

Lorenzo Ciari and Alan Colman

BUILDING STRONGER COMPETITION FRAMEWORKS

A fundamental requirement for the transition from planned to market economies is the development of an effective competition framework. Without it, monopolies and restrictive practices can inhibit private sector development. In other words, the commanding role of the state in the planned economy becomes replaced by dominant firms and enterprises controlling segments of a distorted market economy. Competition policy creates a level playing field and facilitates the entry of new market players and products.





There is an important role for the EBRD to play in working with transition countries to improve their competition frameworks and to strengthen the enforcement of competition law. In carrying out this work, the Bank is able to draw on two of its internal resources: (i) the Legal Transition Team (LTT) in the Office of the General Counsel, which conducts legal analyses and designs technical assistance projects to help improve laws and strengthen key institutions, with the objective of improving the investment climate in the region; and (ii) the Bank's Office of the Chief Economist (OCE), which has an intimate knowledge of the development of competition policy in the region and considerable expertise on economic concepts underpinning competition law. Over the past two years, LTT and OCE have worked together on a number of technical assistance projects aimed at enhancing the effectiveness of the institutions which are responsible for upholding competition, namely competition authorities and the courts. This work was prompted by the EBRD's own research – and in particular the Bank's transition indicator for competition – on the progress of transition countries in developing competition policy.

COMPETITION POLICY: THE COMPETITION INDICATOR

The EBRD's annual transition indicators have been mapping economic transition in the region since the Bank was first established. One of the indicators looks at the quality of competition policy and its enforcement. The indicator is based on surveys and in-depth research undertaken by the Office of the Chief Economist collecting information on both the institutional environment in which competition authorities operate and the actual enforcement of competition law. The scoring system used for the competition indicator consists of a scale ranging from 1 (denoting a complete absence of competition legislation) to 4+ (denoting the kind of competition framework that is typical of an advanced industrialised economy) (see Box 1).

The most recent competition scores for countries where the EBRD invests are set out in Chart 1. The average score for all countries is 2.4. The best performing region, as one would expect, is the European Union (EU), with an average competition

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AUTHOR

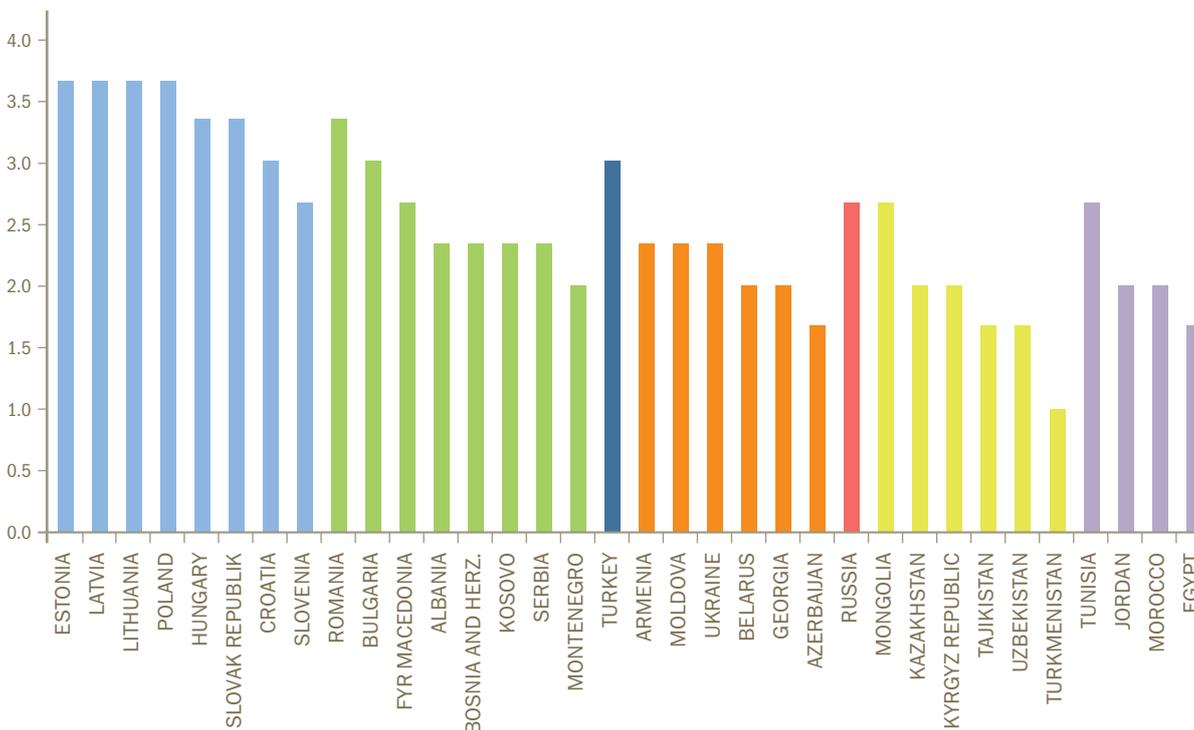
1 LORENZO CIARI
GENERAL INDUSTRY ECONOMIST
EBRD
EMAIL: CIARIL@EBRD.COM

2 ALAN COLMAN
SENIOR COUNSEL
EBRD
EMAIL: COLMANA@EBRD.COM

score of 3.3. The Commonwealth of Independent States has the lowest average regional score (2.0), reflecting strong state involvement in the economies of several countries, notably Belarus, Turkmenistan and Uzbekistan. The countries of south-eastern Europe all sit between 2.0 and 3.0 on the scoring spectrum. The mode average score (value that appears most often in a set of data) is a tie between 2.0 and 2.3, the very point on the scale at which improved institutional effectiveness is required before progressing to the next step. It is clear that these countries need to focus on

improving the implementation of competition law, in part by strengthening the institutional capacity of regulators and the courts that review their decisions. Yet when one examines the historical transition indicator scores, it is striking to see that a number of countries have been stalled at 2.0 or 2.3 (2+) for many years. Indeed, in recent years relatively little progress has been made across the transition region in improving competition frameworks and their enforcement. Of the 34 countries in which the survey was conducted, 13 have made no progress in their competition

CHART 1 TRANSITION INDICATOR SCORES FOR COMPETITION (2013) IN COUNTRIES WHERE THE EBRD INVESTS (BY REGION)



Source: EBRD

BOX 1 SCORING SYSTEM FOR THE EBRD TRANSITION INDICATOR FOR COMPETITION

| | |
|----|--|
| 1 | No competition legislation and institutions. |
| 2 | Competition legislation and institutions set up; some reduction of entry restrictions; some enforcement actions on dominant firms. |
| 3 | Some enforcement actions to reduce abuse of market power and to promote a competitive environment, including dominant conglomerate break-ups; substantial reduction of entry restrictions. |
| 4 | Significant enforcement actions to reduce abuse of market power and to promote a competitive environment. |
| 4+ | Standards and performance typical of advanced industrial economies; effective competition policy; unrestricted entry to most markets. |

BOX 2 EBRD TECHNICAL ASSISTANCE WORK
ON COMPETITION POLICY

| Judicial training in competition law | Capacity-building of competition authorities |
|--------------------------------------|--|
| Bosnia and Herzegovina (2012) | Jordan (2015) |
| Jordan (2015) | Moldova (2015) |
| Kyrgyz Republic (2010) | Montenegro (2014) |
| Moldova (2013) | Serbia (2014-15) |
| Mongolia (2013) | |
| Montenegro (2014) | |
| Serbia (2013) | |

Note: Includes completed projects and projects under development.

indicator scores for five years or more, and a further eight have made no progress for at least three years. Of the remaining countries, data for five have only been available since last year – that is, new countries where the EBRD works in the southern and eastern Mediterranean (SEMED) and Kosovo. This leaves only eight countries which have made some improvement in competition policy over the last three years, and of these, two were downgraded in 2013 (Hungary and the Slovak Republic).

TECHNICAL ASSISTANCE

In examining opportunities for technical assistance projects, the Bank has paid particular attention to south-eastern Europe, where basic competition legislation is in place and institutional shortcomings now represent the main obstacles to progress. This is where the real challenge lies. Adopting competition legislation and regulations and setting up new organisations is relatively easy. However, making those organisations run effectively is much more difficult. There is a keen awareness in government circles of the importance of strengthening the effectiveness of organisations involved in the implementation and enforcement of competition policy. The Bank's technical assistance efforts in relation to competition have focused mainly on judicial training in competition law and policy, and capacity-building work with competition authorities. An overview of this work is set out in Box 2. Some of these projects are discussed further below.

JUDICIAL TRAINING

In 2012 the EBRD launched a project with the judicial training authorities in Bosnia and Herzegovina aimed at strengthening the skills of the judiciary in the area of competition law. EU reports had noted that, although the country's Competition Act of 2005 was largely in compliance with the *acquis communautaire*, implementation remained uneven. This was in line with the country's transition indicator score of 2.3. The objective was to prepare judicial training and a specialist handbook for judges of the Court of Bosnia and Herzegovina, which hears appeals against the regulator, the Competition Council. Judges had not previously received any training in the field of competition and few had significant experience in this area. One notable statistic was the fact that the court had never ruled against the competition authority in a claim brought by a private entity seeking to challenge one of its decisions. The project design paid special attention to discretion and legal remedies available to the court when resolving claims in these areas, as well as relevant market, economic and financial aspects of competition matters.

In 2013 a similar judicial training programme was implemented by the EBRD, this time for the benefit of judges of the Serbian Administrative Court, which hears appeals against decisions of the Commission for the Protection of Competition (CPC). Serbia's current transition indicator score for competition is 2.3 – again pointing to problems with the implementation of its competition framework. The focus of this project was not competition law, but rather the economic concepts that underpin competition law. The first question that arises in many competition cases is the definition of the relevant market. This involves applying economic techniques that require an understanding not only of how markets work, but also of general economic theory. The Bank worked with the Judicial Academy in Serbia towards developing a training programme that covered areas such as: economic analysis of market definition; the economics of monopoly power and price discrimination; and dominant market positions and their abuse, such as predatory pricing. The programme involved a series of seminars by leading Serbian academics, as well as guest lectures by judges from Croatia, the Czech Republic, Hungary and

Romania. As part of the project, a website was created which includes all of the training materials for the programme, as well as recordings of the various seminars and a self-test facility allowing participants to test their knowledge of the course content.

Judges in administrative courts are often required to deal with non-legal disciplines pertaining to the jurisdictions of the administrative bodies whose decisions they are reviewing. The economics of competition cases is just one example; accounting skills for taxation and insolvency matters are another. It is important that judicial training initiatives be sensitive not only to training needs in relation to substantive law, but also in relation to associated non-legal areas. Judges do not necessarily need to have high levels of expertise in these areas, but they must have a sufficient grasp of the relevant concepts to be able to understand disputes, ask probing questions of counsel and expert witnesses, and come to well-reasoned conclusions, applying all of the academic disciplines relevant to the case in a coordinated fashion.



CAPACITY-BUILDING OF COMPETITION AUTHORITIES

The Bank's technical assistance work on competition has also been directed at competition authorities. In late 2013 the team launched a small project with Serbia's Commission for the Protection of Competition, similar to that conducted at the Serbian Administrative Court. The training course on economic concepts that had been offered to the Serbian judges was revised and reworked for the CPC, where a high level of specialisation and economic knowledge is expected of its members. The training programme was coordinated with other organisations working with the CPC, and covered the various microeconomic concepts underpinning competition policy and regulation, looking at their relevance for members and staff of the CPC. One new element was a component explaining the relevance of econometric techniques in detecting violations of competition rules.

Following a review of the project in 2014, and after further discussions with the CPC and other international organisations supporting the development of the competition framework in Serbia, the Bank launched a second project comprised of four main components. Under this project, CPC members will receive training on how to conduct independent econometric studies. On-the-job training is considered to be the most effective way of doing this, building on the basic training given to members in 2013. The CPC will also acquire software to facilitate the implementation of econometric studies and will provide training on the use of these tools. The second component will seek to develop the CPC's competence in using its statutory powers to conduct dawn raids. Various observers, including the European Union, have encouraged the Serbian authorities to exercise these powers in appropriate cases. That said, entering premises and seizing evidence is an intrusive measure and needs to be carried out judiciously. Furthermore, proper use of forensic software is required to analyse data seized in dawn raids. The third component will enhance members' capacity to perform the CPC's role as a public advocate for competition policy in Serbia. This is an important function, which has the potential to raise public awareness of competition policy in a country where competition rules are still not well understood and in some cases remain counter-intuitive for the general public. The final component will facilitate closer cooperation between the CPC and sector-specific regulators, primarily the telecommunications



and broadcasting regulator and the energy regulator. The CPC and the sector-specific regulators require a better understanding of the division of responsibilities between them, as well as the importance of approaching relevant issues in a harmonised manner.

Another competition authority with which the EBRD has been working is Montenegro's Agency for Protection of Competition (APC). Montenegro's transition indicator for competition has been stalled at 2.0 since 2009. However, the recent prospect of EU accession has been encouraging reforms. Chapter 8 of Montenegro's EU accession negotiations, concerning competition law and policy, opened in October 2012. A range of legislative amendments were passed in 2012, including provisions establishing the APC as a functionally independent authority. Since then, the APC has sought to strengthen its case-handling capacity and it has been assisted in these endeavours by the EU. However, APC members still lack a greater understanding of underpinning economic concepts, such as merger assessments and evaluation criteria. Merger control has been one of the APC's principal activities since its establishment; however, substantive instruction still has not been provided to APC members on this subject. It remains a particularly important component of competition policy in the Montenegrin market, which is still undergoing a privatisation process. In 2014 the EBRD launched a project to respond to these needs. Merger-related aspects of the project include understanding merger notification procedures, as well as assessment and decision-making in accordance with EU regulations and practices. The project design emphasises the importance of determining the purpose and effect of available remedies in merger control, with practical examples from EU member states, as well as specific merger assessment guidelines for various sectors, such as banking, insurance and retail.

CONCLUSION

Certain conclusions can be drawn from the Bank's technical assistance work in the area of competition frameworks. First, the Bank believes the projects conducted to date have been useful. Participants that have benefited from training attest to improvements in knowledge, and government counterparts are eager to build on this work and make further progress in the enforcement of competition standards. Second, the Bank has been fortunate to have worked with enthusiastic counterparts and to have identified competent local consultants to help carry out the project. Each country's needs are unique and projects must therefore always be carefully tailored. Lastly, the perspectives of local stakeholders on the state of development of competition policy appear to corroborate the overall assessment of the EBRD transition indicator scores in the countries where projects have been conducted. The basic story they tell is consistent – while the “law on the books” is generally in good order, its implementation needs to be improved. This phenomenon of an implementation gap is well known to the Bank, and has been a feature of the evolution of legal frameworks in the region throughout its transition period.

An important part of the EBRD's future work will also involve looking back to assess the impact of its past projects over time. We must study how greater knowledge and capacity translates into practice. Will we see more confident, capable actions on the part of regulators and better, more consistent judgments from the courts? If so, we can expect to see progress in the transition indicator scores of the countries concerned. The results will prove that improving a country's competition framework enhances its investment climate.

