooperation (Mexico, Chile) to memoranda of understanding (China). Very strict provisions on competition contain newly signed association agreements with Moldova²⁰, Georgia²¹ & Ukraine²².

The EU-Ukraine, EU-Georgia and EU-Moldova FTAs were announced as being the first in a series of so-called Deep and Comprehensive Free Trade Agreements (DCFTAs)²³. Within this category, the competition chapters are nevertheless very diverse²⁴.

What is characteristic of the EU-Ukraine DCFTA is the provision on approximation of law and enforcement practice, with strict deadlines and hard obligations. Parties should exchange information and cooperate on enforcement matters, although the obligations are again particularly weak, stating that ‘the competition authority of a Party may inform the competition authority of the other Party of its willingness to cooperate with respect to enforcement activity. This cooperation shall not prevent the Parties from taking independent decisions’²⁵. What sets the EU-Ukraine DCFTA apart from the other DCFTAs is that Ukraine will align its competition law and enforcement practice to that of the EU *acquis* in

²⁰ Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part (OJ, 2014, L 260/4)

²¹ Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (OJ, 2014, L 261/4)

²² Association Agreement between the European Union and its Member States, of the one part, and Ukraine of the other part (OJ, 2014, L 161)

²³ European Commission, The EU’s Association Agreements with Georgia, the Republic of Moldova and Ukraine, Brussels, 23 Jun. 2014, MEMO/14/430.

²⁴ Demedts V. Which Future for Competition in the Global Trade System: Competition Chapters in FTAs // Journal of World Trade. – 2015. - 49, no. 3. - P. 407–436.

²⁵ Art. 259(2) EU-Ukraine DCFTA

a number of fields. The agreement foresees that the parties should consult each other, but this is not regulated in detail, nor is it mandatory. As a result, there are actual substantive requirements for the domestic regime. This type of commitment cannot be found in other post-Global-Europe FTAs. What is remarkable is that the scope of the EU acquis to which Ukraine should approximate its laws is not included in an annex but in the main text of the agreement.

European integration structures have created a unique permanent competitive relations regulation system. And you can actually watch the process "Europeanization" of competition law. In today's globalized trade we can observe the tendency of convergence of national legal competitive environment by entering into international agreements and the inclusion of these special "clause" to regulate competition. It is logical that the EU as a successful integration group is a model in competition matters for other integration groupings in the world.

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Key words: competition, abuse of dominance position, mergers, international competition network, agreements, positive & negative comity, Association agreement