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EUROPEANIZATION OF PRIVATE LAW IN CENTRAL  
AND EASTERN EUROPE COUNTRIES (CEECS):  
PRELIMINARY FINDINGS AND RESEARCH AGENDA

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**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**  
**DEPARTMENT OF LAW**

*Europeanization of Private Law in Central and Eastern Europe Countries (CEECs):  
Preliminary Findings and Research Agenda*

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## **Abstract**

Since its creation, European Union (hereinafter: 'the EU') has experienced various enlargements. In 1973, Denmark, Ireland and the United Kingdom joined the EU. Greece became a Member in 1981 and was followed by Spain and Portugal in 1986. Austria, Finland and Sweden accessed the EU in 1995. In 2004, ten Central and Eastern European Countries (hereinafter: 'the CEECs') became EU members. Finally, another two CEECs, i.e. Bulgaria and Romania, joined the EU on 1 January 2007.

What impact did previous enlargements have on national systems of private law? It is an important question since there are ongoing accession negotiations with Croatia and Turkey and also other countries (Macedonia, Bosnia and Herzegovina, Albania Serbia and Montenegro, Ukraine and Moldova) are interested in adhering to the EU. Not only these countries but also Russia has developed specific relationships with the EU which affect its private law system. Learning from previous experience may help structuring better pattern of Europeanization. But the broader question is whether the process of 'Europeanization' of private law in CEECs can be considered concluded with membership or 'regional policies' are needed to contextualize the implementation of EU law and to govern its spillovers.

## **Keywords**

European private law, enlargement, European agreements, stabilisation and association agreements, accession agreements, competition law, consumer law, securities law



## I. Introduction (Fabrizio Cafaggi and Lukasz Gorywoda)\*

Since its creation, European Union (hereinafter: ‘the EU’) has experienced various enlargements.<sup>1</sup> In 1973, Denmark, Ireland and the United Kingdom joined the EU. Greece became a Member in 1981 and was followed by Spain and Portugal in 1986. Austria, Finland and Sweden accessed the EU in 1995. In 2004, ten Central and Eastern European Countries (hereinafter: ‘the CEECs’) became EU members. Finally, another two CEECs, i.e. Bulgaria and Romania, joined the EU on 1 January 2007.

What impact did previous enlargements have on national systems of private law? It is an important question since there are ongoing accession negotiations with Croatia and Turkey and also other countries (Macedonia, Bosnia and Herzegovina, Albania Serbia and Montenegro, Ukraine and Moldova) are interested in adhering to the EU. Not only these countries but also Russia has developed specific relationships with the EU which affect its private law system. Learning from previous experience may help structuring better pattern of Europeanization. But the broader question is whether the process of ‘Europeanization’ of private law in CEECs can be considered concluded with membership or ‘regional policies’ are needed to contextualize the implementation of EU law and to govern its spillovers.

The current debate on the desirability and modes of formation of European private law focuses on the search for a common core of rules at EU level and on the opportunity of codification of such rules. However, little or no attention has been given to the direct or indirect impact of EU on national private law systems of New Member States (hereinafter: ‘the NMS’) and neighboring countries. Furthermore in the search of common principles little attention is devoted to the legal traditions and practices developed in CEECs.<sup>2</sup>

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\* This paper is an outcome of collective work in the framework of a research project ‘Europeanization of Private Law in Central and Eastern European Countries’ launched in Spring 2008 and coordinated by the European University Institute. The paper is based on national reports drafted by the following research teams: Marija Bartl, Jana Komendova, Zdenek Novy (Czech Republic); Nikolett Hös, Judit Török, Pál Szilágyi (Hungary); Ilze Dubava (Latvia); Lithuania (Egle Zemlyte); Rozeta Karova, Ana Dojcinovska (Macedonia); Alexandr Svetlicinii (Moldova); Magdalena Bober, Lukasz Gorywoda, Agnieszka Janczuk, Inga Lobočka, Marcin Rogowski (Poland); Ana Sarateanu (Romania); Paul Kalininchenko, Ekaterina Mouliarova, Nadezda Purtova (Russia); Andrea Fejős, Alexandr Svetlicinii (Serbia); Kristian Csach (Slovakia); Urska Petrovcic (Slovenia); Yeşim M. Atamer, Basak Basoğlu, Kadir Berk Kapancı, Mert Elcin (Turkey). The work of the national reporters was coordinated by Federica Casarosa. The project is coordinated by Fabrizio Cafaggi, Marise Cremona and Hans-W. Micklitz, and supported by the Academy of European Law. Preliminary findings of the research conducted from Spring to Autumn 2008 were presented at the workshop of 21-22 November 2008 held at the European University Institute <<http://www.eui.eu/LAW/Events/Programmes/FC21-22Nov08.pdf>>. Sectoral analyses building on the data from the questionnaire were presented by Lukasz Gorywoda (EUI), Nikolett Hös (EUI) and Rozeta Karova (EUI). Special contributions to the workshop were made by: Yeşim M. Atamer (Istanbul Bilgi University), Antonina Bakardjieva Engelbrekt (University of Stockholm), Fabrizio Cafaggi (EUI), Olha Cherednychenko (University of Amsterdam), Marise Cremona (EUI), Monika Jozon (Sapientia – Hungarian University of Transylvania), Hans-W. Micklitz (EUI), Ekaterina Mouliarova (EUI), Norbert Reich (University of Bremen) and Marek Safjan (University of Warsaw, as of 2 October 2009 judge of the European Court of Justice) who presented the methodological draft report developed by the Working Group of Warsaw University.

<sup>1</sup> From a conceptual standpoint, the EU can be viewed as a supranational club that provides a variety of non-rival goods (i.e. allowing consumption to multiple users) to its members. These goods can be enjoyed only by the members of the club, i.e. they benefit only the parties to the accession agreements. The critical variable which is to be optimized in the process of enlargement becomes the number of club members, i.e. optimal club size. The assumption is that the optimal club size will differ contingent on the nature of the respective club good. It implies that different results will hold for different EU policies.

<sup>2</sup> Exceptions are R Manko, ‘The Culture of Private Law in Central Europe after Enlargement: A Polish Perspective’ (2005) 11 *European Law Journal* 527 and M Safjan, L Gorywoda and A Janczuk, ‘Taking the Collective Interest of Consumers Seriously: A View from Poland’ in F Cafaggi and H-W. Micklitz (eds.) *New Frontiers of Consumer Protection: The Interplay Between Private and Public Enforcement* (Intersentia 2009).

Europeanization has become a leading concept in the field of European studies and it denotes quantitative and qualitative influence of EU law on national laws and domestic institutional frameworks. The leading contributions on Europeanization employ the models and explanatory apparatus developed for the analyses of the Old Member States (hereinafter: ‘the OMS’).<sup>3</sup> An unfortunate effect of these accounts is the absence of accurate theoretical characterization and empirical testing of the consequences of Europeanization for the NMS, Candidate Countries (hereinafter: ‘the CC’), Potential Candidate Countries (hereinafter: ‘the PCC’), Neighboring Countries (hereinafter: ‘the NCC’), and Partners. These contributions also tend to treat Europeanization as a product instead of viewing it as an interactive process.<sup>4</sup> This approach leads to neglect that legal systems affected by the Europeanization are not only ‘law-takers’ but also ‘law-givers’.<sup>5</sup> An accurate and systematic theoretical characterization of patterns of Europeanization based on empirical testing, however, is relevant from the pre- and post-enlargement policy standpoints. Understanding how Europeanization affects national systems of private law of the new and future members of the EU will help to appropriately structure the enlargement strategy.

The objective of this project is to fill this theoretical and empirical gap by developing a methodology and producing evidence capable of assessing the impact of EU on private law systems not only of the countries that have recently accessed to the Union but also on those of neighboring countries that have signed agreements with EU. The analysis takes into account both the unilateral process of approximation of laws in NMS and neighboring countries, and the mutual influence between EU and those (groups of) countries, as the latter can affect both the creation of European law and its modes of implementation. Within this framework, the research analyzes not only the legal tools used by each country in its approximation process, but it takes into account also the impact of activity of legal actors, judges, regulators, private organizations and law firms, involved in the application of the European principles within their countries. The overall goal of the analysis is to identify distinct patterns of Europeanization of the NMS, CC, PCC, NCC and Partners.

The project moves from the assumption that patterns of Europeanization may be shaped by the obligations resulting from the partnership, association and accession agreements. As legal obligations to approximate existing and future legislation differ in their level of detail, the degree of Europeanization is determined by the discretion left to the Applicant and Member States. Thus, the ‘**if question**’ (Was/is there a legal obligation to Europeanize?) will be coupled with the ‘**how question**’

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<sup>3</sup> See, for example, R Zimmermann, ‘Civil Code and Civil Law: Europeanization of Private Law within the European Community and the Re-Emergence of a European Legal Science’ (1995) 1 *Columbia Journal of European Law* 63; J E Levitsky, ‘The Europeanization of the British Legal Style’ (1994) 42 *American Journal of Comparative Law* 347 (‘the traditional role of British courts in the nation’s political system was profoundly altered by the United Kingdom’s accession to the European Communities in 1972’) (arguing that EC membership has generated pressures that are slowly altering the British judiciary’s legal style, and with it their traditionally highly restrained role in the nation’s political system); G D’Alfonso, ‘The European Judicial Harmonization of Contractual Law: Observations on the German Law Reform and ‘Europeanization’ of the BGB’ (2003) 14 *European Business Law Review* 689; G Alpa, *Tradition and Europeanization in Italian Law* (British Institute of International and Comparative Law, London 2005) (analyzing in the second part of the book the implementation of the Unfair Contract Terms Directive in Italian, British and French legal systems).

<sup>4</sup> Important exceptions are F Cafaggi, ‘Una *governance* per il diritto europeo dei contratti’ in F Cafaggi (ed) *Quale armonizzazione per il diritto europeo dei contratti?* (Padova, CEDAM 2003) and Ch Joerges, ‘Europeanization as Process: Thoughts on the Europeanization of Private Law’ (2005) 11 *European Public Law* 63.

<sup>5</sup> One of the exceptions is T Borzel, ‘Member State Responses to Europeanization’ (2003) 40 *Journal of Common Market Studies* 193 (conceptualizing Europeanization as a two-way process and discussing the ways in which governments of Member States both shape European policy outcomes and adapt to them; her claim is that Member States have an incentive to ‘upload’ their policies to the European level to minimize the costs in ‘downloading’ them at the domestic level).

(How has EU influenced the development of national private laws in NMS and other countries under the study?).

Against this background, the main research question (Q) and the underlying assumption (A) of the project may be summarized as follows:

Q:	What are the patterns of Europeanization of national private law systems?
A:	Patterns of Europeanization are the function of: (1) the level of discretion granted by the EU legal obligations to States implementing legislation and case law, and (2) institutional variables specific to national legal system.

This paper builds on the findings of the November 2008 Workshop summarizing the work conducted over the Summer 2008 by a group of young researchers coming from CEECs. Accordingly, it is based on the evidence produced by a team of national reporters through a questionnaire, interviews and a follow-up. The main source of information which was used by the reporters were direct contacts with legal actors and open interviews with national and European institutions. The questionnaire was composed of two parts: general and sectoral.

General part of the questionnaire set out research questions relevant for the framework of the project. Sectoral part, in turn, provided specific questions for competition, consumer, securities and employment law fields. This sectoral partitioning reflects the broad notion of private law – as rules framing and regulating market transactions referring to both individual and collective interests, and including enforcement mechanisms – adopted in the project. Such a broad definition is aimed at investigating the role of European private law to design and regulate new markets.

The questionnaire provided numerous indicators of Europeanization. The evidence gathered over the Summer 2008 was sufficient to spot the most strategic ones. These indicators were instrumental to assessing the level of Europeanization (indicative values: low/high) in the sectors chosen to study. The variance of values revealed different patterns of Europeanization of private law systems in CEECs.

The revealed patterns of Europeanization have clearly shown that ‘one size does not fit all’<sup>6</sup> and, accordingly, suggest that the strategies of Europeanization could be ‘regionalized’. Thus, the overall goal of the project is to define a set of recommendations for the EU policy design concerning both the post-enlargement and the on-going future enlargement and approximation processes that would reflect institutional and socio-economic diversities within an integrated framework provided by European legislation.

Theoretical framework for the project builds on the methodological draft report prepared by the working group of Warsaw University, presented and amply discussed during the November 2008 Workshop.

The first Part (I) of this collective paper sets the framework for the project. Part II analyzes the Europeanization process, in particular the steps for accession and legal reforms. Part III covers consumer law, whereas Part IV assesses the process of Europeanization of competition law in CEECs. Part V looks into securities law. Part VI concludes and sets the research agenda.

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<sup>6</sup> Cf F Cafaggi, ‘The Making of European Private Law: Governance Design’ in Fabrizio Cafaggi and Horatia Muir-Watt (eds.) *Making Private Law: Governance Design* (Edward Elgar Publishing, 2008) and H Collins, *The European Civil Code: The Way Forward* (Cambridge University Press, 2008). On differentiated integration – though not with a reference to private law – see Bertelsmann Foundation (ed.) *The New Europe – Strategies for Differentiated Integration* (Bertelsmann Foundation Publishers, Gutersloh 1997).

## **1. Staging of the Project**

The project was launched in Spring 2008 and has been coordinated by the European University Institute. The main stages of the project are represented in the following table.

Time period	Stage	Output
Before Spring 2008	Planning	Identification of the objectives of the project and methods to be applied
Spring 2008	Design	Development of the questionnaire
June 2008	Start of the Project	Launch meetings and distribution of the questionnaire to national reporters
July – August 2008	Production (1)	Development of the data set by the teams of national reporters (interviews and others methods of data gathering)
September – November 2008	Production (2)	Elaboration of the data resulting from the national reports (continuous contacts with the reporters and set of presentations at the EUI to test the preliminary hypotheses)
21-22 November 2008	Production (3)	2 days workshop at the EUI (presentation of the data in a methodologically unified manner, discussion of the methodological issues (scope of the project) and future agenda)
December 2008 – June 2009	Production (4)	Drafting the collective working paper, and project monitoring: updating national reports, network building, and finding institutional support (i.e. Academy of European Law)
July 2009 – July 2010	Collective (5)	Publication of the collective working paper. The paper is to be a core document with macro questions on the basis of which a set of micro questions will be developed and addressed at subsequent stages of the project. The w.p. will also serve as a basis for a research project design when applying for funding.

## **2. The Scope of the Project**

In the literature Europeanization is understood as ‘the reorientation or reshaping of politics in the domestic arena in ways that reflect policies, practices or preferences advanced through the EU system of governance’.<sup>7</sup> At the same time, the concept has a dynamic dimension. In fact, it is a ‘gradual process that begins before, and continues after, the admission of new members to the organization’. Finally, it entails ‘horizontal institutionalization’, i.e. widening of the group of actors whose actions

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<sup>7</sup> I Bache and A Jordan, ‘Europeanization and Domestic Change’ in I Bache and A Jordan (eds) *The Europeanization of British Politics* (Palgrave Macmillan, Basingstoke 2006), 30. On the concepts and mechanisms of Europeanization see also C Knill and K D Lehmkuhl, ‘How Europe Matters: Different Mechanisms of Europeanization’ (1999) 3 *European Integration Online Papers* No. 7 available at < <http://eiop.or.at/eiop/pdf/1999-007.pdf>> (accessed 6 June 2009), H Wallace, ‘Europeanization and Globalization: Complementary or Contradictory Trends?’ (2000) 5 *New Political Economy* 369, J Caporaso, T Risse, M Green Cowles and T Risse-Kappen (eds), *Transforming Europe: Europeanization and Domestic Change* (Cornell University Press, Ithaca 2001), K Featherstone and C Radaelli (eds) *The Politics of Europeanization* (Oxford University Press, Oxford 2003), M Vink, ‘What is Europeanization?’ (2003) 3 *European Political Science* 63, S Bulmer and C Radaelli, ‘The Europeanisation of National Policy’ in S Bulmer and C Lesquesne (eds) *The Member States of the European Union* (Oxford University Press, Oxford 2005) and S Bulmer ‘Theorizing Europeanization’ in P Graziano and M Vink (eds) *Europeanization: New Research Agendas* (Palgrave Macmillan, Basingstoke 2007).

and relations are normatively structured.<sup>8</sup> Consequently, the project adopts a wide and dynamic notion of Europeanization as a process of creating a common legal sphere in Europe and a common legal culture.<sup>9</sup>

In this project Europeanization is operationalized as a concept referring to five phenomena within vertical, horizontal and diagonal Europeanization:<sup>10</sup> (1) transposition of the *acquis communautaire*; (2) influence on national institutional frameworks (institutional design); (3) compliance with transposed *acquis communautaire*; (4) spillover effects and emulation of EC law; and (5) horizontal Europeanization: borrowing Member States' law (legal transplants).

Against this background, understanding and evaluating Europeanization of private law in CEECs implies at least four courses of action. The first one is to investigate the influence of EU on private law in different groups of European countries. The second one is to conduct an analysis enabling to observe continuities and discontinuities with the pre-existing legal regimes and to assess the different impacts of EU law. The third course of action follows from the second one and proposes a temporal differentiation allowing identification of different phases of adjustment of national private law systems of CEECs to the EU requirements. Finally, the project takes an institutional approach and focuses on legal and socio economic institutions to analyze which ones promote and which ones resist Europeanization within each legal order.

### **3. Domains of the Project**

The scope of the project is related to its domains which consist of national legal systems and sectors chosen for the analysis.

As to national legal systems, five groups of countries have been chosen to look for a preliminary investigation. The first one is formed by New Member States (NMS) and encompasses Czech Republic, Estonia, Hungary, Lithuania, Poland, Romania, Slovakia, Slovenia. The second one consists of Candidate Countries (CC) and embraces Macedonia, Turkey. Potential Candidate Countries (PCC) are the third group and are represented in the project by Serbia. The fourth set is that of Neighboring Countries (NC) and consists of Moldova and Ukraine. Finally, the focus is on Partners represented by Russia.

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<sup>8</sup> See F Schimmelfennig and U Sedelmeier, 'Theorizing EU enlargement: research focus, hypotheses, and the state of research' (2002) 9 *Journal of European Public Policy* 500, 503. According to them '(i)nstitutionalization means the process by which the actions and interactions of social actors come to be normatively patterned (whereas) (h)orizontal institutionalization takes place when institutions spread beyond the incumbent actors, that is, when the group of actors whose actions and relations are governed by the organization's norms becomes larger.' They also stress that '(h)orizontal institutionalization is a matter of degree, and enlargement is best conceptualized as a gradual process that begins before, and continues after, the admission of new members to the organization. Even in the absence of full membership, outside actors might follow certain organizational norms and rules. Non-members align with organizational rules as a result of the organization's accession conditionality, or because these rules are embodied in formal agreements that create an institutional relationship short of full membership, such as association agreements or agreements to participate in selected policies of the organization. Conversely, new members of the organization may negotiate post-accession transition periods before applying some of its norms, or they might begin to participate in some of the organization's policies at different times.'

<sup>9</sup> See 'Methodological draft report' prepared by the Working Group of Warsaw University (Marek Safjan, Leszek Bosek, Krzysztof Matuszyk, Katarzyna Michałowska, Przemysław Mikłaszewicz, Roman Trzaskowski, Aneta Wiewiórowska-Domagalska, Mikołaj Wild) (on file with the research group).

<sup>10</sup> On vertical and diagonal interactions see Ch Schmid, 'Vertical and Diagonal Conflicts in the Europeanization Process' in Ch Joerges and O Gerstenberg (eds) *Private Governance, Democratic Constitutionalism and Supranationalism* (European Communities 1998).

The choice of these countries (CEECs) is motivated by at least four reasons. First, CEECs have been relatively neglected in the academic and policy debates on Europeanization of private law.<sup>11</sup> Second, the pool of CEECs is not a single unit of analysis as the countries have different approximation obligations which translate in different patterns of Europeanization. Third, they also have different market and political regimes influencing modes and constraints of Europeanization. Finally, further level of heterogeneity within CEECs stems from different degrees of the influence of their historical legacies on Europeanization techniques. These factors are treated as independent variables so they will enable the team to identify their influence on Europeanization strategies and find out different patterns of Europeanization.

Partitioning of the countries in different groups is justified, given their diverse relationships with the EU. But the preliminary research suggests that the legal status does not provide a satisfactory explanation of current differences. This is not to say that NMS should be treated as a single unit of the analysis as already in the beginning of 1990s differentiation of former communist states occurred.<sup>12</sup> In general European agreements were negotiated between the EU and the CEECs from the 1990s. However, as early as December 1990, the EU negotiated with Czechoslovakia, Hungary and Poland on the content of the agreement that was signed with these countries in December 1991. It has been noted in the literature that the former European socialist countries all attempted to restructure their economies in the direction of market-type capitalist models. However, they have not all done so at the same pace or to the same degree.<sup>13</sup> Thus, the project disaggregates the group of the NMS to see whether it is possible to observe similar or dissimilar institutional or policy directions triggered by the Europeanization process.

The choice of the countries has an impact on research design. Two approaches are possible: (1) horizontal, and (2) vertical. Within the former, two perspectives can be adopted: (a) one covering all NMS, if the goal is to test the role of national legacies and identify patterns of appropriating EU law; and (2) one covering NMS and all the other groups identified above, if the goal is to test the role of conditionality. Vertical approach would imply a focus on selected countries. Such an approach would be justified if the goal was to get deeper insights on what impact Europeanization has on national institutional choices and design.

Second, three sectors have been chosen for preliminary investigation: consumer law, competition law<sup>14</sup> and securities law.

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<sup>11</sup> Important exceptions are N Reich, 'Transformation of Contract Law and Civil Justice in the New EU Member Countries: The Example of the Baltic States, Hungary and Poland' in F Cafaggi (ed) *The Institutional Framework of European Private Law* (Oxford, Oxford University Press 2006) and M Jozon, 'Integration of the European Developments in Private Law into Domestic Civil Law: Factors Framing the Reception of the DCFR in Romania' (2008) XIV *Juridica International* 156.

<sup>12</sup> More details under II.

<sup>13</sup> D Lane, 'Post-Communist States and the European Union' (2007) 23 *Journal of Communist Studies and Transition Politics* 461, 468.

<sup>14</sup> On Europeanization of competition law in CEECs see K Cseres in F Cafaggi and H Muir-Watt (2008) and A Gwiazda, 'Europeanization of Polish Competition Policy' (2007) 29 *Journal of European Integration* 109. See also F Emmert, 'Introducing EU Competition Law and Policy in Central and Eastern Europe: Requirements in Theory and Problems in Practice' (2004) 27 *Fordham International Law Journal* 642.



The choice of the sectors is motivated by the fact that the notion of the *acquis communautaire*<sup>15</sup> varies across the sectors and is linked to specific EU policies. For example, in competition law there is primary law and case law by ECJ, whereas in the others there is primarily secondary law. This factor affects modes of implementation and thereby Europeanization strategies. Furthermore, the obligations concerning modes of implementation vary from sector to sector and bring about different results. Finally, the sectors chosen for the study vary as to their role for framing reforming markets.

Four questions are related to the domains of the project. The first asks whether CEECs represent a special case of Europeanization of private law. The second investigates whether the historical legacy of CEECs represent a cohesive factor. The third inquiries whether Europeanization of private law differs from other areas. Finally, can more general lessons concerning market design be drawn from the study undertaken in this project?

The preliminary findings suggest affirmative answers. What makes CEECs special is transition from command and control economy and totalitarian rule to market economy and some degree of compliance with the rule of law. What makes Europeanization of CEECs special is the conditionality and the fact that Europeanization of these countries have been interacting with market, constitutional and institutional reforms. Private law, in turn, is special as it is more affected by the historical legacies particular to CEECs than other branches of law and there is only fragmentary coverage of private law at the EU level. Lastly, general lessons from the study can be drawn for Europeanization strategies, for private law as such and for the balance between public and private governance.

#### **4. Institutional Approach**

Europeanization of private law is a complex problem of institutional choice in which the relative ability of institutions and levels of authority can vary from context to context. The project investigates which institutional choices were made in CEECs in response to the Europeanization process. The underlying assumption confirmed by the preliminary research is that the goal of Europeanization often does not dictate *per se* public policy choice to attain it. It means that identifying a goal and instrument for its realization are two distinct exercises and it is the link between goals and public policy choices that results in the 'institutional choice'.<sup>16</sup>

Accordingly, the project addresses the following five questions. First, what is the balance between public and private governance (judicial/administrative) in CEECs ? Second, which factors did affect the balance? Third, from a dynamic perspective, the question is whether Europeanization is tilting this balance in certain direction (deliberately or unintendedly). For example what are the reasons for privileging public over private enforcement. Fourth, the project investigates whether the influence of Europeanization is sensitive to the particular needs of CEECs. Finally, the project inquiries whether it is possible to identify 'varieties of post-communisms'<sup>17</sup> in CEECs and if the answer is affirmative a follow-up question arises as to what extent current Europeanization strategy accommodates these varieties.<sup>18</sup>

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<sup>15</sup> On the concept of *acquis communautaire* see C Delcourt, 'The *Acquis Communautaire*: Has the Concept Had its Day?' (2001) 31 Common Market Law Review 829.

<sup>16</sup> N K Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press, Chicago 1994) 177.

<sup>17</sup> Cf D Lane and M Myant (eds) *Varieties of Capitalism in Post-Communist Countries* (Palgrave Macmillan 2007). In general, see G Menz, *Varieties of Capitalism and Europeanization: National Response Strategies to the Single European Market* (Oxford, Oxford University Press 2005).

<sup>18</sup> On Europeanization and institutional choice in general and with relation to consumer law in specific see A Bakardjieva Engelbrekt, 'The impact of EU enlargement on private law governance in Central and Eastern Europe: the case of

The above questions were posed from a recipient state (CEECs) perspective. However, Europeanization is likely to bring about an institutional change not only at national levels. Indeed, accession/input of new countries may cause an institutional change at the EU level. For example, a study has been conducted to assess whether the 2004 and 2007 enlargements have had an impact on comitology and whether any observable changes to the comitology system can be related to the arrival of the NMS.<sup>19</sup>

It follows that not only Europeanization strategy induces change in private law systems of CEECs but also CEECs are the factor which influences the equilibrium at the EU level. For that reason the analysis of Europeanization cannot be conducted within a stationary framework but calls for an explicit treatment of institutional change. The objective of the project is therefore to develop a framework for understanding the institutional change, i.e. the process of equilibrium displacement and its reconstruction,<sup>20</sup> in the system of private law both at the CEECs and EU level.

## 5. *Diachronic and Synchronic Approach*

In order to capture the character of Europeanization as a dynamic process, the project adopts a theoretical framework combining a time sensitive diachronic analysis with a more explanatory synchronic examination. Whereas the purpose of diachronic analysis is to identify points of change in the development of national private laws, comparing pre and post-communist stages, synchronic examination should allow for explaining the critical events or turning points and for assessing their relevance as causes of institutional and policy change.

Thus, the project captures the dynamic process of change in national private laws triggered by Europeanization by the identification of time periods when critical events or turning points took place. Diachronic approach therefore implies that when studying Europeanization of private law in CEECs, it is important to look for examples of continuities and discontinuities in the development of national private laws. These examples will serve as case studies and provide evidence to answer the following two questions: (1) whether changes in private laws of CEECs occurred gradually or have rather been abrupt; and (2) whether legislative changes have been followed by institutional transformation.<sup>21</sup>

A brief illustration can be helpful. Assume a simplified world where the impact of EU law may either interrupt the national legislative developments in a given private law matter or uphold them. While scenario A exemplifies legislative discontinuity, scenario B illustrates legislative continuity. This hypothetical has important consequences for the role of judiciary. Whereas legislative discontinuity implicates lesser importance of the judiciary, continuity entails its higher importance. The scenario of higher importance of the judiciary brings in the issue of different judicial attitudes. Accordingly, judges may either act as a barrier to Europeanization or, vice versa, may facilitate the process of

(Contd.) \_\_\_\_\_

consumer protection' in F Cafaggi and H Muir-Watt (eds), *Making European Private Law: Governance Design* (Edward Elgar 2008).

<sup>19</sup> See M Alfé, T Christiansen and S Piedrafita (2008) ARENA Working Paper No. 18, September 2008 available at <[http://www.arena.uio.no/publications/working-papers2008/papers/wp08\\_18.pdf](http://www.arena.uio.no/publications/working-papers2008/papers/wp08_18.pdf)> (accessed 6 June 2009) (demonstrating that the two enlargements have had an impact on the way in which comitology is practised rather than regulated, i.e. the impact has occurred with respect to the informal side, where working practices, operational procedures and generally the 'way of doing things' have changed). In general see C Knill, *The Europeanization of National Administrations: Patterns of Institutional Change and Persistence* (Cambridge University Press, Cambridge 2001) (explaining national patterns of administrative transformation in the context of Europeanization and discussing factors influencing administrative adjustment to European policy).

<sup>20</sup> Cf D C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990).

<sup>21</sup> On the reform of judiciary in CEECs see F Emmert, 'Administrative and Court Reform in Central and Eastern Europe' (2003) 9 *European Law Journal* 288. See also F Emmert, 'The Independence of Judges – A Concept Often Misunderstood in Central and Eastern Europe' (2001) 3 *European Journal of Law Reform* 405.

adaptation of national private laws to EU requirements within or even beyond legislative Europeanization. But even within the judiciaries differences matter. The preliminary findings suggest that Constitutional Courts have had a different, often greater impact than ordinary Courts.

On a macro level, it seems plausible to expect that for an applicant state, the decision to access the EU, constitutes a major institutional policy reorientation whereas, for the MS, the decision to enlarge an existing EU is more a matter of policy continuity.<sup>22</sup> On a micro level, the situation might be more complex. In order to assess this situation, at least the following two questions should be addressed.

1. Do institutional constraints from the period of communism influence the modes of implementation of the *acquis* in the field of private law in the CEECs?
2. To what extent do legal traditions of these countries matter as far as Europeanization of private law is concerned?<sup>23</sup>

In contrast, synchronic examination focuses its attention on events fixed in a given time period in order to explain what happens at the specific time when they emerge. In other words, synchronic analysis zooms in on identified periods of change to discover where the changes derive from.

## **6. *Patterns of Europeanization of Private Law***

The diachronic evidence gathered through the questionnaire has shown that formal EU intervention (i.e. signing an agreement with the EU) has not been the main driver of Europeanization. In fact, it has predominantly affected the answer to the ‘how’ and not to the ‘if’. Accordingly, the underlying hypothesis of the project is that limited role of legal obligations contained in EU agreements contributes to different patterns of Europeanization in each group of the countries but does not represent the most relevant explanatory variable.

Against this background, the project poses two questions concerning patterns of Europeanization. The first one concerns the relationship between legal obligations to adopt European legislation and legislative initiatives introducing European-like legislation undertaken outside of legal obligations. The second question, in turn, deals with the relationship between institutional and socio-economic factors driving towards Europeanization of private law in Central and Eastern European countries.

When considering the domestic impact of EU law on private law, this project analytically distinguishes three sets of factors by which European requirements may trigger domestic institutional change.

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<sup>22</sup> See F Schimmelfennig and U Sedelmeier, ‘Theorizing EU enlargement: research focus, hypotheses, and the state of research’ (2002) 9 *Journal of European Public Policy* 500, 514.

<sup>23</sup> Cf European Parliament resolution on European contract law of March 23, 2006 that at point six ‘calls for differing legal traditions and systems to be respected.’ On the influence of historical legacy on private law in CEECs on the example of the concept of collective interest of consumers as employed in Polish legal systems across the time see M Safjan, L Gorywoda and A Janczuk, ‘Taking the Collective Interest of Consumers Seriously: A View from Poland’ in F Cafaggi and H-W. Micklitz (eds.) *New Frontiers of Consumer Protection: The Interplay Between Private and Public Enforcement* (Intersentia 2009).

First, and in its most simple form, EU may produce domestic change by prescribing actual legal and institutional requirements with which a given state must comply ('approximation clauses' or other clauses forcing implementation or adjustment as an example of legislative technique of Europeanization). That means that EU actually prescribed an institutional model to which domestic arrangements had to be adjusted. Thus, countries had only limited degree of discretion when deciding on specific arrangements in order to comply with European requirements. Here the question is how legal obligations influenced modes of implementation of EU law in national private law systems. This question hinges upon the principle of institutional autonomy and requires to evaluate whether there is a difference between institutional autonomy of OMS and NMS.

Second, Europeanization may occur indirectly through market-driven factors inducing the adoption of EU-like legislation. For example, incentives to adjust legal standards by a given non-EU state could stem from the need of entering into trade arrangements with the EU. In this case, states had much higher degree of discretion when deciding on adjustments of their domestic regimes (allowing them for innovation) than in the first scenario (Europeanization by legislation). Thus, European influence is confined to altering domestic trading structures.

Third, also an example of indirect influence, institutional and cultural factors may play a role in the strategies of Europeanization of private law. For example, twinning projects and – formally outside of the Europeanization process – various arrangements for consultancy, such as the programs set up by the International Monetary Fund and the World Bank for the economic transformation of CEECs in 1990s.

To sum up. This project is concerned with the Europeanization of national private law and, more specifically, with the extent to which the implementation of European policies implies adjustments in domestic institutions, such as dominant regulatory styles and structures in sectors governed by private law mechanisms, and it has identified three sets of factors triggering Europeanization of national private laws: (1) legal factors; (2) market-driven factors that induce the adoption of EU-like legislation; and (3) socio-institutional and cultural factors. Each set of the factors will be outlined separately.

### 6.1. Legal factors and diversity of obligations

Already before the collapse of the communist system, the EU had conducted negotiations on an individual basis with the CEECs.<sup>24</sup> It had concluded trade and co-operation agreements with Hungary in 1988 and with Poland and the Soviet Union in 1989. In the post-communist period, the EU introduced 'association agreements' as a tool for structuring its relationships with CEECs. Association agreements had earlier been arranged with Turkey from as early as 1963 and led to EU-Turkey customs union in 1996. European association agreements were important to the extent they defined the countries which the EU considered to be most compatible with market economy and electoral democracy models.

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<sup>24</sup> See in more detail on the background to this development under II.

An early differentiation of former communist countries occurred. European agreements were negotiated between the EU and the CEECs from the 1990s. As early as December 1990, the EU negotiated with Czechoslovakia, Hungary and Poland on the content of the agreement that was signed with these countries in December 1991. The agreements aimed to structure relationships between the EU and the CEECs and were conducted on a bilateral basis between the EU and each country. At this stage, however, an agreement did not commit the EU to giving membership: it covered free trade, financial and technical assistance, energy, environment and communications. Agreements also covered the development of laws compatible with the single market, affecting particularly state subsidies, and freedom of competition.

The PHARE program (Poland and Hungary: Assistance for Economic Reconstruction)<sup>25</sup> was introduced in 1990. It provided support for building institutional capacity for the adoption and implementation of EU law and numerous sector-level projects were conducted. After 1991, countries of the Commonwealth of Independent States (CIS, comprising former Soviet republics now independent) received assistance under the TACIS (Technical Assistance to the CIS) program. Its objectives were to promote a country's transition to a market economy and to facilitate introduction of democracy and the rule of law.

EU Enlargement to the CEECs is widely understood as having been an important mechanism for Europeanization. The conditionality for EU membership<sup>26</sup> is seen as providing incentives and sanctions for compliance or non-compliance with EU requirements, such as the 'Copenhagen Criteria' and the transposition of the *acquis communautaire* into domestic law.<sup>27</sup> It has been noted in the literature that agreements between the EU and CEECs were asymmetrical in character as the EU was able to unilaterally determine conditions to these countries.<sup>28</sup>

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<sup>25</sup> The PHARE program was later extended to other countries.

<sup>26</sup> The tool of conditionality is not an EU-invention as it has been extensively used in the fields of international development and international relations. The concept describes the practice of attaching conditions to a loan, debt relief, other type of aid or membership in international organization by international financial institutions, regional organizations or donor countries; cf J Braithwaite and P Drahos, *Global Business Regulation* (Cambridge University Press 2000).

<sup>27</sup> See also U Sedelmeier, 'Pre-accession conditionality and post-accession compliance in the new member states: a research note' in W Sadurski, J Ziller and K Zurek (eds) *Après Enlargement: Legal and Political Responses in Central and Eastern Europe* (RSCAS, Florence 2006); G Pridham, 'The effects of the European Union's democratic conditionality: the case of Romania during accession' (2007) 23 *Journal of Communist Studies and Transition Politics* 241; G Pridham, 'Status quo bias or institutionalisation for reversibility?: the EU's political conditionality, post-accession tendencies and democratic consolidation in Slovakia' (2008) 60 *Europe-Asia Studies* 423. On the enlargement process see the contributions in M Cremona (ed) *The Enlargement of the European Union* (Oxford University Press 2003).

<sup>28</sup> In some cases, though, the EU used its political power to secure its objectives. In the case of Romania, for example, G it has been documented that 'EU pressure was the decisive factor in explaining Romania's compliance with and implementation of conditionality'; G Pridham, 'Romania's Accession to the European Union – Political Will, Political Capacity and Political Conditionality: the Perspectives of Brussels and Bucharest' (2006) XV *International Issues & Slovak Foreign Policy Affairs* 52, 66.

The Copenhagen Criteria had to be met by applicant countries before membership would be granted. The major components of the Copenhagen Criteria were the following:

1. stability of institutions: guarantee of democracy, rule of law, human rights;
2. a functioning market economy, involving considerable de-statization and the formation of privately owned enterprises;
3. capacity to cope with competitive pressures and market forces within the Union;
4. capacity to take on membership obligations (the *acquis communautaire*), including adherence to the aims of EMU (economic and monetary union) and political union.

These components formed a comprehensive bundle of conditions from which intending members, unlike existing ones, could not opt out.<sup>29</sup> In 1994 a strategy of pre-accession was adopted in Essen. In December 1995, the Madrid session of the European Council referred to the need, in the context of the pre-accession strategy, 'to create the conditions for the gradual, harmonious integration of the applicant countries, particularly through: the development of the market economy, the adjustment of their administrative structure, and the creation of a stable economic and monetary environment'. The Madrid Council also requested that the Commission prepare 'opinions' on the ten post-socialist candidate countries (Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia) and Cyprus. These considered the effects of enlargement on the EU, particularly the agricultural and structural policies, and the long-term budgetary outlook. The Commission Report – 'Agenda 2000: For a Stronger and Wider Union' – was delivered in July 1997. There followed a detailed screening process of each country, which negotiated bilaterally with the Commission. The candidate countries had to show the extent to which they had met the conditions of the 31 chapters of the *acquis communautaire*, as set out in the 1995 White Paper.

The Commission's White Paper of 1995 on the Internal Market<sup>30</sup> set out the legislation which the candidate countries would need to transpose and implement in order to apply the *acquis communautaire*, and identified elements essential to the implementation of the single market (known as Stage I measures) which would need priority attention. The White Paper intended to help the candidate countries prepare for integration into the internal market and gave a closer definition of the legislation concerned. It identified the 'key measures' with a direct effect on the free movement of goods, services, capital and persons and outlined the conditions necessary in order to operate the legislation, including the legal and organizational structures. The areas of EU activity were examined, dividing the measures into two stages, in order of priority, to provide a work program for the pre-accession phase. The Technical Assistance and Information Exchange Office (TAIEX) was set up with the objective of providing complementary and focused technical assistance in the areas of legislation covered in the White Paper. A legislative database was established by the Office.

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<sup>29</sup> 'They had no opportunity to back out of crucial chapters. Unlike 'old' members, they had to accept in principle joining the European Monetary Union (EMU) when they were ready, and could not opt out (as did Britain, Denmark and Sweden). They also had to have independent central banks, a condition that constrains a government's economic policy. (...) Financial stability ruled out Keynesian-type state investment promoting growth, although it should be noted that new members (such as Ireland and Spain) have benefited from large EU transfers that have boosted investment.' D Lane, 'Post-Communist States and the European Union' (2007) 23 *Journal of Communist Studies and Transition* 461, 467.

<sup>30</sup> Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union – White Paper. COM (95) 163 final, 3 May 1995.

As a follow up to the White Paper, CEECs established various institutional structures to administer the pre-accession requirements. For example in Poland, each Ministry was required to establish an EU Integration Unit, 29 working groups were set up to work on pre-accession implementation, and there were published in 1996 a series of legal studies outlining its path to approximation.

Preparation of the candidate CEECs focused almost exclusively on harmonization, and little attention was paid to areas where there was no harmonization, but which were affected by the rules governing free movement and which would have to stand the test of proportionality upon accession. It has been noted in the literature that

‘the new Member States will defend their national values not necessarily as an attempt to promote protectionist aims, as sometimes still happens in the former Member States, and will likewise occur in these new countries, but rather in order to make the Community rules workable in the context of their different market conditions, and in the context of their social, legal, and cultural values.’<sup>31</sup>

**Table 1: Level of integration achieved by an agreement with the EU**

Countries/ Agreements	Coopera- tion Agreement	Europe Agreement/ SAA	Application for Accession	European Partnership	Accession Partnership	Accession to the EU
Poland		1991	1994		2001	2004
Hungary		1991	1994			2004
Czech Republic						2004
Slovakia						2004
Romania		1993				2005
Lithuania	1992	1995				2004
Estonia						2004
Latvia						2004
Slovenia						2004
Macedonia	1997	2001	2004	2006	2007	
Serbia	2004, 2006	2008				
Turkey					2001	

<sup>31</sup> M Józson, ‘The Enlarged EU and Mandatory Requirements’ (2005) 11 European Law Journal 549, 549 (discussing the limits and possibilities of the current regulatory approach of the Internal Market under the specific market conditions and legal culture of the enlarged EU).

**Table 2: Level of integration achieved by an agreement with the EU**

Countries/Agreements	Partnership and Cooperation Agreement	Action Plan/Common Strategy/Others	Other (new) enhanced agreement
Moldova	1994	2005	
Russia	1994	1999, 2005 (Road Maps on Four Common Spaces)	

The project has identified different obligations concerning adoption of European legislation according to the five categories of countries. The study of the agreements with the EU has revealed references to: implementation of the *acquis communautaire*, approximation and compatibility.

Most of the approximation clauses read that the applicant country ‘shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community’. This is the case of Europe Agreement with Romania, Slovakia, Czech Republic, Lithuania, Estonia and Slovenia. However, there is no reference to ensuring compatibility in a *gradual* way in the Europe Agreement with Poland and with Hungary. Furthermore, whereas the relevant clause for Poland imposed an obligation of using ‘best endeavours’ (Article 68 of Polish Europe Agreement) to ensure compatibility, the Hungarian clause simply read that Hungary ‘shall act to ensure that future legislation is compatible with Community legislation as far as possible’ (Article 67 of Hungarian Europe Agreement).

There are also differences related to the areas to which the approximation obligations were extended. Whereas reference to telecommunications is made with respect to Estonia (Article 69 of Estonian Europe Agreement), Latvia (Article 70 of Latvian Europe Agreement), Lithuania (Article 70 of Lithuanian Europe Agreement) and Slovenia (Article 71 of Slovenian Europe Agreement), there is no such reference concerning Europe Agreements with Czech Republic, Hungary, Poland, Romania and Slovakia. Another approximation obligation which has been asymmetrically framed with respect to CEECs relates to product liability. Whereas product liability is not explicitly mentioned in Europe Agreements with Czech Republic, Poland, Romania, Slovakia, Slovenia, it is enlisted as an independent field among those requiring approximation for Estonia (Article 69 of Estonian Europe Agreement), Latvia (Article 70 of Latvian Europe Agreement) and Lithuania (Article 70 of Lithuanian Europe Agreement). In the case of Hungary product liability is listed as a subset of consumer protection measures (Article 68 of Hungarian Europe Agreement). There is no mention to telecommunication and product liability also in the Partnership and Cooperation Agreement between the European Communities and their Member States and the Republic of Moldova.<sup>32</sup>

Whereas some of the Europe Agreements stress a need of ‘rapid progress’ in the approximation of law in given fields, other omit such qualification. There are also examples where direct courses of action which the applicant country is obliged to undertake are set out. For example, it has been explicitly imposed on Turkey to adopt a new commercial code.<sup>33</sup>

<sup>32</sup> Official Journal L 181, 24/06/1998.

<sup>33</sup> Council Decision 2008/157/EC of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC, Official Journal L 51, 26/02/2008.



Some of the instruments refer to ‘progressive approximation of legislation’ (Common Strategy of the European Union of 4 June 1999 on Russia, 1999/414/CFSP). Furthermore, differences in the way the obligations are framed relates to the sectors and concern the level of detail in which the requirements are spelled out. Finally, institutional mechanisms envisaged in the agreements with NMS, CC, PCC, NCC and Partners show some degree variety.<sup>34</sup>

Variety of wording and structures of the clauses shows different degree of bindingness and different degree of discretion granted to the states when adjusting their private law systems to EU policies.

At the beginning, in the context of enlargement, basically the candidate states had to accept the *acquis*. Currently, the texts of the agreements go further and the phrases mentioning the *acquis communautaire* have a higher ‘obligatory’ wording. For the ten candidate countries ‘the basic principle (...) that the entire *acquis communautaire* must be accepted as binding’<sup>35</sup> was accompanied by the ‘importance (...) of ensuring its effective application through appropriate administrative and judicial structures’.<sup>36</sup> The *acquis communautaire* therefore constitutes currently a compulsory reference framework for countries wishing to gain accession as well as for the Union, and thus indirectly for the countries which are already members.<sup>37</sup> This leads inevitably to the question of the precise content and contours of this framework.<sup>38</sup>

## 6.2 Market-driven factors inducing adoption of EU-like legislation

The questionnaire has identified various patterns of Europeanization of national private law grounded in market mechanism (i.e. price mechanism). For example, incentives to adjust legal standards by a given non-EU state could stem not from a particular legal requirement but from the need of entering into trade relationships with the EU to increase its GDP.

## 6.3 Socio-economic and institutional factors

As an example of indirect influence, institutional and cultural factors may play a role in the strategies of Europeanization of private law.

The twinning programs between CEECs and EU public administrations assisted the implementation of European rules in specific areas. For example, the Polish Financial Supervision Authority benefited from a project on the implementation of the methodology of Supervisory Review Process for investment firms in accordance with the Capital Requirements Directive.<sup>39</sup>

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<sup>34</sup> For a description of the adaptation process to the EU requirements undertaken by Ukraine see R Petrov, ‘How Far to Endeavour? Recent Developments in the Adaptation of Ukrainian Legislation to EU Laws’ (2003) 8 *European Foreign Affairs Review* 125.

<sup>35</sup> Case C-259/95, *Parliament v. Council*, (1997) ECR I-5313, para. 17.

<sup>36</sup> Regular reports from the Commission on progress towards accession by each of the candidate countries, COM (1998) 712 final 17 December 1998, p. 19.

<sup>37</sup> See also R Petrov, ‘Exporting the *Acquis Communautaire* into the Legal Systems of Third Countries’ (2008) 13 *European Foreign Affairs Review* 33.

<sup>38</sup> See C Delcourt, ‘The *Acquis Communautaire*: Has the Concept Had its Day?’ (2001) 31 *Common Market Law Review* 829. See also C Curti Gialdino, ‘Some reflections on the *Acquis Communautaire*’ (1995) 32 *Common Market Law Review* 1089.

<sup>39</sup> D D Toshkov, *Between politics and administration: compliance with EU Law in Central and Eastern Europe* (PhD Thesis, Leiden University 2009) available at <<https://openaccess.leidenuniv.nl/handle/1887/13701>> (accessed 17 June 2009).

At the same time, CEECs have been an object of various programs involving exchange of officials and consultancy arrangements, the later also within a global framework as coordinated by the IMF and the World Bank.

Legal technical assistance programs focused primarily on improving the statutory laws in non-EU countries and operated on the assumption that supplying the ‘right’ laws on the books would enhance legality, and ultimately economic development of these countries. However, many of these programs have not produced the expected results. The most obvious example is Russia, where the drafters of the corporate code now admit that the idea of picking the right laws and thereby enhance corporate governance has essentially failed.<sup>40</sup> On the other hand, some of them have succeeded.<sup>41</sup>

Furthermore, after the 1989 turning point many foreign law firms – mainly of US origin – established their local branches in the CEECs. Preliminary research provided evidence that those law firms assisted in drafting statutes implementing EU law in CEECs. It seems plausible to assume the common law background of these lawyers-drafters has had an impact on the design of the national rule implementing a given EU requirement.<sup>42</sup> Further evidence is needed to test the accuracy of this proposition.

## **7. *Patterns of Legal Europeanization of Private Law***

Notwithstanding the growing number of studies consistent and systematic framework to account for the varying patterns of institutional adjustment across countries and policy sectors is still lacking. Empirical evidence indicates a great variety in domestic patterns of Europeanization. In order to understand the varying impact of European integration on domestic arrangements and structures, the first systematic cross-national studies advocated a more differentiated approach.<sup>43</sup> They argued that the domestic impact of EU varies with the level of European adaptation pressure on domestic institutions and the extent to which the domestic context (including institutional opportunity structures and constellations of domestic actors) facilitates or prohibits actual adjustments to European requirements.

The evidence gathered through the questionnaire has demonstrated different patterns of legal Europeanization of private law in CEECs. First pattern concerns Europeanization due to implementation of agreements or obligations associated to memberships. Second pattern describes Europeanization due to legal transplants from MS to non-members and from OMS to NMS.

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<sup>40</sup> B S Black, R Kraakman and A Tarassova, ‘Russian Privatization and Corporate Governance: What Went Wrong?’ (2000) 52 *Stanford Law Review* 1731. See also V Meier, ‘The transition in Eastern Europe: what went wrong?: the responsibility of the West’ (1993) 24 *Est-Ovest* 9.

<sup>41</sup> See, for example, E L Glaeser and A Shleifer, ‘The Rise of the Regulatory State’ (2003) 41 *Journal of Economic Literature* 401 discussing the reform of the Polish securities market and the factors which made it successful. In general see D Nelken, ‘The Meaning of Success in Transnational Legal Transfers’ (2001) 19 *Windsor Yearbook of Access to Justice* 350. For CEECs see T W Waelde and J L Gunderson, ‘Legislative Reform in Transition Economies: Western Transplants – A Short-Cut to Social Market Economy Status?’ (1994) 43 *International and Comparative Law Quarterly* 347.

<sup>42</sup> On the influence of US law and lawyers in Europe see W Wiegand, ‘Reception of American Law in Europe’ (1991) 39 *American Journal of Comparative Law* 229. For CEECs see C E Anderson, ‘Exporting Democracy: US Lawyers Help Eastern Europe Draft New Constitutions’ (June 1990) *ABA Journal* 18 and J Davison, ‘America’s Impact on Constitutional Change in Eastern Europe’ (1992) 55 *Albany Law Review* 793.

<sup>43</sup> C Knill, ‘Implementing European Policies: the Impact of National Administrative Traditions’ (1998) 5 *Journal of European Public Policy* 1; C Knill and A Lenschow, ‘Coping with Europe: the Impact of British and German Administration on the Implementation of EU Environmental Policy’ (1998) 5 *Journal of European Public Policy* 595; T Borzel, ‘D Lehmkuhl, The Importance of Small Differences. The Impact of European Integration on the Associations in the German and Dutch Road Haulage Industries (Thela Thesis, The Hague 1999).

Third pattern deals with Europeanization within EU due to legal transplants between MS beyond EU legislation, especially related to the process of recodification. Here, an important role of the Dutch Civil Code, of the Swiss Civil Code and of the reformed BGB has been noticed. Finally, the role of twinning projects as an instrument for horizontal legal transplants has been also evidenced by the data gathered through the questionnaire.<sup>44</sup>

In general, horizontal and vertical legal transplants have been identified. Horizontal legal transplant imply interaction among different legal systems, which can take place for single rules or institutions or for entire branches of law, and can be determined by different reasons which range from prestige to forced imposition.<sup>45</sup>

Thus, horizontal legal borrowing occurs when one co-equal legal system borrows from another, such as Europe borrowing from the US, or one European member state from another EU member state.<sup>46</sup> Vertical legal transplant, in turn, occurs when a supra-governmental regime borrows from its own constituent members, such as the EU-level institutions borrowing from EU member states.<sup>47</sup> The Better Regulation initiative is a conscious exercise of legal transplanting. This borrowing has been both horizontal and vertical.

Looking at the countries, different patterns of legislative Europeanization of private law in CEECs have been found. First pattern concerns implementation of EU legislation combined with recodification based on modes adopted by one MS; in this case Europeanization operates both vertically and horizontally.

Second, in candidate countries adoption of European-like legislation can be based on direct references to EU legislation or MS implemented legislation. Third, often candidate and neighboring countries look at MS and follow EU implemented legislation.

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<sup>44</sup> In the literature see P H Brietzke, 'Designing the Legal Frameworks for Markets in Eastern Europe' (1994) 7 *Transnational Lawyer* 35 ('Harvard's Jeffrey Sachs and numerous Chicago-trained economists at the International Monetary Fund, the World Bank, and the US Agency for International Development assumed that there were enough similarities in human behavior and economic mechanisms to make textbook microeconomics directly applicable to recent events in Eastern Europe.'). The starting point for the legislative reforms in CEECs has been described by D Lane, 'Post-State Socialism: A Diversity of Capitalisms?' in D Lane and M Myant *Varieties of Capitalism in Post-Communist Countries* (Palgrave Macmillan 2007), 13: 'The disintegration of the state socialist societies in the early 1990s left ambiguous the type of political and economic order which was to replace them. Their fall was not a consequence of the classical pattern of revolution, in which an alternative *ex ante* economic system was postulated in the political policy of the reformers. The major systemic changes advocated by the reformers were the removal of the dominant Communist Party and its replacement by democratic forms and a move to markets in place of centralized planning.'

<sup>45</sup> See A Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd edn (University of Georgia Press, Athens 1993) and A Watson, 'From Legal Transplants to Legal Formants' (1995) 43 *American Journal of Comparative Law*, 469-476. Turkey and Armenia are examples of extreme borrowing from codes of other countries, see A Watson, 'Legal Transplants and European Private Law' available at <[http://www.alanwatson.org/legal\\_transplants.pdf](http://www.alanwatson.org/legal_transplants.pdf)> (accessed 13 June 2009).

<sup>46</sup> See, for example D Borcan, 'New bankruptcy laws in central Europe: The influence of American, French and German law' (2002) 33 *Revue d'Etudes Comparatives Est Ouest* 93. See also G Ajani, 'By Chance and Prestige: Legal Transplants in Russia and Eastern Europe' (1995) 43 *American Journal of Comparative Law* 93.

<sup>47</sup> A framework of legal borrowing that adds the vertical dimension (between states and federal and international bodies) is developed in J B Wiener, 'Something Borrowed for Something Blue: Legal Transplants in the Evolution of Global Environmental Law' (2001) 27 *Ecology Law Quarterly* 1295.

## **8. *Different Modes of Adoption of EU Legislation and General Principles***

The project has identified different modes of adoption of EU legislation. EU legislation may be adopted: (1) through legislation; (2) through administrative agencies; (3) through judiciary; and (4) through private organizations, including law firms (here we speak not about adoption but about Europeanization).

### **8.1 Europeanization of private law through legislation**

Europeanization may occur through legislation. Three patterns have been identified: (1) by integration in civil, commercial codes and consumer codes; (2) by compound legislation in comprehensive Acts; and (3) by piecemeal legislation.

Clearly the choice of each strategy has a different impact on national systems of private law and, in consequence, on market design.

### **8.2 Modes of adoption through administrative agencies**

The next identified mode of adoption of EU law is through administrative agencies. The focus of the project is on three issues. First, the role of executive and in particular of administrative agency networks as a vehicle of Europeanization of private law in NMS has been investigated. Second, in the competition field, the role of the network of competition authorities in ensuring Europeanization has been analyzed. Finally, in financial markets, the role of CESR, CEBS and CEIOPS has been addressed.

### **8.3 Modes of adoption through judiciary**

Preliminary research has identified two patterns of adoption of EU law through judiciary. The first one is exemplified by references made by judges to EU legislation or case law. The second one has to do with judicial cooperation, both formally and informally structured.

### **8.4 Modes of Europeanization: the role of private organizations**

The evidence gathered allows for preliminary findings. The role of international law-firms in Europeanization is relevant but varies from sector to sector and also from country to country. The role of multinational firms as ‘Europeanizer’ is also relevant. The role of NGO’s in particular consumer and environmental organisations is relevant but weaker than that of market players.

## **9. *Differences in Sectors***

The three sectors were chosen to examine which differences exist among areas all related to market design. The research question associated to choice of different fields concerns different paths of continuity and discontinuities with pre-existing legal regimes.

## **10. *Conclusions***

The research design of this project frames Europeanization of private law as a process and not as a product. The objective of the project is to understand the mechanism of institutional changes in CEECs

triggered by the Europeanization process. Accordingly, the selection of countries and sectors have been instrumental to the development of a framework enabling to investigate the core issue of the project which is the process in which the phenomenon of Europeanization has been taking place. Conditionality and other political elements have constrained this process but despite these factors the research can provide useful indications also for the OMS and the EU as a whole. In particular, the project aims at developing a systematic set recommendations for a design of a differentiated Europeanization strategy which would take into account the specificities of CEECs.

On the basis of the evidence gathered through the questionnaire and the follow-up a broad picture of the Europeanization of private law in CEECs has been developed. At this stage, the research has covered a broad range of issues both country-wise and sector-wise. At the next stage, a selection will be made. As to the countries, the objective will not be to produce a full picture of the respective developments in a comparative way, but to choose the representative countries across the identified five groups in order to identify different patterns of Europeanization and to compare them. Sector-wise, as there is a correlation between the choice of the sectors and goals of the project, sectors will be selected to observe what the mechanisms of institutional change are.

The issue of continuity as framed in the questionnaire went further back than to the period of communism. The choice is motivated by the fact that the project looks at the extent to which the legal tradition of CEECs have interplayed with the political dimension of communism and what impact this interplay has had on the current institutional framework. Accordingly, the focus is on potential tension between legal tradition which is based on European models and institutional tradition which has been highly influenced by the communism, or in other cases as in Turkey, by other types of constitutional or political traditions as this tension might affect the process of Europeanization.

Preliminary research has revealed that CEECs suffer from enforcement problems. Accordingly, institutional perspective of the project will be developed to address the question of how soft law based strategies at the EU level might work in the areas where enforcement issues are problematic.

From a methodological standpoint, the project envisages to extend the range of instruments for data-gathering and data-analysis. Questionnaire provided the data to describe the landscape from which the project moves. Other instruments, as impact assessment of ECJ judgments to understand the institutional dynamics behind the Europeanization process (Who uses ECJ judgments and for what purposes? What explains the tendency of lower courts to use refer more than higher courts to ECJ judgments? What is the impact of ECJ judgments on administrative agencies?) are being considered.

Finally, the project has a double scope. Scientific scope will translate into a systematic characterization of patterns of Europeanization of private law in CEECs. In its institutional vest, in turn, the project aims at establishing a network – coordinated by the European University Institute – of scholars, judges and policymakers concerned about the Europeanization strategies.

## **II. Institutional Framework (Marise Cremona and Karolina Podstawa)**

This section provides a general overview of the institutional frameworks established by various agreements concluded by the European Union (EU),<sup>48</sup> instruments adopted by the EU and documents issued by the EU institutions, which establish the legal basis for the approximation of national laws to European law in two fields: competition and consumer protection. This necessarily brief overview will therefore refer mainly to those frameworks and instruments which are relevant for these two fields of research.

At the same time, the research field is limited geographically – it is to focus on Central and Eastern European states – 'new' member states (with the exception of Cyprus and Malta), candidate states (Croatia, Former Yugoslav Republic of Macedonia and Turkey), potential candidate states (Serbia), neighbouring states (Ukraine and Moldova) and Russia.

### ***1. The New Member States of Central and Eastern Europe***

#### **1.1 Enlargement and pre-accession strategy**

The enlargement and pre-accession strategy of the European Union has been developed since the 1993 Conclusions of the European Council through a set of policy documents of the European Council and with the aid of a 'White Paper' of the European Commission drawn up in 1995 at the request of the European Council. On its basis one may observe the way in which the initial strategy was monitored by the Community institutions and the way it was transformed into concrete initiatives described below.

Ever since the political decision taken in 1993 concerning the accession of the Eastern and Central European countries to the European Union, the set of conditions and instruments allowing for such an expansion has been developed by the Union. Thus, fulfilment of both political (stability of democratic institutions, observance of human rights standards etc.) and economic criteria was required. Amongst the economic criteria a prominent place was taken by the need to ensure sufficient conditions for competition and therefore managing the transition from a centrally-planned to a free market economy. Assistance was to be predominantly delivered through mechanisms established by association agreements, signature of which was a priority at the time. Similarly, approximation of laws conducted with the help of the Union was perceived as one of the main instruments supporting the creation of such conditions. The Conclusions of the European Council adopted in Copenhagen in 1993<sup>49</sup> emphasised that the Community and its Member States welcome and support the reform of the economy in the CEE countries. The cooperation between the Union and the CEE countries was geared towards future membership. Within this framework the European Council placed the emphasis on approximation of laws, in the first instance with regard to distortion of competition and *inter alia* protection of consumers. For that purpose officials from the candidate states were to be trained in Community law. More specific conditions for such cooperation were determined by Annex II to the Conclusions where, yet again, the approximation of laws was invoked as the main means for furthering economic integration. The Commission was called upon to open access to Community programmes to candidate states.

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<sup>48</sup> The term 'European Union' (EU) is used here for ease of reference to include both the EU and the European Community (EC); the agreements referred to here were in fact concluded by the European Community, in many cases together with the Member States, as so-called mixed agreements.

<sup>49</sup> European Council, Conclusions of the European Council, (Copenhagen, 21 - 22 June 1993).

The subsequent Conclusions of the European Council adopted in Essen in December 1994<sup>50</sup> emphasise the role of competition policy in the process of integration. In Annex IV, the Council reported to the Essen European Council on a strategy to prepare for the accession of the associated countries of Central and Eastern Europe. The section on medium term measures is entirely devoted to Competition and State aids policy. The Essen Conclusions call on the Commission to submit a White Paper on the implementation process

The Commission 'White Paper' on Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union of 3 May 1995<sup>51</sup> responds to the call and describes the part of the pre-accession strategy for the associated countries of Central and Eastern Europe. In the 'White Paper' key areas are identified in which approximation of legislation is a priority. Furthermore, the importance of establishment of adequate structures for implementation and enforcement (and therefore of institutional reform) is recognised. It is emphasised in the 'White Paper' that the burden of responsibility rests on the candidate states, yet the Union is also the one who is to act by providing assistance (primarily through the PHARE programme, as well as through the new technical assistance information exchange office). The 'White Paper' provides recommendations as to how the assistance is to be developed and the manner in which candidate states may use it.

A further legal act providing for the enlargement and pre-accession strategy is Council Regulation 622/98/EC on assistance to the applicant states in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships.<sup>52</sup> This instrument provides a general legal basis for the establishment of Accession Partnerships whose specific conditions are to be decided by the Council following a proposal by the Commission.

Finally, the Conclusions of the European Council adopted in Copenhagen in December 2002<sup>53</sup> confirm that this strategy will be continued on the part of the Union; assistance was to be granted to candidate states also after their accession to the European structures.

## 1.2 'Europe' Association Agreements

The 'Europe' Association Agreements, as determined especially by the Copenhagen and Essen Conclusions were to provide the main tools for the gradual integration of the Central and Eastern European economies to the European Community. As such, they were to provide a framework not only for improving market access on both sides, but also for approximation of laws especially in the fields of competition and consumer protection (perceived as priorities by the EU institutions).

The 'Europe' Association Agreements were concluded by the European Community and its Member States with ten States of Eastern and Central Europe in the period between 1993 and 1996.<sup>54</sup> They

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<sup>50</sup> European Council, Conclusions of the European Council, (Essen, 9-10 December 1994).

<sup>51</sup> European Commission, 'White Paper' on Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union *in* COM(95)163 final (3 May 1995).

<sup>52</sup> Council Regulation (EC) No 622/98 of 16 March 1998 on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships.

<sup>53</sup> Conclusions of the Copenhagen European Council, (12-13 December 2002).

<sup>54</sup> Europe Agreement establishing an association between the European Economic Communities and their Member States, of the one part, and Romania, of the other part, (1 February 1993), Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part, (4 November 1993), Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part, (4 October 1993), Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, (8 March 1993), Europe Agreement establishing an association between the

provide for the gradual establishment by the Community and respective states of a free trade area in accordance with the provisions of the 'Europe' Agreements and in conformity with the GATT, together with some commitments on the movement of persons, establishment and the provision of services.<sup>55</sup> All of the 'Europe' Association Agreements entered into by the European Community also include a title on payments, capital, competition and other economic provisions as well as on approximation of laws. In fact, all of those provisions concern the establishment of conditions in which trade and competition may take place without obstruction from customs duties, other trade restrictions or obstacles to establishment or capital movements.

In addition, the Association Agreements contain provisions specifically concerning competition. They list concrete practices which are deemed not to be compatible with the proper functioning of the Agreement (all agreements between market players which in their object or effect distort competition; abuse of a dominant position on the market; public aid). Such practices were to be assessed on the basis of the criteria arising from application of the rules of Articles 81, 82 and 87 TEC. The Association Council is the body responsible for adopting the rules necessary for the implementation of the provisions concerning competition. Although these provisions are directly concerned only with anti-competitive conduct as it affects trade between the parties, it can nevertheless be argued that they imply at least a convergence of domestic competition law with Community norms.

Finally, each Association Agreement includes explicit approximation of laws clauses. Starting from a recognition of the importance of legislative approximation for the economic integration of the States involved, a twofold obligation was placed upon the CEE States and the Community. The CEE States were obliged gradually to enhance the compatibility of their current and future legislation with that of the Community; the Community on the other hand was obliged to assist that endeavour to the extent specified in the Agreements.

The CEE States, on the basis of the 'Europe' Agreements, were to approximate their current and future legislation in a number of specified areas, including the rules on competition and consumer protection<sup>56</sup>. In addition to the general list of areas to which approximation of laws is extended, some countries were specifically obliged to make rapid progress in approximating specific fields, for example Estonia, Lithuania and Slovenia were to particularly focus *inter alia* on internal market, competition and consumer protection. In other cases approximation of laws clauses refer to specific sub-fields of generally defined areas, so for example in the case of Hungary there was a reference to the field of 'consumer protection including product liability'.<sup>57</sup>

Although the provisions of the Europe Agreements relating to legislative approximation are relatively 'soft', with no prioritisation, they were supplemented first by the Commission's White Paper,

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European Communities and their Member States, acting within the framework of the European Union, of the one part, and the Republic of Slovenia, of the other part, (10 June 1996)., Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Estonia, of the other part, (12 June 1995)., Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Latvia, of the other part, (12 June 1995)., Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Lithuania, of the other part, (12 June 1995)., Europe Agreement establishing an association between the European Communities and their Member States, of the one part and the Republic of Poland, of the other part OJ L 348/93 (13 December 1993)., Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, (13 December 1993)..

<sup>55</sup> Usually a Title on Free Movement of Goods and a Title on Movement of Workers, Establishment, Supply of Services.

<sup>56</sup> The full list included the following: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer protection, indirect taxation, technical rules and standards, nuclear law and regulation, transport and the environment.

<sup>57</sup> Article 68 of the Europe Association Agreement with Hungary.



mentioned above, and then in the context of the pre-accession process by the bilateral Accession Partnerships adopted on the basis of Regulation 622/98/EC, which set agreed priorities. The process of accession negotiations, once they were underway, and the Commission's regular annual reports on progress towards fulfilment of the Copenhagen criteria, also contributed what was effectively a monitoring of the candidate States' progress towards adoption of the *acquis*.

The 'Europe' Association Agreements also established certain obligations of the Community in relation to legislative approximation. The Community was to provide the CEE States with technical assistance, including exchange of experts, provision of early information on relevant legislation, organization of seminars, training activities, and assistance with translation of Community legislation in the relevant sectors.

The term 'Technical Assistance' encompasses the range of instruments devised by the European Commission and available to the then Candidate, States within the framework of the Europe Agreements and the pre-accession strategy. The overarching objective of all the instruments is to assist the beneficiary states' efforts in legislative, administrative and judicial reform so that they are in a position to fully implement and comply with the *acquis communautaire*. Beneficiary States are assisted either by the transfer of know-how, or by technical assistance involving investment. The transfer of know-how is provided by the means of three instruments: the Technical Assistance and Information Exchange Instrument (TAIEX), Twinning, and SIGMA; the latter, devised in cooperation with the OECD, being a tool of assessment and monitoring of progress as well as complementing technical assistance. More detailed analysis of these instruments as well as their impact on the implementation of the Community *acquis* goes beyond the scope of this overview, yet some characteristics should be noted.

Within the framework of TAIEX the concerned States receive short term assistance in approximation, application and enforcement of Community law. Expertise provided is thus tailor-made and usually takes the form of seminars, workshops, expert and study visits.

Twinning is the predominant instrument of the Communities for assistance in institution building. Twinning projects have been developed by the European Commission since 1998. In essence, they provide a framework for the involvement of experts from the administration of a Member State (a Resident Twinning Advisor) in projects conducted in a correspondent ministry in a beneficiary country. Twinning projects are designed in such a manner so as to assist implementation in specific areas, and involve additional support in the form of short-term expertise, training, translation and interpreting services as well as a specialised IT assistance. Twinning projects were financed under PHARE, and now by other pre-accession instruments.<sup>58</sup>

## **2. Candidates and Potential Candidates**

After the recent enlargement of the EU, the relationship between the EU and non-EU States in Europe varies depending both on their level of economic and political development and on the EU's political priorities. A distinction has been made in EU policy between those countries covered by the European Neighbourhood Policy (discussed below) and the countries of the Western Balkans.<sup>59</sup> Initial references at the time of the Stability Pact to the 'European vocation' of the Western Balkans and their 'perspective of EU membership' have now become more definite. Since the European Council

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<sup>58</sup> For more on Twinning and instruments involved see the European Commission Website: [http://ec.europa.eu/enlargement/how-does-it-work/technical-assistance/twinning\\_en.htm](http://ec.europa.eu/enlargement/how-does-it-work/technical-assistance/twinning_en.htm)

<sup>59</sup> The Western Balkans in EU policy includes Albania, Bosnia and Herzegovina, Croatia, Kosovo under the UN Security Council Resolution 1244, the Former Yugoslav Republic of Macedonia (FYRoM), Montenegro and Serbia.

Conclusions at Feira in June 2000<sup>60</sup> the Western Balkan states have regularly been referred to as 'potential candidates', and this term also appears in the Preambles to the Stabilisation and Association Agreements already concluded with FYRoM, Croatia and Albania. Croatia and FYRoM are now candidate States and to this group we can add Turkey. Given that it is the aim of this study to give an overview of the institutional framework relevant to the evolution and development of competition and consumer law, this part of the study will not include Kosovo, since efforts there are concentrated currently on the post-war settlement, rather than on creating the framework for economic cooperation. The following analysis will be divided into two parts. The first will focus on the existing framework of cooperation, as it currently stands, in the case of the Western Balkan states the Stabilisation and Association Agreements, and in the case of Turkey the Ankara Association Agreement. Secondly, we will examine the measures undertaken by the EU with respect to potential candidates and candidate states with the view of preparing them for accession.

### **3. Western Balkans**

On 29 April 1997 the Council adopted Conclusions on the principle of conditionality governing the development of the EU's relations with certain countries of south-east Europe.<sup>61</sup> The EU determined the political and economic conditions which were to become the basis of its policy towards those states. The conditions are both general and country-specific, with different levels of conditionality established for the establishment of trade preferences, financial and technical assistance and then the establishment of contractual relations. In an Annex the criteria applied in order to facilitate assessment of the conditions are specified. Thus the list of economic conditions, referred to as market economy reform, comprises: macroeconomic institutions and policies necessary to ensure a stable economic environment; comprehensive liberalisation of prices, trade and current payments; setting-up of a transparent and stable legal and regulatory framework; demonopolisation and privatisation of State-owned or socially-owned enterprises; establishment of a competitive and prudently managed banking sector.

These conditions have continued to play a part in the Stabilisation and Association Process. The European Commission in its Communication to the Council and the European Parliament of 26 May 1999 on the Stabilisation and Association Process for the countries of South-Eastern Europe set out its approach to establishing cooperation between the European Union and Western Balkan States, based on the development of economic and trade relations with the region and within the region.<sup>62</sup>

#### **3.1 Stabilisation and Association Agreements (SAAs)**

Following the guidelines and indicators included in the Conclusions and Commission Communications described above, the Stabilisation and Association Process was initiated and Stabilisation and Association Agreements have been concluded with Albania, Bosnia and Herzegovina, Croatia and the Former Yugoslav Republic of Macedonia. The agreements with Croatia and FYRoM are in force, whilst in case of Albania, Bosnia and Herzegovina and Montenegro, Interim Agreements covering trade are in force pending entry into force of the SAA. In case of Serbia, an Interim Agreement has been signed, but it is not yet in force and will enter into force as soon as the Council decides that Serbia is fully cooperating with the ICTY.

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<sup>60</sup> European Council at Feira, 19-20 June 2000, Presidency Conclusions at para 67.

<sup>61</sup> Bulletin EU 4-1997.

<sup>62</sup> COM (1999)235 final.

All SAAs, and to a limited extent the Interim Agreements, provide similar regimes concerning approximation of laws, competition and consumer protection. Out of the group of Western Balkan states, this study will focus on Croatia and the Former Yugoslav Republic of Macedonia, agreements with which are already in force. The Stabilisation and Association Agreement with the Republic of Croatia was signed on 21 October 2001,<sup>63</sup> whilst the Stabilisation and Association Agreement with the former Yugoslav Republic of Macedonia was signed on 26 March 2001.<sup>64</sup> In the following we will use the SAA with Croatia as a primary point of reference.

The SAA with Croatia includes a separate title (Title VI) on approximation of laws, law enforcement and competition rules. With reference to approximation of laws according to Article 69 (Article 68 of the SAA with the FYROM) Croatia is to '*endeavour to ensure that its existing laws and future legislation shall be gradually made compatible with the Community acquis*'. Unlike the Europe Agreements the SAA defines priority fields for the first stage of approximation of legislation. These are: *inter alia* the fundamental elements of the Internal Market *acquis*. Legal approximation is to be carried out on the basis of a programme to be agreed between the Commission and Croatia. The SAA with FYROM determines that in the first stage of approximation of laws, the selected areas, such as competition, are to be aligned with the Community *acquis* within determined deadlines, the remaining legislation is to be aligned at the end of the transition period.

With reference to competition, Article 70 of the SAA with Croatia (Article 69 of the Agreement with the FYROM) specifies the arrangements which are to be regarded as '*incompatible with the proper functioning of the Agreement*' (abuse of dominant position, state aid, agreements between undertakings). Such practices are to be assessed 'on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular *from Articles 81, 82, 86 and 87 of the Treaty establishing the European Community and interpretative instruments adopted by the Community institutions*.' The SAA also, in Articles 70(3) and (4), specifies the need for Croatia to establish independent bodies with the powers necessary to give effect to these provisions.

Consumer protection is also envisaged as a field of approximation and cooperation in the SAAs. Article 74 of the Agreement with Croatia (Article 97 of the SAA with the FYROM) provides for cooperation between the parties with a view to alignment of standards of consumer protection in Croatia to those of the Community. For fulfilling this purpose

'the Parties shall encourage and ensure:

- a policy of active consumer protection, in accordance with Community law;
- the harmonisation of legislation of consumer protection in Croatia on that in force in the Community;
- effective legal protection for consumers in order to improve the quality of consumer goods and maintain appropriate safety standards.'

Similar provisions are also included in the Stabilisation and Association Agreement with the Republic of Serbia of 29 April 2008, as well as in the Interim Agreement.

### 3.2 Potential candidate/candidate status and pre-accession

Following the Conclusions of the Feira European Council of June 2000, the full integration of the Western Balkan States with the Community was confirmed as an important objective of EU policy. The Commission Communication of 21 May 2003 on 'The Western Balkans and European

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<sup>63</sup> OJ 2005 L 26/3.

<sup>64</sup> OJ 2004 L 84/3

Integration<sup>65</sup> envisages therefore a new type of cooperation which provides the framework for a differentiated approach to the Western Balkan states depending on their progress in the fulfilment of the Copenhagen criteria and the Stabilisation and Association Process. Such cooperation would involve *inter alia* European Integration Partnerships, enhanced support for institution building, participation in Community programmes and support for economic development. The Commission stated in the Communication that

'the task now is to ensure that progress already made is irreversible and the foundation for further steps forward. There is a need to go beyond reconstruction and rehabilitation and to support political and economic transition, including when appropriate the approximation of EU legislation, with a view to the eventual goal of EU membership. The European Union will strengthen its support for the countries of the Western Balkans in their endeavours to meet these challenges.

The Thessaloniki Agenda adopted by the Council of 16 June 2003 and the European Council Conclusions adopted on 19-20 June 2003 outlined the framework of future cooperation between the Western Balkan states and the Community. Emphasis was placed on the European Partnerships which were to be drawn up for each SAP country. Those partnerships identify priorities for action and support in a tailor-made manner the efforts of the Western Balkan states to move closer to the European Union. According to Council Regulation 553/2004 on the establishment of European Partnerships in the framework of the Stabilisation and Association Process,<sup>66</sup>

'The European partnerships shall provide a framework covering the priorities resulting from the analysis of Partners' different situations, on which preparations for further integration into the European Union must concentrate in the light of the criteria defined by the European Council, and the progress made in implementing the stabilisation and association process including stabilisation and association agreements, where appropriate, and in particular regional cooperation'.

Within the European Partnerships particular attention was to be devoted to enhanced cooperation for institution building in the framework of which twinning projects were to be conducted. Twinning projects have been financed under the CARDS programme and are now covered by the Pre-Accession Financial Instrument.<sup>67</sup> European Partnerships have been agreed with Albania, Bosnia and Herzegovina, Montenegro, and Serbia including Kosovo. They establish a detailed framework of priorities and targets, on the model of Accession Partnerships.

The subsequent Commission Communication 'Western Balkans – Enhancing the European perspective'<sup>68</sup> of 8 March 2008 gave a detailed overview of the progress of the Western Balkan states, referring to twinning programmes financed under TAIEX. Projects thus financed also include those focused on the translation of EU legislation with a particular focus on internal market, agriculture, and the justice and home affairs areas.

Both Croatia and FYROM are now candidate states and have Accession Partnerships with the European Union. These documents determine the specific obligations of each State with respect to competition policy, consumer protection, with a broadly-understood approximation of laws required in virtually every field as part of the pre-accession adoption of the *acquis*. Thus with respect to competition policy Croatia is required to introduce measures aimed at making its steel market more competitive, to complete the alignment of its rules with the Community *acquis* with respect to State Aid and to adopt anti-trust control measures. FYROM, on the other hand, should establish anti-trust enforcement controls, *ex ante* control of state aid, strengthen the capacity of the Commission for

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<sup>65</sup> COM (2003) 285 final.

<sup>66</sup> OJ 2004 L 86/1.

<sup>67</sup> Regulation No 1085/2006 of 17 July 2006 establishing an instrument for pre-accession assistance (IPA), OJ 2006 L 210/82.

<sup>68</sup> COM(2008) 127 final.

Protection of Competition and ensure appropriate application of competition law. The Accession Partnerships include also obligations as to consumer protection – both Croatia and the FYROM are to further align with the consumer and health *acquis*, ensuring adequate administrative structures and enforcement capacity.

It is important to note that according to the Enlargement Strategy Report 2008-2009 of 5 November 2008,<sup>69</sup> Croatia is evaluated positively. It is supposed to close negotiations on consumer law in the first half of the 2009, whilst negotiations on competition law are yet to be launched. Similarly, FYROM's progress was noted both in the field of competition and consumer protection. With reference to FYROM no roadmap for further negotiations, however, was determined.

Financial and technical assistance for the endeavours of the Western Balkan states is provided through the Instrument for Pre-Accession Assistance, Regulation 1008/2006/EC.<sup>70</sup> The aim of the instrument according to the preamble of the Regulation is to ensure that all types of assistance on the part of the European Union are accessible to all beneficiary countries.<sup>71</sup>

#### **4. Turkey**

Although the Ankara Agreement of 1963 envisages the possibility of eventual Turkish membership of the (then) EEC, and although Turkey applied for the full membership of the Community as early as in 1987, it became an official candidate state only as a result of the Helsinki European Council of December 1999, accession negotiations being initiated in 2005. The extended timeline of Turkey's cooperation with the Community is connected to the geo-political specificity of this state as well as the fluctuating nature of EU-Turkey relations over a long period. Over many years aspects of Turkey's economic law have been influenced by the Community and have been adjusted in order to further the development of economic integration, in particular through the formation of the customs union in 1995. Hence, both consumer protection and rules of competition have been affected by Community legislation in the framework of cooperation determined by the Community and Turkey.

##### **4.1 The Association Agreement with Turkey**

The Agreement establishing the Association between the European Economic Community and Turkey, known as Ankara Agreement, was signed on 12 September 1963.<sup>72</sup> The main goal of the Agreement was to strengthen economic relations between the parties as well as the improvement of working and living conditions of the Turkish people. The Ankara Agreement provides for the creation of a customs union. According to the Agreement, the Association was to be divided into three phases:

- the preparation phase (5 years unless extended) during the course of which the Turkish economy was to be strengthened with the help of the Community;
- the transition phase (which was to last at most 12 years) in the course of which the customs union was to be created and Turkish law was to be approximated to the Community legal order in order to facilitate trade between the parties;
- the final stage which was to involve the consolidation of efforts and cooperation within the established customs union.

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<sup>69</sup> COM(2008) 674 final.

<sup>70</sup> OJ 2006 L 210/82.

<sup>71</sup> Recital 18.

<sup>72</sup> OJ 1973 C 113.

An Association Council was established which was to assist the parties in case of any problems with *inter alia* competition law (Article 10). Somewhat unusually for Community agreements, the Association Council was given the power to take binding decisions and has adopted a number of important decisions, in particular those relating to the rights of Turkish migrant workers legally resident in EU Member States.

On 22 December 1995 the EC-Turkey Association Council adopted a decision on implementing the final phase of the Customs Union. The decision covers free movement of goods and commercial policy, the agricultural products regime, customs provisions and approximation of laws. The provision for approximation of laws in the Customs Union Decision of the Association Council is elaborate and consists of five sections, each one dealing with a different field of law: Turkey is obliged to approximate its laws to those of the Community in the fields of protection of intellectual, industrial and commercial property, competition, trade defence instruments, government procurement as well as direct and indirect taxation.

The Section on Approximation of Laws on Competition is detailed and provides both for competition rules applicable to the Customs Union and for approximation of legislation. With reference to competition rules within the Customs Union, the decision covers arrangements which are prohibited or deemed void if they impair conditions of competition (Article 32) and exceptions to such provision (Article 32(3)). Article 33 prohibits abuses of a dominant position, whilst Article 34 determines the type of state aid which is incompatible with the proper functioning of the Customs Union. What is more, subsequent provisions of the Decision set out rules of interpretation of practices contrary to Articles 32, 33 and 34 which are to be assessed on the basis of criteria arising from the application of the rules of Articles 81, 82 and 87 of the TEC (and therefore of the case law of the European Court of Justice) and the secondary legislation. The Decision provides also for a consultation procedure as to what measures may be taken by the other party should the aforementioned not be fulfilled, priority being given to measures that will least disturb the functioning of the Customs Union (Article 38).

The Approximation of Laws section then establishes an obligation on the part of Turkey to ensure that its legislation in the field of competition is made compatible with the EC and is applied effectively. Article 39 *et seq.* set out the obligations of Turkey in this respect, including approximation of legislation *inter alia* with regard to state monopolies of commercial character and government procurement. Interestingly, there are no provisions which determine the extent of assistance on the part of the Community to Turkey with respect of approximation of laws. Only Article 40 imposes an obligation on the Community to inform Turkey as soon as possible of the adoption of any Decision under Articles 81, 82 and 87 of the EC Treaty which might affect Turkey's interests. Turkey, on the other hand, may enquire about any specific case decided by the Community under the listed articles. Furthermore, under Article 43 either party may initiate a notification and consultation procedure with reference to any anti-competitive activities carried out on the territory of the other Party, including a request to initiate enforcement action (albeit with no obligation on either side either to initiate or to refrain from such action).

## 4.2 Turkey as a candidate State

It was not until the December 1997 Luxembourg European Council that a formal political decision was taken as to Turkey's eligibility to become a member of the European Union, subject to conditions, and in December 1999 the Helsinki European Council acknowledged Turkey officially as a candidate state.

In 2001 the Council adopted Regulation 390/2001/EC on assistance to Turkey in the framework of the pre-accession strategy and in particular on the establishment of an Accession Partnership.<sup>73</sup> In accordance with Recital 7 of the Preamble, '(t)he Partnership, and in particular its intermediate objectives, should assist Turkey in preparing for membership within a framework of economic and social convergence and in developing its national programme for the taking up of the *acquis* as well as a relevant timetable for its implementation'. The Partnership therefore creates a single framework covering the priorities for preparation of accession as well as financial resources for assistance (Article 1). Article 4 makes reference to the assistance being conditional upon respecting the obligations undertaken in the EC-Turkey Agreements and fulfilment of the Copenhagen criteria.

On the basis of this Regulation, the Council was to adopt decisions specifying the conditions of the Accession Partnership, and has adopted Accession Partnerships for Turkey in 2001 and 2003.<sup>74</sup> The most recent revision was adopted on 18 February 2008.<sup>75</sup> The Accession Partnerships identify the '*main priorities identified for Turkey relate to its capacity to meet the criteria defined by the Copenhagen European Council of 1993 and the requirements of the negotiating framework adopted by the Council on 3 October 2005*'. With reference to regulation of competition, the short term priorities in this decision involved:

- adoption of a State aid law in line with the *acquis* requirements and setting up an operationally independent state aid monitoring authority able to fulfil existing transparency commitments;
- finalisation and adoption of the National Steel Restructuring Programme in line with EU requirements.

As the medium-term priorities the following were identified:

- alignment of secondary legislation in the State aid field;
- ensuring of transparency in the area of state aid in line with existing bilateral commitments; informing the Community of all aid schemes in force and notify in advance any individual aid to be granted.

Similarly, the Partnership identified short and medium term priorities in the field of consumer protection. As the short term priorities the following were determined:

- further alignment with the consumer and health *acquis* and ensuring adequate administrative structures and enforcement capacity;
- strengthening the courts' capacity, including through training, to ensure consistency in interpretation of consumer legislation.

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<sup>73</sup> OJ 2001 L 58/1.

<sup>74</sup> Decision 2001/235/EC (OJ L 85, 24.3.2001, p. 13) and Decision 2003/398/EC (OJ L 145, 12.6.2003, p. 40).

<sup>75</sup> OJ 2008 L 51/4.

The medium-term priorities involve:

- ensuring a high level of protection through the effective enforcement of consumer protection rules and involvement of relevant consumer organisations.

The core of Turkey's obligations in these fields therefore involve approximation of its laws in the specified areas to those of the European Community, effective enforcement and building institutional capacity. Progress is monitored through mechanisms established under the Association Agreements. Turkey is assisted through two financial instruments: programmes adopted before and in 2006 are implemented in accordance with Council Regulation (EC) No 2500/2001 of 17 December 2001 concerning pre-accession financial assistance for Turkey, whereas programmes and projects adopted as from 2007 are implemented in accordance with Regulation (EC) No 1085/2006 on pre-accession assistance (IPA). On the basis of those instruments agreements are made for financing specific programmes.

## 5. *The European Neighbourhood Policy*

The European Neighbourhood Policy was launched in 2004 when the European Commission proposed a comprehensive policy of integration with neighbouring states. It encompasses certain non-Member European states which have not been granted potential candidate or candidate status (eastern European states) and states participating in the Mediterranean Partnership.<sup>76</sup> Given the scope of this project, this section will focus on those ENP states which are relevant to the research – Ukraine and Moldova.

### 5.1 Partnership and Cooperation Agreements

Even before the ENP was launched cooperation between the European Union and Moldova and Ukraine, and other States of the former Soviet Union, was based on partnership and cooperation agreements (PCAs).

Both the PCA with Ukraine<sup>77</sup> and the PCA with Moldova<sup>78</sup> have separate titles covering competition, intellectual, industrial and commercial property protection and legislative cooperation.

With respect to competition the PCAs provide that the Parties '*agree to work*' in order to facilitate competition. Yet, rather than requiring approximation of laws, the agreements obliges the parties to '*ensure that they have and enforce laws addressing restrictions on competition by enterprises within their jurisdiction*'. The corresponding duty of assistance is formulated in the following manner: '*The Parties with experience in applying competition rules shall give full consideration to providing other Parties, upon request and within available resources, technical assistance for the development and implementation of competition rules.*' (Article 49(4)). The PCAs provide also for a consultation procedure within the Cooperation Committee, should competition be distorted.

Separate provisions (Article 51 in the PCA with Ukraine and Article 50 in the PCA with Moldova) refer to approximation of existing and future legislation of partner states to the legislation of the Community. They '*shall endeavour to ensure that its legislation will be gradually made compatible*

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<sup>76</sup> The ENP covers Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine in the East and Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, the Palestinian Authority, Syria, and Tunisia in the Mediterranean.

<sup>77</sup> Council and Commission Decision of 26 January 1998 on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Ukraine, of the other part of 26 January 1998, OJ 1998 L 49/1.

<sup>78</sup> Partnership and Cooperation Agreement between the European Communities and their Member States and the Republic of Moldova, OJ 1998 L 181.



*with that of the Community*'. This process of approximation is to cover *inter alia* rules on competition, consumer protection and company law. The Community is to provide Ukraine/Moldova with technical assistance in the form of exchange of experts, the provision of early information especially on relevant legislation, organization of seminars, training activities, and aid for translation of Community legislation in the relevant sectors.

Finally, both PCAs include provisions concerning consumer protection (Article 75 in the PCA with Ukraine, and Article 72 in the PCA with Moldova). Parties are to enter into close cooperation aiming at achieving compatibility between systems of consumer protection. Several means of cooperation are described, including *inter alia* the provision of expertise on legislative and institutional reform, training activities for administration officials and other consumer interest representatives, the development of exchanges between the consumer interest representatives, and increasing the compatibility of consumer protection policies.

## 5.2 The ENP framework

The European Neighbourhood Policy, as launched by the European Union in 2004, covers both Eastern and Southern neighbours of the European Union. Contractual relations with the ENP states are either in the form of PCAs (the Eastern neighbours) or Euro-Mediterranean Association Agreements (the Southern neighbours). The exceptions, where no agreement with the EC is yet in force, include Belarus, Libya, and Syria. Negotiations for a new enhanced agreement with Ukraine were launched in March 2007.

Since 2004, the Commission – chief architect of the policy – has developed a number of instruments which also concern competition and consumer regulation. The Commission Communication to the Council and the European Parliament 'Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours' of 11 March 2003<sup>79</sup> provides the initial outline for the policy and the means to facilitate achievement of its objectives. The new vision, as described by the Commission, was to work towards an area of prosperity and security, through the provision of concrete benefits to the neighbouring states corresponding to the progress made by them in terms of their political and economic reform. According to the Commission

'(i)n return for concrete progress demonstrating shared values and effective implementation of political, economic and institutional reforms, including aligning legislation with the *acquis*, the EU's neighbourhood should benefit from the prospect of closer economic integration with the EU. Specifically, all the neighbouring countries should be offered the prospect of a stake in the EU's Internal Market and further integration and liberalisation to promote the free movement of – persons, goods, services and capital (four freedoms).<sup>80</sup>

The Union was therefore to engage in close cooperation including assistance in implementing relevant parts of *acquis communautaire*. The Commission clearly states that Community experience concerning economic integration through the establishment of the internal market, including the development of the four freedoms while ensuring competition and consumer protection, should serve as a model for the neighbourhood countries. To facilitate the transfer of the Community model, the Commission referred to enhanced assistance better tailored to the needs of its partners and new financing instruments.

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<sup>79</sup> COM (2003)104.

<sup>80</sup> Communication on Wider Europe – Neighbourhood – p. 10.

The subsequently adopted European Neighbourhood Strategy Paper of 12 May 2004<sup>81</sup> defined the methodology to be adopted for fulfilment of the ENP goals. The method assumes the identification of a set of priorities whose fulfilment was to bring a state closer to the Union. The set of priorities, incorporated into an Action Plan, was to be tailor-made and to reflect existing relations with a given country. The Action Plan would be reviewed within the existing institutional structures established by the partnership and cooperation or association agreements. Action Plans were to refer *inter alia* to shared values, economic and social policy, trade and internal market. Within the trade and internal market sphere emphasis is placed on 'legislative and regulatory approximation'<sup>82</sup> with the focus placed on relevant fields allowing for alignment with the internal market. Specific actions are to be taken in the areas of energy, transport, environment, information society and research and development. In the Strategy the Commission proposed the development of a new financial instrument – the European Neighbourhood Instrument. This instrument was established as part of the new financial framework for 2007-2013 by means of Regulation 1638/2006 of 24 October laying down general provisions establishing a European Neighbourhood and Partnership Instrument.<sup>83</sup>

All ENP states, including Moldova and Ukraine, have negotiated Action Plans with the EU. Approximation of legislation lying at the core of the ENP is reflected in virtually every section of the Action Plans, as every sphere needs to be aligned with the policy and *acquis* of the EU. With respect to specific obligations with reference to competition law, Moldova is to implement its PCA commitments with reference to state aid and anti-trust law. Similarly, Ukraine is to implement its PCA commitments with reference to state aid law and to develop a state aid regime compatible with that of the EU; it is also to align its anti-trust law in line with PCA commitments and EU law.

In the subsequent Communication of the Commission of 4 December 2006 'On strengthening the European Neighbourhood Policy' it is emphasised that deeper economic integration depends upon achieving a progressive convergence in trade and regulatory areas. In the Commission Communication of 5 December 2007, it is indicated that such deeper integration is to be achieved by means of deep and comprehensive free trade agreements (DFTAs) which are to cover substantially all trade in goods and services as well as strong legally binding provisions on the implementation of trade and economic regulatory issues.

Since 5 March 2007 negotiations with respect to a new enhanced agreement (NEA) with Ukraine have been underway. The shape of this agreement on enhanced cooperation is not yet finalised, nevertheless it is likely to involve establishment of a free trade area. Further elements may be inferred from the Non-paper of the European Commission on 'ENP – a path towards further economic integration'.<sup>84</sup> Thus, as well as a stronger institutional framework, the agreement will most probably include further commitments with respect to competition policy, and bettering consumer protection by improvement of sanitary and phyto-sanitary practice.

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<sup>81</sup> COM (2004)373 final.

<sup>82</sup> Ibidem, p. 15.

<sup>83</sup> OJ 2006 L 310/1.

<sup>84</sup> [http://ec.europa.eu/world/enp/pdf/non-paper\\_economic-integration\\_en.pdf](http://ec.europa.eu/world/enp/pdf/non-paper_economic-integration_en.pdf)

## 6. *Russia*

The contractual relationship between the EU and Russia is based upon the Partnership and Cooperation Agreement of 24 June 1994.<sup>85</sup> The Agreement provides for general conditions for cooperation between the EC and Russia. It includes also some general provisions concerning approximation of laws, competition and consumer protection (Title VI). Yet, none of those contain strong obligations on the part of the parties to the Agreement – instead they may be interpreted as statements of intent. Article 53 of the Agreement provides for the deletion of obstacles to competition in so far they obstruct trade between the parties ‘*through application of their competition laws or otherwise*’, yet does not expressly point to approximation of legislation as to the means of achieving this aim. Instead, in Article 55, entitled *Legislative Cooperation* the parties recognise the importance of approximation of legislation as a condition for strengthening the economic links between Russia and the Community. In this respect Russia ‘*shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community.*’ The approximation of laws is to encompass *inter alia* rules on competition, public procurement and consumer protection. With reference to consumer protection the parties have decided to enter into cooperation ‘*with a view to achieving compatibility between their systems of consumer protection*’ (Article 60(2)). The cooperation is to involve

‘establishment of permanent systems of mutual information on dangerous products, the improvement of information provided to consumers especially on prices, characteristics of products and services offered, the development of exchanges between the consumer interest representatives, and increasing the compatibility of consumer protection policies.’

In May 2003, at the EU-Russia Summit, it was decided to create four "Common Spaces" as an additional basis for developing EU-Russia relations. These were:

- a common economic space;
- a common space of freedom, security and justice;
- a space of cooperation in the field of external security;
- a space of research and education including cultural aspects.

On 10 May 2005, Road Maps for the above Common Spaces were agreed. With reference to the field of competition the Road Map determined as an objective *approximation of competition legislation systems and strengthening of implementation of competition policy of the sides*. Specific actions included strengthening of cooperation of relevant State bodies as well as further harmonisation of competition legislation, including common rules on disciplines applicable to public aids (Article 53.2.2 of the PCA), elaboration of adequate systems of competition and comparison of areas of competition rules and legislation.

In March 2008 a Progress Report on the implementation of the Four Common Spaces<sup>86</sup> was published. According to this document, Russia has indeed made endeavours to approximate its rules of competition to the Community *acquis* on competition – in 2006 a new Russian competition law was adopted to which ‘*the Commission made a significant input*’ and which includes a chapter on State Aid. At the same time it is emphasised that the Commission conducted regular meetings with

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<sup>85</sup> OJ 1997 L 327. A number of other sectoral bilateral agreements exist, for example concerning trade in textiles and steel.

<sup>86</sup> [http://ec.europa.eu/external\\_relations/russia/docs/commonspaces\\_prog\\_report2007.pdf](http://ec.europa.eu/external_relations/russia/docs/commonspaces_prog_report2007.pdf)

representative of the Russian Federal Antimonopoly Service (FAS). In the framework of EU-Russia cooperation there were a number of projects implemented with the FAS; the project "Approximation of competition rules" (which terminated in December 2007) involved *inter alia* a number of traineeships of FAS officials in DG Competition. Furthermore, a twinning project with Italy "Fair competition in the financial sector" took place, terminating in December 2007.

As of the June 2008 EU-Russia summit, negotiations have been launched for a new EU-Russia agreement to replace the PCA. The first round of negotiations took place in July 2008, yet due to the Georgia conflict the EU suspended negotiations and subjected their continuation to the withdrawal of Russia troops to positions held before 7 August 2008. The negotiations were restarted at the EU-Russia summit of 14 November 2008. The Commission in its Communication to the Council containing the Review of EU-Russia relations stated that:

'The EU expects the New EU-Russia Agreement to provide for a comprehensive legally binding framework to cover all main areas of the relationship based on our mutual interests and the international commitments which the EU and Russia have entered into, including promoting respect for human rights and the rule of law.'<sup>87</sup>

It may be therefore predicted that the future agreement will contain further approximation clauses with relation to the main areas of the relationship, including competition rules and consumer protection, in the same way as the enhanced agreement currently being negotiated with Ukraine.

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<sup>87</sup> Communication from the Commission to the Council - Review of EU-Russia relations, (5 November 2008).

### **III. Consumer Law (Hans-W. Micklitz)**

#### ***I. Four Reasons for Research***

The following analysis focuses on consumer law in NMS, CC and PCC. It brings together year long research in the accession process of the NMS, the CC and the PCC. Seen against this background there are at least four major reasons why further research in the field of Eastern European Private law is urgently needed.

*First* and foremost there is a deep lack of knowledge on the basis from where these countries started and even more of how the consumer law looks like today. However, there are differences in between the different categories of countries. The research undertaken within the PHARE project (NMS) which was run by the Centre de Droit de la Consommation, Louvain-la-Neuve in the 1990's was the so far only attempt to analyse the then existing consumer law in the now new Member States. The series of publications which resulted from the PHARE project, have never been officially published. They do not bear an ISBN number, they cannot be bought and they are available only to those who have been lucky to receive a hard copy.<sup>88</sup> This series might serve as a good starting point to define the basis from where all the new Member States started in the nineties. A comparative analysis of the results has, as far as I know, never been undertaken. There is no corresponding knowledge available of how the consumer law looks like in the NMS today. If any, reference can be made to the Consumer Law Compendium, which provides evidence on the degree to which the eight consumer law directives, the so-called consumer *acquis*, have been implemented and enforced in the NMS.<sup>89</sup>

The research landscape outside and beyond the NMS looks even more remote. As a rule, one might start from the premise that the European Commission, whenever it got involved, engaged consultants who were commissioned to analyse the existing consumer law in all CC and PCC's. However, this stocktaking is neither publicly available nor accessible on request. The European Commission understands these reports as being confidential in the sense that they serve as preparatory documents of the envisaged integration process. If any, consultants being engaged at the different stages of the negotiations might gain access to the documents. In so far I would like to refer to my experience in Turkey, where I have been working as a consultant between 2003 and 2007 in the field of consumer law.<sup>90</sup> The situation is slightly better with regard to the Western Balkan, where the GTZ has sponsored a kind of a stock taking of the consumer laws in the Western Balkan.<sup>91</sup>

All these reports, whether they are publicly available or not, suffer from one deficiency – they do neither systematically analyse the origins of consumer law in NMS, CC and PCC nor do they look at possible links to the former communist legal order, which contained already elements of what later became consumer law. The relationship between the national private legal orders as far as they exist(ed) and the emerging consumer law is equally set aside. Consumer law is analysed without its context to civil law. This might explain why today, two different legal worlds exist in most of the

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<sup>88</sup> They are on file with the author.

<sup>89</sup> H. Schulte-Nölke/Ch. Twigg-Flesner/M. Ebers (eds.), *Consumer Law Compendium, The Consumer Acquis and its transposition in the Member States*, 2008.

<sup>90</sup> A more substantive analysis of the Turkish consumer law as it stands today is provided by Y. Atamer/H.-W. Micklitz, *The Implementation of EU consumer protection Directives in Turkey*, 27 *Penn State Int. Law Review*, 551, 2009, 551-607.

<sup>91</sup> H.-W. Micklitz, *The Law of the Western Balkan Countries in the Mirror of Consumer Law A Comparative Analysis of Albania, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia*, June 2008.

countries under review – the Europeanisation of the national private law systems, as discussed within the CFR – and the Europeanisation of consumer law, as discussed in the consumer Acquis. However, a disclaimer has to be made: neither the CFR principles nor the Acquis principles reach beyond CEE's and even these are taken into account to a very limited extent only.<sup>92</sup>

With regard to consumer law, the analysis is therefore quite technical. The then (now) existing EU consumer law acquis is the benchmark against which national rules are tested,

- being enshrined in the civil law system, e.g. consumer sales or unfair terms,
- being integrated into national consumer protection acts adopted prior to the initiation of the accession process and
- last but not least forming part of particular national acts dealing e.g. with the quality, labelling or measuring of consumer products.

This rather technical approach deprives the consultants from the difficulty to get involved into sensitive political areas of law-making and law-enforcement. There are a few exceptions which result if any from academics who are, however, focusing their research interests on their home country or on those countries where they are familiar with. The situation is even worth with regard to NC's or partner countries like Russia. Here very few knowledge on consumer law is available.<sup>93</sup>

*Second:* the overall approach of the European Community as enshrined in the accession policy was concentrating at least in the initial phase on the adaptation of the *substantive* law to the EC law requirements. Consumer law stood side by side with the whole set of EU rules these countries had to overtake. However, consumer law did not enjoy any priority. The European Commission regarded consumer law as the very last field of law which the countries had to look at.<sup>94</sup> This has changed over time, in particular after the accession of the NMS in 2004 and 2007. Today consumer law is playing a much more prominent role in the ongoing negotiations with CC's and PCC's. The old Member States and the Community organs have realised that consumer law forms a constituent part for the shaping of a civil society. This can easily be documented by reference to the development in the Western Balkans, where the change in priorities is most obvious.

This change goes hand in hand with a different approach to the whole integration project via adaptation of the legal system. The Copenhagen declaration constituted the break even point for the EU policy. Since then the European Commission, in particular after the accession of the NMS takes a much harder look at institutional choices. Old Member States and the Community organs have recognised that the adaptation of the legal systems does not suffice, that the countries must establish the necessary institutional infrastructure the requested democratisation process requires. This change in perspective heavily affected the policy of the European Commission. From now onwards the adaptation of national consumer rules to the EC consumer acquis is regarded as just a first step in the

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<sup>92</sup> It is more or less Poland, the Czech Republic and to some extent the Baltic States which are represented in the two projects

<sup>93</sup> See with regard to Russia N. Reich, Die Entwicklung des Verbraucherrechts im postsozialistischen Russland: Vom Klienten zum Konsumbürger, in H.-W. Micklitz (ed.), *Rechtseinheit oder Rechtsvielfalt in Europa? – Zur Rolle und Funktion des Verbraucherrechts in den MOE-Staaten und in der EG*, Band 1 der Schriftenreihe des Instituts für Europäisches Wirtschafts- und Verbraucherrecht (VIEW), 1996, at 183.

<sup>94</sup> See for an early account of the EC policy, Th. Bourgoignie, *The Approximation Process of Consumer Laws of Central and Eastern European Countries to EU Legislation: A Favourable Context but an Urgent Need for Clarification*, in H.-W. Micklitz (ed.) *Rechtseinheit oder Rechtsvielfalt in Europa? – Zur Rolle und Funktion des Verbraucherrechts in den MOE-Staaten und in der EG* (Hrsg. und Autor), Band 1 der Schriftenreihe des Instituts für Europäisches Wirtschafts- und Verbraucherrecht (VIEW), 1996, 91.

overall envisaged democratisation project. The shift in focus directs the attention to the role and function of the executive, the ministries, national agencies, the judiciary and last but not least business and consumer organisations. One might easily add to this scenario the consultants, be they development aid agencies, consumer ministries, consumer agencies and/or consumer organisations within a Twining project. Their role too has tremendously changed. However, this is nowhere explicitly said in the relevant EU policy documents.

So far the reports and analyses available in consumer law largely neglect the institutional dimension of the consumer law adaptation process. One central aspect of the envisaged research project is to put emphasis on the relationship between the integration of the consumer law *acquis* and its impact on institutional choices.

*Third:* even the enlarged approach which takes the relationship between substantive law and institutional choices into account does not consider the different economic, social and local needs of the countries which apply for membership or which seek a close connection to the EU outside formal membership. The benchmark for the whole EU policy with regard to NMS, CC, CCP's and NC's is again and again the consumer law *acquis*. Inherent to the EU policy is the assumption that consumers in the EU deserve the same level of protection all over the EU, including the non-Member States and that the consumer law *acquis* which has been developed in the last three decades mostly in the old Member States fits to the needs of consumers independent of their economic and social status. Whilst one might sympathise with the first assumption the second lacks any realistic background.

Not least through the accession of the 12 NMS the EU has become much more heterogeneous, economically, socially and culturally. With the decision of the Member States to open the door to accession to all Western Balkan countries, to a region which is still struggling with post war conflicts, the diversity has further increased. The EU policy suffers from a deep conceptual flaw which affects both the economic as well as the cultural differences. Two examples might illustrate what is meant. Quite a number of EU directives define a threshold for the applicability of the protective devices. The Directive 85/374 on product liability exempts liability claims for damaged consumer goods below € 500 from the scope of application.<sup>95</sup> This might not necessarily make sense, but it might be comprehensible in developed economies where consumers buy goods far beyond that threshold. However, in NMS, CC's and PCC's this very same threshold considerably reduces the protective ambit of the Directive.

Social and cultural differences come clear in the degree to which certain market activities are of relevance for that particular country. A good example is the now revised Directive 2008/122<sup>96</sup> on time sharing which plays an important role in the old Member States where consumers buy this kind of services as a particular variant of their envisaged vacation strategies. For the Western Balkan the implementation of such a directive simply sets aside the social reality. Here people might face all sorts of consumer problems but certainly not with regard to time sharing contracts. If any the Directive could be understood as a means to open the market for Western European consumers. The deeper background to the conceptual flaw of the EU policy might result from the citizen dimension which is to some extent enshrined in the new EU consumer policy, but which is not (yet) reflected in the consumer law *acquis*, which focuses on the consumer shopper.

The differences in economic, social and cultural needs of consumers in an ever larger European Union challenges the ideology of the whole EU initiated transformation and integration process. It might well be that one set of – if one follows the intention of the European Commission – fully harmonised

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<sup>95</sup> Directive 85/374.

<sup>96</sup> OJ L 33, 3.2.2009, 10.

consumer protection law rules<sup>97</sup> does simply not suffice to deal with the economic, social and cultural realities of the European Union. Maybe countries in transition need different laws and might ask for different priorities. The NMS, CC and PCC's are the target of a Western type consumer policy which in no way reflects the integration process of the last 20 years. Integration is regarded as a one way process where the EU defines the standards and where the non Member States, interested in membership or co-operation have to obey by the rules defined by the EU. There is ample need to take the research into account which deals with the export of western type law to developing countries. There might be lessons to learn from the limits of exporting law as well as from the fact that the exported law is transformed in these countries and that the so transformed law flows back to its sources.<sup>98</sup> One obvious contradiction is that the resistance against full harmonisation comes mostly from the old Member States, whereas the NMS supported by consumer organisations tend to favour full harmonisation. The reasons behind such an attitude will have to be elaborated.<sup>99</sup>

*Fourth:* the initial policy of the EU has been or seems to have been to look after the correct implementation of consumer laws alone. Whenever the respective country did not comply with the EU requirements they had to change their law. Once consumer law is disconnected from its legal environment – the national private legal orders and/or the national laws which preceded Western type consumer laws – co-operation between the EU and the national bureaucracies is facilitated. Both might willingly or unwillingly tend to be satisfied if the consumer law is more or less literally in line with the EU requirements. On paper the consumer law of the respective country complies with the *acquis*. Such a disconnected law might perpetuate an ambiguous legacy from communist times. The new law resembles much more politics than law in the meaning Western democracies attribute to it. It is subject to easy change, it looks as if the legal orders of these countries are now up to the standards of their Western counterparts, but this law in the books remains entirely artificial, disconnected from existing national rules, disconnected from the institutions in charge of its implementation and disconnected from reality.

The consumer law in the NMS, the CC's and the PCC's often looks like a wall which is nicely painted and perfectly built, but if one walks around the wall, one might recognise that the legal wall is not backed by institutions which awake the law in the books to life. This is not to say that all countries look alike. In fact there are enormous differences between the NMS and even more between the CC's and the PCC's. But these differences do not reach the level of political awareness. Whether and to what extent there are institutions such as competent courts and competent administrations in the countries has long been regarded as a *quantité négligeable* which did not affect the yes or no to the accession. The Copenhagen declaration demonstrates the break even point, however, it is a long way down from policy declarations in the Council of Ministers to the reality of consumer law enforcement. It is perhaps one of the most challenging questions within the envisaged project whether and if so, how, the newly introduced consumer laws are enforceable, let alone enforced. The available research with regard to enforcement of consumer law in the NMS, CC's and PCC's is near to zero.<sup>100</sup>

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<sup>97</sup> COM (2008) 614 final, 8 October 2008, see H.-W. Micklitz/N. Reich, *Crónica de una muerte anunciada: The Commission Proposal for a 'Directive on Consumer Rights'*, *Common Market Law Review*, 47 (2009) 471; G. Howells/R. Schulze (eds.), *Modernising and Harmonising Consumer Contract Law*, 2009.

<sup>98</sup> R. Knieper *Möglichkeiten und Grenzen der Verpflanzbarkeit von Recht*, *RabelsZ* Vol 72 2008, S. 88

<sup>99</sup> One possible explanation could be that at least some of the NMS do not have the capacity and the resources to define a national consumer approach, so they rely on the EU to do it on their behalf, see H.-W. Micklitz, *The Relationship between National and European Consumer Policy – Challenges and Perspectives*, *Yearbook of Consumer Law 2008*, Ashgate 2007, 35-66.

<sup>100</sup> H.-W. Micklitz/Thomas Roethe, *Produktsicherheit und Marktüberwachung im Ostseeraum – Rechtsrahmen und Vollzugspraxis*, *VIEW Schriftenreihe*, Band 26, 2008.



## **2. Continuity and Discontinuity**

The continuity/discontinuity paradigm affects the substantive law and the institutional choices. When it comes down to implement the EU consumer law, the NMS, CC's and PCC's have to face the situation of whether they build the consumer law into the existing legal system, thereby putting emphasis on continuity or whether they pave the way for the development of a new legal body separate and disconnected from the old system.

With regard to substantive law one might have to distinguish between countries having a civil law tradition and those who haven't. Countries with an established civil law system have amended their national laws in communist times paying tribute to the then dominating ideology. Whilst these ideological elements have been repealed after 1990, particular rules on what is called today consumer protection, mainly with regard to sales transactions and unfair terms often remained in place.<sup>101</sup> This approach can be found in a number of NMS, such as Poland, Hungary, Czech Republic and the Republic of Slovakia. It remains to be investigated to what extent these countries have integrated consumer law, or parts of the EU consumer law, such as consumer sales law and unfair contract terms law into their civil law codes and if yes, how these rules fit together with rules enshrined in particular consumer protection acts which have been adopted. So far the research puts emphasis very much on areas outside consumer protection such as contract, tort, securities.<sup>102</sup>

On the other end are those NMS which had not had a strong civil tradition or which had not had a separate civil code, such as e.g. the Baltic States. Here the Russian civil law system as developed after the revolution applied until these countries became independent and joined the EU. These countries often revitalised the civil law systems which existed before the Russian occupation. One might assume that these countries were much more concerned with the re-establishment of the national private law systems than with the question whether and to what extent the re-enactment should be done in light of the existence of the EU consumer law *acquis*.

The exception to the rule are countries which have replaced or even substantially revised their national civil system in order to pay tribute to the communist distinction between three types of contractual relations, business relations, relations of the Communist States with the outside world and relations between business (state owned companies) and citizens (consumers).<sup>103</sup> The most consistent model has been presented by the former *Zivilgesetzbuch* of the German Democratic Republic in 1971 which replaced the *Bürgerliches Gesetzbuch* from 1900 that had governed Germany till the foundation of the two Germanies after 1945. The ZGB was repealed after unification. None of the partly very consumer friendly rules e.g. with regard to consumer guarantees remained in place.<sup>104</sup> The former Yugoslavia adopted a genuine civil code thereby replacing the Austrian Civil Code which had governed the private law relations in that region for over a century. One of its major characteristic of the Yugoslavian Civil Code is the integration of commercial relations into the civil code, contrary to the Austrian/German tradition. This code is still valid in the successors of the former Socialist Republic of Yugoslavia, that is in Serbia, Croatia, Macedonia, Serbia and Bosnia Herzegovina. The Code forms

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<sup>101</sup> With a few exceptions, N. Reich, Transformation of Contract Law and Civil Justice in the New EU Member Countries: The Example of the Baltic States, Hungary and Poland, in F. Cafaggi (ed), *The Institutional Framework of European Private Law*, 2006, 271, A. Bakardjieva-Engelbrekt, The Impact of EU enlargement in Central and Eastern Europe: the case of consumer protection, in: F. Cafaggi/H. Muir-Watt (2009), *Making European Private Law, Governance Design*, 98

<sup>102</sup> Tartu Conference on Recent Development in European Private Law, *Juridica International*, Law Review University of Tartu, 2008

<sup>103</sup> See N. Reich, *Sozialismus und Zivilrecht. Eine rechtstheoretisch-rechtshistorische Studie zur Zivilrechtstheorie und Kodifikationspraxis im sowjetischen Gesellschafts- und Rechtssystem*, Frankfurt am Main 1972 (präzise Analyse der Etappen der sowjetischen Zivilrechtsentwicklung).

<sup>104</sup> J.-U. Heuer (ed.), *Die Rechtsordnung der DDR, Anspruch und Wirklichkeit*, 1995.

some sort of a common basis which has survived the Balkan War in the nineties. It contains rules on consumer sales and on unfair contract terms legislation and has the reputation as being relatively open to the social concerns of consumer protection. Again, evidence is missing.

Outside civil law, all former socialist countries, the NMS and the Western Balkan countries have one experience in common: they all adopted in the 1970'ies particular laws on measurement which were aiming at raising the quality of socialist production. Their adoption goes back to a mixture of policy objectives, on the one hand the low quality of consumer products in socialist countries, on the other hand the pressure from West European companies which were ready to transfer the production of spare parts for cars, or furniture or clothes to these countries provided the output met the West European quality standards. These newly adopted laws constituted at the same time the nucleus for a first series of socialist consumer protection laws, providing for remedies to consumers in case of unsatisfactory quality standards. The very burdensome and bureaucratic complaint mechanism still constitutes one of the pillars of consumer protection, not only in the NMS, but also in the CC's and the PCC's.<sup>105</sup>

Under the continuity/discontinuity paradigm it might be interesting to investigate whether and to what extent the laws on measurement constituted the starting point for the development of a genuine western-type consumer law meant to integrate also those consumer law directives, which had no predecessor or counterpart in the socialist economies, such as the directives on doorstep selling, distant selling or on injunctions. Such an approach might help to understand the difficulties in the NMS, CC's and PCC's to handle legal categories which are completely alien to their national legal systems.

It is not clear from the official documents whether the European Commission started and/or starts from continuity. In theory this would have entailed the necessity to investigate the starting conditions in these different Member States, i.e. the existence of a civil code, of particular laws on measurement etc, in order to provide advice on how best to implement the EU consumer law directives. To my knowledge, however, no such effort has ever been made. The official policy was disinterested in the starting conditions of the respective Member States. If such an approach would have existed, it would have allowed the European Commission and the old Member States to better understand the relationship between the law on measurement, quality controls, guarantees and guarantee certificates which till today create so much confusion in the minds of academics and practioners.

At a more abstract level, however, there is a certain continuity between the origins of socialist consumer law and the capitalist westernised consumer law. Both relied on statutory intervention into private law relations, both presuppose the existence of a state (statutory body) who knows the level of protection needed and to ideally look after the enforcement of the respective quality standards i.e. the consumer guarantees. It is here where the link between the substance of the EU consumer law and the institutional setting is most obvious and it is here where the European Commission at least in an early stage seemed ready to rely on existing institutional structures in the NMS to give weight to consumer law. The entities (inspectorates) which were in socialist times responsible for controlling the quality of the product – a meter is a meter is a meter – were seeking new tasks in order to survive the transformation process of the economy where there was no room for quality controls anymore.<sup>106</sup> Consumer law seemed to be the born area for such future activities. The now arising greater concern in enforcement matters, not only in the NMS, CC's and PCC's, seems to tilt the balance towards discontinuity. The development of appropriate institutional patterns of enforcement authorities is just another target for the envisaged research.

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<sup>105</sup> With regard to Turkey, Y. Atamer/H.-W. Micklitz, loc.cit.

<sup>106</sup> Th. Roethe, Zum Konsumentenschutz in den MOE-Staaten, in H.-W. Micklitz (ed.) *Rechtseinheit oder Rechtsvielfalt in Europa? – Zur Rolle und Funktion des Verbraucherrechts in den MOE-Staaten und in der EG* (Hrsg. und Autor), Band 1 der Schriftenreihe des Instituts für Europäisches Wirtschafts- und Verbraucherrecht (VIEW), 1996, 205.

### **3. Modes of Implementation of Consumer Law**

#### **3.1 Legislative implementation**

The legislative implementation, i.e. more particularly, the approach chosen by the European Community in the mid-1990's is relatively well documented. It might be characterised by two major components: 1) the competence struggle between the OECD and the European Commission and 2) the uncertainty on the role of consumer protection in the accession process.

In the early nineties it was far from being clear that the EU would become the sole and key player in Eastern Europe. The OECD had published much earlier than the EU a programme on how the consumer policy in Eastern Europe could look like.<sup>107</sup> It needed the political decision of the Member States in the Copenhagen Declaration which opened the door for the accession of the Central and Eastern European Countries to place the EU in a prominent position. The question then was whether and to what extent consumer law and consumer policy would become an integral part of the official EU accession policy. There was much discussion needed at the EU level and between the EU and the Member States before consumer policy was given at least a certain role in the accession process. The overall mechanism was a two-step procedure which broke down the then existing EU consumer law *acquis* into two sets of rules, ranked according to their priority.<sup>108</sup>

In comparison to the rather crude policy in the European Agreements and the later documents which paved the way for the membership of the NMS, the consumer policy in the political negotiations with the Western Balkan countries seems rather sophisticated. Each step of integration, Trade and Co-operation Agreements, Stabilisation and Co-operation Agreements, status of Potential Candidate or Candidate is associated to an ever deeper degree of adaptation of consumer law. Consumer law and policy is regarded in the Trade and Co-operation Agreements as being part of the market building policy. It is then upgraded in the Stabilisation and Co-operation Agreements to an independent field of political activities in the later stage of the negotiations. A further distinction is drawn between potential candidates and candidates. In so far it seems fair to say that the process is much more organic than it has been conceived in the negotiations with the CEE's.<sup>109</sup> The European Commission publishes regularly progress reports which also document in some detail the development of consumer law and consumer policy in that area.

The parameters of analysis are the Copenhagen criteria and the *acquis communautaire*. Both are not directly connected. This means that the progress reports on consumer law and policy can still be read so as to put emphasis on the compatibility of the national laws with the EU directives. This, however, is only partly correct. The Copenhagen criteria are given much more weight in the progress report. These criteria are, however, not applied to the field of consumer law and policy. If one looks deeper into the substance of consumer law and policy in the SEE countries it becomes clear that the compliance criteria are still very technical. The EU Commission still insists on a more or less literal implementation of the EU consumer law *acquis* thereby setting aside deeper issues of how the new law could be connected to the old one and whether or not the respective countries, i.e. the competent officials in charge of the implementation have really understood the substance behind the different

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<sup>107</sup> Reprinted in Micklitz (ed.), and see the contribution of E. Linke, *Cosnuemr Policy Activities in OECD*; in H.-W. Micklitz (ed.) *Rechtseinheit oder Rechtsvielfalt in Europa? – Zur Rolle und Funktion des Verbraucherrechts in den MOE-Staaten und in der EG* (Hrsg. und Autor), Band 1 der Schriftenreihe des Instituts für Europäisches Wirtschafts- und Verbraucherrecht (VIEW), 1996, 127.

<sup>108</sup> See the comprehensive analysis of Th. Bourgoignie in H.-W. Micklitz (ed.) *Rechtseinheit oder Rechtsvielfalt in Europa? – Zur Rolle und Funktion des Verbraucherrechts in den MOE-Staaten und in der EG* (Hrsg. und Autor), Band 1 der Schriftenreihe des Instituts für Europäisches Wirtschafts- und Verbraucherrecht (VIEW), 1996, 91.

<sup>109</sup> See for details, H.-W. Micklitz, *GTZ*, 2008.

rules. The European Commission is output orientated. What counts is whether or not the respective country has adopted a new set of rules which show the preparedness to bring the national legal system into line with the EU requirements. What has changed, however, is the greater interest in the development and availability of an appropriate institutional infrastructure.

The process as a whole is worth being reconstructed in detail. If one compares the CEE's and the SEE's it is striking to see that the whole EU system of surveillance and monitoring is coming to a halt from the moment onwards where the country has become a member. Recognition of the official status is equated with compliance of the national rules with EC law. In the light of these findings it would be certainly most exciting to get access to the internal protocols and documents which accompany the accession process, both in the CEE's and the SEE's. However, it is easy to predict that such a request for disclosure of information has little chance of success. It might therefore be necessary to look for more indirect sources of information, via interviews with those officials within the European Commission and the respective NMS, CC's, and PCC's who played a key role in the negotiations.

### 3.2 Via separate laws and/or via amendments of the civil law

The European Commission has never expressed loudly and clearly its preference for either model. In so far the European Commission treats the CC's and the PCC's as if they were already Member States which remain free in their decision how to implement the EC directives.

In reality, however, it seems that the NMS as well as the CC's and the PCC's have limited choice. The strong pressure from the Commission, the take-it or leave-it approach, the semi-official neglect of the national starting conditions, of national particularities, of national economic, social and cultural differences urged the NMS and urge the CC's and the PCC's to opt for the seemingly easier solution – the adoption of a separate body of consumer law. The working hypothesis is that the dominance of genuine bodies of consumer laws enhances the tendency to regard consumer law not only as a separate body of legal rules, but as an area of the legal systems which remains only loosely connected to the national civil law rules as well as to the national enforcement mechanisms. Consumer law and national private law are separated

- by different legal languages, the national language enshrined in civil law and laws on measurements on the one side, and the EU language in consumer law on the other,
- by different competencies for the elaboration of the laws, the ministry of justice with regard to civil law, the ministries of trade and industry with regard to consumer law,
- by different national legal communities, on the one hand the civil lawyers which participate to some extent in the process of Europeanisation of private law, the DCFR, and the consumer lawyers who have joined the Acquis principles,
- by different institutions competent for the enforcement, national courts with regard to the civil law, administrative authorities, i.e. ministries or public entities with regard to consumer law, combined with all sorts of ADR mechanisms administered by public authorities.

### 3.3 Role and function of intermediaries in the implementation process

The European Commission is setting the scene. The key actors in the implementation process are consultants coming from all over Europe and abroad and the institutions to which they are linked, universities, consultancy firms, twinning projects, national EC development aid agencies and international organisations, such as the World Bank or non European development aid agencies.

There is a notable difference in the role and function attributed to intermediaries in the implementation process of CEE's and SEE's. In the initial phase of the EU enlargement towards Central and Eastern Europe, the Centre de Droit de la Consommation had a key role to play which came near to monopol. The European Commission has granted the CDC a prominent position in the PHARE project which allowed it to engage consumer lawyers from all over Europe into the diverse implementation projects. The approach chosen was not one per country or per groups of countries, but per subject i.e. per EC consumer law directive. Each group of academics and consumer activists was in charge of one particular directive and its implementation throughout more or less 12 countries. This can easily be demonstrated by looking at the diverse reports which have been made available by the CDC to document the progress in the adaptation process. This rather homogenous approach ended up rather abruptly in the late 1990's before the integration process was completed. In the second stage twinning projects played a prominent role. However, little is known on the number and the participants of the projects.

The situation with regard to the SEE's is different. The European Commission did no longer grant one institution a quasi monopol. Tendering became the rule which changed the institutional framework for the intermediaries considerably. Three phenomena can be observed relatively easily: diversity instead of homogeneity of intermediaries, disruption through change of intermediaries instead of continuity, consultancy firms instead of universities as key players. Whilst this trend is obvious it is in no way clear to what extent the different institutional setting affected and affects the accession process. The European Bank of Reconstruction plays certainly the role of a co-ordinator, in the field of consumer law, however, it is not really visible. One might therefore start from the premise that the diversity of actors might also lead to more diverse approaches to consumer law in the SEE's. However this would have to be tested in the project.

One aspect has to be added: in the Western Balkans, in the NE's or in Russia the European Commission competes with international organisations as well as powerful non-European national development agencies such as USAID. It is very hard to overlook of who is doing what in that region even in the rather narrow field of consumer law. Whilst the project aims at shedding light on the role of the different intermediaries it is by no means clear in what field of consumer law and if any, the different institutional setting produces different legal solutions and different institutional choices.

In the very end, the work has to be done by individuals, by consultants, be they academics, activists, practising lawyers, public officials. It is plain that consultants favour in the very end the adoption of the national legal system they are familiar with – which means in practice the national legal system they have been trained in. This is another variant of the homeward trend so well-known in international private law which needs to be investigated.

## **4. Enforcement**

### 4.1 Internal socio-economic and cultural factors

Looking into the area of enforcement opens up very sensitive issues not only for politics but also for research. The Copenhagen criteria have been setting the agenda and since then the Member States and the European Commission have a mandate to look into the institutional infrastructure of all countries which apply for membership to the EU. That is what the European Commission is doing in particular with regard to the SEE's. The respective progress reports contain data on the administration and the judiciary, its degree of independence, corruption issues and competence as well as on the development of a civil society. The available data are not directly connected to the field of consumer law, although they are equally relevant in consumer law.

The NMS, however, are completely out of reach of any EU policy. Surveillance and monitoring end more or less by the time these countries joined the EU, although it is plain that the Copenhagen criteria are not yet fully met in all the NMS. In the light of the limited data yet available, emphasis has to be put on the development of appropriate research questions which bring the more general findings into a consumer law perspective.

The countries which are subject of analysis, both NMS and CC's and PCC's, suffer to a different degree from overstuffed but under-qualified bureaucracies. Usually the competent ministries are responsible for the enforcement process. They involve in the field of consumer law the so-called market inspectorates which have to survey the market of consumer products. The market inspectorates have been in charge of controlling the quality of products in the communist times. Consumer guarantees and consumer certificates here played and still play a prominent role. One aspect of the research is to look into the origins of the market inspectorates and their transformation to genuine market surveillance authorities. Since the adoption of Regulation 768/2008<sup>110</sup> the Member States and the CC's and the PCC's are legally obliged to cope with the consequences of the establishment of an internal market via the establishment of market surveillance authorities. Surveying and monitoring the market differs considerably from the task of market inspectorates who control the different production and distribution premises.<sup>111</sup> The point then is to what extent the NMS, CC's and PCC's face challenges which differ from their counterparts in the old Member States or whether all authorities have to face more or less similar challenges. If the latter is true, investigation of market surveillance could become a perfect ground in which the one way thinking – from the West to the East, from old to new Member States and/or CC's and PCC's would have to be rethought.

The situation with regard to the judiciary looks very much alike. In theory the Copenhagen criteria require independent and competent judges, easy access to courts and a trustworthy legal environment which allows the citizens to believe into the role and function of judges to enforce the law. In practice there are huge differences between the NMS and between the NMS, the CC's and the PCC's. The conceptual question is how to define a research design which allows for evaluating and maybe even ranking the role and function of the judiciary in the respective states. Whilst there is quite some research available on the role and function of constitutional courts, even on the function of constitutional courts in the field of private law, on governance through courts and judges, all this research is of limited importance for the field of consumer law, in particular in the CC's and PCC's. The starting hypothesis is that perhaps not all but most countries are very much relying on the establishment of appropriate ADR mechanisms which allow the consumer easy access and which avoid the difficult issues of how to get access to not always impartial courts. One may wonder whether there is a link between the socialist heritage of complaints which could be directly lodged at the highest political level – dear Mr. Honecker in Germany<sup>112</sup> – and the development of out-of court mechanisms.

Consumer organisations are on the political agenda as they are regarded as key actors in the development of civil society.<sup>113</sup> In western type democracies consumer organisations are playing a major role in the enforcement of consumer law though to a varying degree. Most of the consumer laws

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<sup>110</sup> OJ L 218, 13.8.2008, 30.

<sup>111</sup> A very telling example is the transformation of the enforcement policy in Sweden in preparation of the accession to the EU, see N. Ringstedt, *Post Market Control of Technical Consumer Goods, Product Safety in Practice – the Experience of the national Swedish Board for Consumer Policies*, in H.-W. Micklitz (ed.), *Post Market Control of Technical Consumer Goods*, 1990, 85.

<sup>112</sup> See in particular the research of Inga Markovits, *Gerechtigkeit in Lüritz*, 2006.

<sup>113</sup> H.-W. Micklitz, *Verbraucherschutz West versus Ost – Kompatibilisierungsmöglichkeiten in der Europäischen Gemeinschaft – Einige Vorüberlegungen*, in: H. Heiss (Hrsg.) *Brückenschlag zwischen den Rechtskulturen des Ostseeraums*, 2001, 137.

adopted during the implementation phase in the countries under review deal rather extensively with the role and function of consumer organisations. The laws set criteria to define consumer organisations, they establish registers and they define their role in the policy making and the law enforcement. These laws reflect a certain reluctance in granting consumer organisations a substantial role to play in the enforcement of consumer law.<sup>114</sup> It seems as if the administrations would like to have a close eye on what these organisations are doing and what they should do. This is certainly the legacy of communist times which could only change over time. What matters in our context is the relationship between underdeveloped courts and non-existent or understaffed consumer organisations. If consumer organisations can go to court, they might exert pressure on the development of a competent infrastructure, if they are barred from standing, they may only approach the ministries and authorities in charge of enforcement to move them into action.

#### 4.2 External factors

It is suggested that the Copenhagen criteria paved the way for exerting influence on the development of appropriate enforcement structures. The question then is what kind of policy the European Commission developed to give shape to this rather broad objective.

It has to be recalled that the European Commission has no genuine competences in the enforcement of consumer law – contrary e.g. to competition law. That is why it is for the Member States to decide on the institutional framework of enforcement. They are in principle free to choose between public – administrative and private – judicial enforcement of consumer law.<sup>115</sup> However, the European Commission has gradually shifted the balance from private judicial to public administrative enforcement. This can be documented by the development from the Directive 98/27 (now 2009/22) on injunctions to the Regulation 2006/2004 on transborder co-operation in consumer law. The former very much relies on consumer organisations in bringing actions before national courts to stop the use of unfair contract terms and to prohibit unfair commercial practices. The latter obliges Member States to establish a public authority which is in charge of transborder co-operation. Whilst the Regulation applies only to transborder consumer issues, the policy of the European Commission clearly is to indirectly putting pressure on Member States to extend the competence of public authorities also to purely national conflicts. For the European Commission the advantage of administrative enforcement is that as an executive body it might participate directly or indirectly in transborder co-operation processes. It does not seem far-fetched to assume that the European Commission will not prevent the NMS, the CC's and the PCC's to lay the enforcement into the hands of public authorities. The more interesting question is whether and to what extent the enlargement process has encouraged and last but not least enabled the shift from private to public enforcement in the old Member States. Whilst such a consequence would prove the two way flow of legal transplants, the next question then is to what extent the emphasis on administrative enforcement prevents the NMS, the CC's and the PCC's from fostering the development of a civil society in which consumer organisations may operate in practice.

The research project would equally have to analyse the role and function of national ministries in NMS, CC's and PCC's during the accession and after the accession process. Roughly speaking these countries were forced by the self-imposed duty to implement the EU law *acquis* to transform the ministries into law making i.e. law producing machineries. In an institutional perspective it is striking to see that the European Commission co-operates with ministries not with parliaments to implement

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<sup>114</sup> H.-W. Micklitz/Peter Rott/Ulrike Docekal/Peter Kolba, Verbraucherschutz durch Unterlassungsklagen, Rechtliche und Praktische Umsetzung der Richtlinie Unterlassungsklagen 98/27/EG in den Mitgliedstaaten, VIEW Schriftenreihe, Band 17, 2007.

<sup>115</sup> See F. Cafaggi/H.-W. Micklitz, Collective enforcement of consumer law: a framework for comparative assessment, *European Review of Private Law* 2008, 391.

the EU law. Whilst this might not be so different from the practice in the old Member States, the question remains to what extent the EU integration process absorbs all resources in these countries, resources which were in theory designed not only to make the law but to enforce it. Once the integration process is completed these very same law making bureaucracies have to transform themselves into monitoring and surveillance authorities. Both tasks require different skills. The field of consumer law might serve as research field to get a better understanding of the impact of the EU, first on the law making and then on the law enforcement.



## **IV. Europeanization of Competition Law (Kati Cseres and Rozeta Karova)**

### ***I. Introduction***

At first sight competition law seems to be lacking a direct link to the developments of private law. However, it plays a significant disciplinarian role in delineating the borderlines of the formulation and the application of private law tools. While private law provides the inner rules of private transactions, competition law regulates the “external effects” of contractual agreements. The complements and conflicts between private law and competition law are imperative. An analysis of the interplay between competition law and private law is, therefore, relevant in discussing the way European private law should be shaped in the future.

The competition law part of the research examines the transfer and implementation of the competition *acquis* and the leverage of EU law in the way competition laws developed in five different groups of countries. The analysis covers the following groups of countries:

- New member states (NMS): Poland, Hungary, Czech Republic, Slovakia, Romania and Lithuania;
- Candidate countries (CC): Croatia, Macedonia and Turkey;
- Potential candidate countries (PCC): Serbia;
- Neighbouring countries (NC): Moldova
- Partners: Russia.

Accession to the EU acted as considerable political and economic pressure and exercised the most significant influence on the way competition laws have been shaped in the above listed Central and Eastern European Countries (CEEC). However, an in-depth analysis of this extra-ordinary law transfer and the way EC law still influences the competition laws in these countries is missing. Such a research seems necessary for five reasons.

First, the available research covers only the competition laws of the NMS and the legal academic discussion has mainly focused on the constitutional law and public administration aspects of EU enlargement. Economic law and specifically competition law has so far received limited attention. The discussion on the impact of European competition law on national competition law concentrated on the question how far the NMS managed to align their legislation with that of the EU and how effectively and accurately the new Member States implemented the *acquis communautaire*.<sup>116</sup> This top down approach was concerned about the ability of these countries to meet the requirements of accession and later membership and was based on conditions set by the EU. Such an approach is appropriate to identify whether adequate rule transfer has taken place and to spot legislative gaps, but it is not an appropriate method to ask whether formal rule transposition has been effectuated by effective

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<sup>116</sup> Ojala, M. *The competition law of Central and Eastern Europe* (Sweet & Maxwell, 1999); D. Geradin, D. Henry, Competition Law in the New Member States – Where Do We Come From? Where Do We Go?, in: D. Geradin, D. Henry (eds.) *Modernisation and enlargement: two major challenges for EC Competition law* (Intersentia, 2005); J. Fingleton (1999), M Fritsch, H Hansen, (eds.), *Rules of competition and East-West integration* (Boston: Kluwer Academic Publishers, 1997).

enforcement and placed in an adequate institutional set up. Such an approach can identify short-term effectiveness but neglects long-term efficiency of enforcement and institutional design.

Second, the experience of the NMS indicate that EU leverage has been the most noticeable and direct on the statutory enactments of competition law, however, it has in an indirect way also influenced enforcement methods and institutional choices. This unusual process of rule transfer exhibited an exceptional influence of the EU on the competition rules of the NMS demonstrated by the fact that these countries often aligned their national laws even further than they were obliged to do. The principles that governed the transfer and the design of economic law merits in-depth research as well as a broader comparison on the way EU law influenced the competition laws in the CCs, PCs and NCs. The analysis of the different degrees of leegroom for domestic liberation in these groups of countries is essential in order to capture the true impact of EU law on law enforcement and institution building.

Third, even though the faithful adoption of EU competition rules have been beneficial as a driving force behind the development of national competition systems, but it is questioned whether the closely aligned rules matched the specific economic and legal needs of the domestic markets, business communities and consumers. This process has been in line with the NMS and CCs and PCs' desire of rapid accession and their joint interest with the EU to demonstrate fast and visible results. However, it has paid less attention to issues related to the small size of these economies and that fact they were in transition from planned economy to a market economy. Moreover, the research on the impact of the new competition law regimes on small and transition economies, the competition process and the private sector is scarce.<sup>117</sup>

Fourth, in the CEECs there seems to be a significant difference between the black letter of the law and its active enforcement. It is key to investigate why and how the CEECs reconcile their legal obligations with the need to address specific market failures of their transition economies and with the need to develop enforcement methods and institutional structure suitable for their local socio-economic circumstances.

Fifth, there are crucial developments in competition policy that directly intervene with national private laws. The ECJ 's judgment in *Courage*<sup>118</sup> not only formulated the Community right to damages for violating EU competition rules but also raised important legal questions related to the core of private law.<sup>119</sup> Present policy papers such as the Green Paper of 2005<sup>120</sup> and the White of Paper 2008<sup>121</sup> on damages claims make specific proposals to address the obstacles to effective antitrust damages actions but at the same time they address the main divergences of tort laws across the various Member States.<sup>122</sup> The documents actually argue that the differences among the various models of tort laws

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<sup>117</sup> J. Hölscher, J. Stephan, Competition Policy in Central East Europe in the light of EU Accession, in: Journal of Common Market Studies, Vol. 42, no 2, pp. 321-45, 2004; M. Dutz, M. Vagliasindi Competition Policy Implementation in Transition Economies: An Empirical Assessment, EBRD, Working papers, 1999; S. Estrin, P. Holmes (1998), 'Competition Policy for Central and Eastern Europe: The Challenge of the Europe Agreements', in S. Estrin, P. Holmes (eds), Competition and Economic Integration in Europe, (Edward Elgar, Cheltenham, 1998); M. S. Gal, Market Conditions Under the Magnifying Glass: General Prescriptions for Optimal Competition Policy for Small Market Economies, Working Paper # CLB-01-004, New York University Center for Law and Business.

<sup>118</sup> Case C-453/99 *Courage v. Crehan* para 26

<sup>119</sup> Such as invalidity of contract clauses, contractual and non-contractual liability, the nature of the damages (direct pecuniary loss and lost business opportunities) as well as the amount of damages, causal link between the damages and the infringement.

<sup>120</sup> Green Paper Damages actions for breach of the EC anti-trust rules, COM (2005) 672 final

<sup>121</sup> White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165, 2.4.2008

<sup>122</sup> In both documents the Commission concluded the exercise of right to damages in Europe is still facing considerable hurdles because the "traditional tort rules of the Member States, either of a legal or procedural nature, are often inadequate for actions for damages in the field of competition law, due to the specificities of actions in this field."

jeopardize the effective private enforcement of European competition law.<sup>123</sup> The Commission in fact makes a far-reaching attempt to bridge “what until now seemed to be the “unbridgeable”.”<sup>124</sup>

It should be added that this process of competition law transfer has taken place parallel with the modernization and the decentralization of EU competition law enforcement, which introduced a new enforcement system. It is important to note that the modernization of European competition law enforcement established a system of close cooperation between the EU and the national authorities and delegated an active role for local/national actors. The new enforcement system that entered into force on 1 May 2004 inherently involved a process of increased Europeanization of competition law in all Member States. It has, moreover, made easier the private enforcement of competition law and encouraged private actors to enforce competition rules before their own domestic courts. The im(com)plications of introducing private enforcement of competition law serves as an example of Europeanization of private law.

The following sections investigate the modes of implementation in the different groups of countries by comparing their legal obligations and the concrete law in the books. This inquiry addresses the substantive as well as the procedural rules of competition law including the legislation on enforcement methods and institutional design. Further, the paper investigates the active invocation of these rules, the formal and informal constraints, the social, economic and political factors that influenced actual enforcement and how the different private and public law actors endorse and seek further reference to primary EU law.

## **2. *Continuity v. Discontinuity***

One of the general questions the overall research addresses is whether an identifiable body of law had existed before alignment with EC law was sought. The degree of continuity or discontinuity of pre-existing competition laws is a relevant indicator of the degree of Europeanization that has taken place in the investigated groups of countries.

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<sup>123</sup> At the same time they also clearly contrasted the high convergence of competition laws with the considerable divergences in tort laws. Marco, F. Sánchez Graells, A. Towards a European tort law? Damages actions for breach of the EC antitrust rules: harmonizing tort law through the back door?, *ERPL*, 3/2008, p. 472-473

<sup>124</sup> Van Gerven, W. Bridging the unbridgeable: Community and national tort laws after *Francovich* and *Brasserie*, *International and Comparative Law Quarterly*, Vol.45 July 1996, pp.507-544

**TABLE I: An overview of the pre-existing competition laws in the investigated countries**

<b>When did an identifiable body of competition law develop?</b>	<b>Pre-IIWW</b>	<b>Communist</b>	<b>Post-communist/Pre-association</b>	<b>Post association/Pre accession</b>
<b>NMS</b>	<b>Act on cartels:</b> <b>Czech Republic</b> (1870, 1934), <b>Poland</b> (1933) <b>Hungary</b> (1931)	<b>Poland</b> (1987) <b>Hungary</b> (1984)		<b>Poland</b> (1990, 2000); <b>Hungary</b> (1990); <b>Czech Republic</b> (1991, 2001); <b>Lithuania</b> (1992); <b>Romania</b> (1996); <b>Slovakia</b> (1991); <b>Slovenia</b> (1993, 1999)
<b>CC</b>				<b>Macedonia</b> (1999, 2004); <b>Turkey</b> (1994)
<b>PCC</b>				<b>Serbia</b> (1996, 2006)
<b>NC</b>				<b>Moldova</b> (1992)
<b>Other partners</b>				<b>Russia</b> (1991, 1995)

Source: Results of the questionnaires of the national reporters

Although many of the NMS had competition legislation before World War II, these were set aside and became invalid after 1945. After 1945 the economy in these countries was subject to monolithic central direction and planning and the existence of competition policy would have been illogical in view of state monopolies. The Eastern European legal systems followed the Soviet monistic concept of civil law that strove for the unified regulation of all transactions between citizens and social organisations in the civil code and economic legislation. Economic law was mainly enacted in administrative acts instead of legislative acts.

Romania and Turkey were the only countries that did not have any provisions of competition law before the implementation of the *acquis*. In Romania the exception was the law concerning unfair competition, but it concerned commercial law, not competition law. Turkey is an interesting example because the first and the current Turkish legislation on competition law is the Act Regarding the Protection of Competition from 1994. Even though its drafting started in 1971, it was within the framework of implementation of the *acquis*, because of the legal obligation to draft an act on the protection of competition stemming from the Association Agreement of Turkey with the EU from 12.09.1963.

Competition was actually non-existent in these countries based on central planning. Administratively planned market activities and the central allocation of resources took the place of free competition and trade. The researched countries had to build competition laws from the scratch and more importantly create a competition culture. In the process of transition competition law played a significant role. Competition law and policy were of great importance in creating a functioning market economy in the former socialist countries. It supported and stimulated the economic changes and it had a demonstrative role as well. The introduction of competition law proclaimed these countries commitment to market economy and competition advocacy as well as proclaimed the principles of correct economic activity and fair market practices.

While many of these countries studied the competition laws of other countries such as Germany, the US and even NMS and invited foreign experts to advise on drafting competition acts, the European competition rules provided a convincing model. In the 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 adopted new competition acts and they gradually aligned the legislation to the EU rules. This research will investigate which vertical (directly from EU law) and horizontal (from other Member States) legal transplants have been imported into the domestic legal systems. A significant question to be examined is whether the adoption of competition laws has been followed by the active enforcement of those laws. For example, in Moldova the initial Law on Limitation of Monopolistic Activity and Promotion of Competition was adopted in 1992, before even the Partnership and Cooperation Agreement (PCA) with the EU. However, this law remained under-enforced due to political and institutional constraints until the adoption of the new competition law in 2002.

While the adoption of an identifiable body of competition law has been a clear example of Europeanization in the NMS, CCs and the PCs, it still remains to be investigated what motivated the respective countries to adopt the European model of competition rules, in particular in the neighbouring and partner countries is to be studied.

### 3. Modes of Implementation of the Acquis

The second question of the overall research addresses is the modes of implementation of the *acquis*. In particular, the research discusses the degree of Europeanization in the legislative and the judicial mode of implementation.

#### 3.1 Legislative implementation

**TABLE II: Legislative implementation**

Have the national competition legislation followed the wording and logic of the EC competition rules?	Equivalent to art. 101 TFEU			Equivalent to art. 102 TFEU All countries have correspondent rules, although some of them include broader rules, more detailed explanations.
	Notification procedure		Block Exemptions	
	YES	NO		
<b>NMS</b>	<b>Slovakia</b> (not compulsory)	<b>Poland, Hungary</b> (repealed in 2005), <b>Czech Republic, Romania, Lithuania, Slovenia</b>	<b>Poland, Hungary, Czech Republic, Romania, Lithuania Slovakia</b> (EU rules apply - no national ones)	<b>Poland Romania</b> (more ex. of abuse), <b>Czech Republic</b> (presumption of dominance from ECJ case law), <b>Slovakia</b> (Act on buyer power has been enacted (in force from January 2009 that focuses on the problem of supermarkets and their supplier), <b>Slovenia</b>
<b>CC</b>	<b>Macedonia, Turkey</b> (not compulsory)		<b>Macedonia, Turkey</b>	<b>Macedonia</b> (the notion “dominant position” is explained)
<b>PCC</b>	<b>Serbia</b>		<b>Serbia</b>	<b>Serbia</b> (exact wording)
<b>NC</b>	<b>Moldova</b> (no application - no guidelines yet)		<b>Moldova</b> (NO)	<b>Moldova</b> (more ex. of abuse that could be found in ECJ case law)
<b>Other partners</b>	<b>Russia</b>		<b>Russia</b>	

a) *The new Member States*

The legal, economic and political requirements of the CEECs' accession to the EU have been first laid down in the so-called Copenhagen criteria<sup>125</sup> of the 1993 Copenhagen European Council and later in more detail in the 1995 White Paper, which was drafted in order to assist the candidate countries in their preparations to meet the requirements of the internal market.<sup>126</sup> The relations between the CEECs and the EU had been institutionalised through bilateral association agreements, the so-called Europe Agreements<sup>127</sup> during the 1990s. The Europe Agreements and the White Paper contained the main legal and economic conditions of accession. These conditions included the establishment of a functioning market economy, adherence to the various political, economic and monetary aims of the European Union, as well as the capacity to cope with competitive pressure and market forces within the EU. More specifically transposition of the competition and state aid *acquis*, effective enforcement of the competition and state aid rules and strengthening of the administrative capacity through well-functioning competition authorities were among the obligations of the candidate countries.<sup>128</sup>

The Europe Agreements contained a reproduction of the competition provisions of the EU Treaty prohibiting restrictive agreements, abuse of a dominant position and state aid rules.<sup>129</sup> These provisions also contained a clause that required the respective Association Councils to adopt within a given deadline the "necessary rules" for the implementation of these competition rules.<sup>130</sup>

The White Paper further emphasized "(I)t is important though to stress that the exercise is not confined to the sole adoption of laws and regulations or structure building. There must be a continued effort to ensure enforcement of the policy and to make the policy widely known and accepted by all economic agents involved i.e. by governments, companies and by the workforce. The law must not only exist but it must also be applied and -above all- be expected to be applied. Economic agents must take their decisions under the assumption that the policy will be applied."<sup>131</sup>

Moreover, it accentuated the relevance of institution building, by requiring viable rules regarding procedures to ensure effective enforcement and thus the functioning of the state aid and competition

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<sup>125</sup> The conditions that pre-accession candidates have to fulfil are specified in a Commission report entitled "Europe and the challenge of enlargement". They were made formal by the Member States at the Copenhagen European Council in June 1993, and then expanded upon by the Commission in a Communication called "Agenda 2000", dated 16 July 1997. Agenda 2000 is an action programme adopted by the Commission on 15 July 1997.

<sup>126</sup> The so-called White Paper was drafted in order to assist the Eastern European countries in their preparation for accession to the EU. White Paper: Preparation of the associated countries of Central and Eastern Europe for integration into the Internal Market of the Union, COM (95) 163, May 1995.

<sup>127</sup> The Europe Agreements were concluded with Hungary and Poland in December 1991, with Romania, Bulgaria, the Czech Republic and Slovakia in February 1995, with Estonia, Latvia and Lithuania in February 1998 and Slovenia in February 1999. EU had Association Agreements with Malta since 1971 and with Cyprus since 1973.

<sup>128</sup> See for example Articles 62 of Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, (1993) OJ L347/1, See chapter 2 of the White Paper.

<sup>129</sup> See for example Articles 62 of Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, (1993) OJ L347/1.

<sup>130</sup> The Association Councils were the bilateral meetings at ministerial level between the EU and the associated countries. This text is based on the wording of Article 67, 68 of the Europe Agreement between the European Communities and Hungary. The relevance of the arguments of this paper for other CEECs is based on the textual similarity of the Europe Agreements. However, an important difference of the Polish Europe Agreement is that a Joint Declaration relating to Article 63 thereof, the equivalent of Article 62 EA, provides that "(p)arties may request the Association Council at a later stage, and after the adopting of the implementing rules..., to examine to what extent and under which conditions certain competition rules may be directly applicable." (1993) OJ L438/180.

<sup>131</sup> White Paper, 49, 51.

policy. These rules had to address the powers of the authority charged with the application of the rules as well as the rights of the undertakings concerned. The authority had to be endowed with sufficient powers to carry out its tasks efficiently.<sup>132</sup>

The European Commission has also provided substantial financial and technical assistance to the candidate countries through the PHARE programme that was among others aimed at strengthening public administrations and institutions to function effectively inside the European Union.<sup>133</sup>

In sum, the NMS at the time when they were candidate countries had to ensure that their future legislation and in particular their rules on competition would be compatible with Community legislation as far as possible. The exact content of the “necessary rules” has not been defined. Similarly, they were required to set up an institutional infrastructure to guarantee effective enforcement of the laws, but further guidance on institutional choice and design had not been provided.

For the NMS further legal obligations stemmed from Regulation 1/2003<sup>134</sup> that entered into force on 1 May 2004. These obligations are also relevant for the CCs and the PCs as they will have to implement the whole of the competition law *acquis* before joining the EU. Regulation 1/2003 introduced a new procedural framework of the application of Articles 81 and 82 EC.<sup>135</sup> The new procedural framework of EC competition law forms a system of decentralised enforcement and parallel competences, where the European Commission shares its competence with the national authorities. The NCAs and the Commission form a network of public authorities co-operating closely together. This so-called European Competition Network (hereinafter ECN) provides a focus for regular contact and consultation on enforcement policy and the Commission has a central role in the network in order to ensure to consistent application of the rules.

Concerning the substance of national competition law Article 3 of Regulation 1/2003 is relevant. Article 3 (1) defines the principle of parallel application of national law and competition law with the limitation posed in Article 3 (2): Member States may not adopt and apply on their territory stricter national competition laws which prohibit agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 101(1) TFEU, or which fulfil the conditions of Article 101(3) TFEU or which are covered by a Regulation for the application of Article 101(3) TFEU. However, this principle of convergence does not apply with regard to prohibiting and imposing sanctions on unilateral conduct engaged in by undertakings.<sup>136</sup> Article 3 (3) further excludes from the principle of convergence national merger laws and laws having a different objective than the protection of competition.<sup>137</sup>

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<sup>132</sup> White Paper, 52-53, 55-56, 59.

<sup>133</sup> [http://ec.europa.eu/enlargement/financial\\_assistance/phare/index\\_en.htm](http://ec.europa.eu/enlargement/financial_assistance/phare/index_en.htm) accessed on 14 October 2007.

<sup>134</sup> Council Regulation EC 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 EC (Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L1/1.

<sup>135</sup> The essence of the new regulation is the following. The notification system has been abolished and Article 81 EC became directly applicable in its entirety, thus including Article 81(3). Agreements that fulfil these requirements of Article 81 EC are deemed legal without the need for notification and a prior administrative decision. Regulation 1/2003 devolves enforcement powers to national competition authorities (hereinafter NCA) and to national courts. Articles 5 and 6 of Regulation 1/2003.

<sup>136</sup> Recital 8 of Regulation 1/2003.

<sup>137</sup> Recital 9 of Regulation 1/2003.



Still, leeways for national law exist even under Article 3 (2) such as inherent restrictions, national group exemptions and national statutory *de minimis* rules. The research will further investigate whether and to what extent the CEECs made use of these leeways. Furthermore, it should be examined whether the CEECs also experienced some “unpleasant U-turns” in the process of drafting competition rules. For example, in Hungary the Competition Act of 1990 only prohibited horizontal agreements and resale price maintenance.<sup>138</sup> The attempt to avoid introducing the prohibition of vertical agreements in 1996 was not successful due to EU pressure. In 1996 a general prohibition of vertical agreements was introduced in Hungary complemented by group exemptions for exclusive distribution, exclusive and franchise agreements.<sup>139</sup> In 2002 a new group exemption was implemented, similar to Regulation 1270/1999, which contained a safe harbour regulation for all vertical agreements with less than 30 % market share.<sup>140</sup> These changes revived the previous Hungarian approach that was more open to economic analysis and less formalistic and completely in harmony with the 1999 EC rules.<sup>141</sup> Similarly, in Lithuania the Competition Act of 1992 did not prohibit vertical agreements unless one of the parties was a dominant undertaking.<sup>142</sup>

Throughout the whole accession process it has not been made clear what institutional and substantive solutions the NMS were to implement in their respective legal system beyond the obligation to bring their competition rules in conformity with EU law. These countries were never presented the exact parameters of their obligation to harmonise their competition laws. Therefore it can be argued that harmonisation in their respective legislative system was required as far as it was indispensable. This is also in line with the general principle of subsidiarity as enshrined in Article 5 TEU. In other words the new Member States, just like the old Member States had considerable latitude for deciding what kind of substantive and institutional regime they would opt for.

This freedom is, however, not unlimited. Article 4 (3) TEU requires the Member States to take all appropriate measures to ensure fulfilment of the obligations arising out of the EC Treaty and facilitate the achievement of the Community's tasks. Moreover, they should “abstain from any measure which could jeopardise the attainment of the objectives of this Treaty”. On the basis of this Community loyalty principle the European Court of Justice has also developed the so-called useful effect doctrine within the realm of competition law. According to this doctrine the Member States may not introduce legislation or take decisions, which would deprive the competition rules of their useful effect.<sup>143</sup>

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<sup>138</sup> The Hungarian legislation at that time seemed to precede the later EC reform of vertical agreements. An often cited argument to this reform was formulated by the then head of the Hungarian competition authority, Ferenc Vissi: “does it make sense to condemn all vertical restraints and then (block) exempt 90% *à la* Brussels, or to accept 90% and condemn only 10% (*à la* Budapest)?”. Cited in B. E. Hawk, System failure: vertical restraints and EC competition law, *CMLR* 32 (4) 1995, 973-990, 980.

<sup>139</sup> Government Regulation 53/1997 (III.26) on exclusive distribution agreements, Government Regulation 54/1997 (III.26.) on exclusive purchase agreements, Government Regulation 246/1997 (XII.20.) on franchise agreements.

<sup>140</sup> Government Regulation 55/2002 (III.26.) on the exemption from the prohibition of the restriction of competition for certain groups of vertical agreements.

<sup>141</sup> OECD, Background report on the role of competition policy in the regulatory reform, Hungary, (2000) 10-11.  
<http://www.oecd.org/dataoecd/27/16/34768045.pdf> accessed 14 October 2007.

<sup>142</sup> Questionnaire on the challenges facing young competition authorities, Contribution from Lithuania, DAF/COMP/GF/WD(2008)57, p. 5.

<sup>143</sup> This doctrine has no explicit legal basis in the EC Treaty but is founded on Article 3(1) (g) read in conjunction with Article 10 and Articles 81 and 82 EC. Case 267/86 Van Eycke v. ASPA (1988) ECR 4769, para. 16.

Beyond these general obligations the Member States had to meet a number of more specific requirements that the new procedural framework has laid down. Under Article 35 Regulation 1/2003 each Member State had a clear obligation to draw up national competition law and designate a competition authority,<sup>144</sup> however, the details have been left to the Member States themselves.

Neither the NMS nor the undertakings in these countries were granted any transitional periods for the implementation of the new, decentralised system of EC competition law.<sup>145</sup> In the new framework national competition legislations operate parallel with EC competition law and the national competition authorities and/or courts apply both national and European competition rules. Concerning the enforcement of the EC competition rules full cooperation between the Commission and the national authorities of the Member States is necessitated by the fact that the European competition rules became directly applicable in the whole Union. The interaction between the European Commission and the national competition authorities is required by Article 11 of Regulation 1/2003. The parallel application of national and EC rules as well as the close institutional cooperation between national authorities and the Commission seem to form significant channels of the Europeanization process. The role of the ECN will be further highlighted below.

The new procedural rules of Regulation 1/2003 were mostly targeted at uniformity and consistency. These rules effect the way national authorities have to enforce EC competition rules, but have not imposed further reaching obligations on the new Member States. While it could be concluded that Regulation 1/2003 has not stood in the way of the CEECs to adopt competition rules different from the EU Treaty (except no stricter rules in the case of Article 101 TFEU), it has definitely formed a further incentive for these countries to converge or even copy the EC rules in their own competition legislation. It has clearly been the idea that implementing similar or identical rules on national level will ease the parallel application of national and EC competition law and help to achieve a uniform and consistent enforcement system.

*b) The candidate and the potential candidate countries*

Similarly to the NMS, the candidate and potential candidate countries need to fulfil the Copenhagen criteria from 1993. The rapprochement of the whole Western Balkans towards the EU, in our investigation represented by Macedonia and Serbia, is developed under the Stabilization and Association Process initiated in 1999. This is a policy framework of the EU accompanying the countries all the way to their final accession. It has the aim of stabilising the countries and encouraging their swift transition to a market economy, promoting the regional cooperation as well as eventual membership of the EU. The Stabilisation and Association Agreements (SAP) tailor made according to the circumstances of each country. However, each agreement is intended to have the common purpose of achieving the sort of formal association with the EU.

Before concluding the SAP, the above mentioned countries have concluded Cooperation Agreements with the EU, such as in case of Macedonia from 1997<sup>146</sup> in which cooperation is promoted in different fields not mentioning competition law separately.

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<sup>144</sup> Article 35 (1) Regulation 1/2003: "The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts".

<sup>145</sup> The negotiations on transitional arrangements were conducted on the basis of the principle that they must be strictly limited in scope and duration. J. Kähkönen, *Accession negotiations brought to successful conclusion*, Competition Policy Newsletter (2003/1) 26.

<sup>146</sup> Cooperation Agreement between the European Community and the former Yugoslav Republic of Macedonia, Official Journal L 348, 18/12/1997 p. 2-167.

However, in this agreement it is stated that Macedonia “shall endeavor to ensure that its legislation would be gradually made compatible with that of the Community” for which “the Community shall provide appropriate technical assistance,”<sup>147</sup> from which it could be concluded that aligning the competition legislation is required as well. In the SAP there is a separate title covering the approximation and law enforcement,<sup>148</sup> which lays down an obligation for the countries to approximate not only the existing but also the future national laws with those of the Community. In particular Article 68 of the SAP with Macedonia provides an obligation for setting a deadline for the approximation of the competition laws.

Besides this obligation, the Article 69 SAP covers the competition provisions and in practice re-states the wording of the EU competition rules. It furthermore includes a legal obligation for assessing the competition law cases on the basis of criteria arising from the application of not only the rules of Articles 101, 102 TFEU, but also Article 107 TFEU on state aid. In addition, it is provided that with regard to Article 106 TFEU and “public undertakings, and undertakings to which special or exclusive rights have been granted, each Party shall ensure that as from the third year following the date of entry into force of the SAP, the principles of the EU Treaty are upheld.”<sup>149</sup>

The European and Accession Partnerships address the issues of enforcement in competition law and state aid control and with regard to ensuring independence of the state aid authority as well as strengthening the administrative capacity of the competition authority.<sup>150</sup>

The implementation of the legal obligations stemming from these legal agreements between the EU and the candidate or the potential candidate countries are to be assessed by the Commission. Each year the Commission adopts its annual strategy document explaining its policy on EU enlargement. The document also includes a summary of the progress made over the last twelve months by each candidate and potential candidate country. In addition, the progress reports are published, where the Commission monitors and assesses the achievements of each of the candidate and potential candidates over the last year.

In sum, similarly to the NMS these agreements oblige the candidate and potential candidate countries to ensure that their future legislation and in particular their rules on competition would be compatible with the Community legislation as far as possible before accession to the EU.

Neither the Copenhagen criteria, nor the Europe Agreements, nor the White Paper for the preparation for accession contained an explicit legal obligation to copy the relevant Treaty provisions. The candidate countries’ economic integration into the Community was conditioned upon the legal obligation to bring national law into general harmony with EU law, but there was no direct and clear obligation to adopt identical substantive rules with the EU model.

However, despite the lack of such an explicit legal obligation there seems to be a high degree of convergence between the competition rules of the NMS, Cs, PCs and EU rules.

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<sup>147</sup> Article 11(2) Cooperation Agreement between the European Community and the former Yugoslav Republic of Macedonia, Official Journal L 348, 18/12/1997 p. 2-167.

<sup>148</sup> See for example Title VI from the Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part, Official Journal L 084, 20/03/2004 p. 13-197.

<sup>149</sup> See Article 70 SAP with Macedonia.

<sup>150</sup> Council Decision 2006/57/EC: of 30 January 2006 on the principles, priorities and conditions contained in the European Partnership with the former Yugoslav Republic of Macedonia and repealing Decision 2004/518/EC, Official Journal L 035, 07/02/2006 p. 57-72.

The research has until now found that the modes of legislative implementation resulted in high convergence of competition rules with the EU norms. Further research will scrutinize the way equivalents of the EU competition rules (Article 101, block exemptions, *de minimis* rules, notification, Article 102 and merger control) had been implemented and what kind of divergent rules exist.

The research will investigate whether and how they made use of the leeways and freedoms made available by EC law and the bilateral agreements.

One central question to be dealt with is what the underlying social, economic and political factors were that determined the modes of implementation. For example, whether there existed substantial political and economic pressure to converge as closely as possible with the EC provisions?

This research will also provide a broader overview of the existing competition laws by systematizing what the scope of the competition legislation are, whether they include other fields of market regulation and which corresponding enforcement competences had been delegated to the competition authorities.

The different groups of investigated CEECs allow to research whether there is a change or development in the way the legal obligations had been formulated by the EU in the various bilateral agreements since the first group of CEECs acceded in 2004. In particular, it will be assessed whether legal obligations contain more guidance on enforcement and institutional design.

### 3.2 Judicial implementation of the European competition case-law

Implementation of EU competition law by the judiciary can be investigated in two kinds of situations when dealing with competition law. The main enforcers of competition law are administrative agencies whose decisions are subject to judicial review by the national courts.

Moreover, the national courts have the competence to enforce competition law in private law claims, especially in damages claims based on national tort law. In both cases references made to EC case-law can be examined.<sup>151</sup>

**TABLE III: National courts' implementation in the NMS**

<b>Application of Articles 101 and 102 TFEU by national courts</b>	<b>Judicial review</b>	<b>Private enforcement Legal basis in competition law</b>
Hungary (modifying NCA decision ) Lithuania (Public procurement for the assignment of concessions in the sector of waste collection)	Hungary: national courts highly converge with NCA Slovakia, Czech Republic Bulgaria Lithuania Romania Latvia, Slovenia, Poland	Bulgaria, Estonia, Latvia, Lithuania, Romania, Hungary, Slovenia Lithuania successful case

<sup>151</sup> Cseres, K.J. J. Langer, Judicial review in Hungarian competition law –*Tetra Laval á la Hongroise* in: Lavrijsen, S. A. Ottow, *Judicial review in competition law and economic regulation*, Europa Law Publishing, 2008 forthcoming.

#### **4. Enforcement**

The research question that stands central in the overall research and is addressed in all the specific legal fields focuses on the questions whether the investigated countries rely mostly on public or private enforcement and whether there was any shift in the institutional balance between the administration and the judiciary. These questions have limited relevance in competition law for the following reasons. In competition law are good economic reasons in favour of public enforcement such as information advantages of competition authorities, the fact that social benefits of law enforcement deviate from private benefits as well as the expected size of sanctions support the dominance of public enforcement over private law enforcement. Accordingly, the European jurisdictions dominantly pursue public enforcement of competition law. The discussion on how to facilitate private enforcement of competition law in Europe has just recently been launched<sup>152</sup> by the Commission and the active invocation of competition rules in national courts is still scarce.<sup>153</sup>

The true character of the investigated legal systems is believed to be confirmed once active enforcement is studied. Two groups of issues will be addressed below. First, there are significant socio-economic factors that have a decisive impact on whether and how the implemented rules are actively invoked in these countries. These socio-economic factors are mostly related to the transition of economy in all the investigated countries. Second, significant influence has been and is still being exercised through the way the new enforcement framework of EC competition law develops. The new enforcement policy developments seem to have an indirect impact in both the Member States as well as in the investigated countries. The role of the European Competition Network as a channel of transferring influence is briefly discussed as well.

##### **4.1 Internal socio-economic factors**

One relevant factor in these countries is the probability of high interdependence of stakeholders because of these more concentrated markets. The high interdependence of stakeholders is, likely to increase the probability of lobbying and rent seeking. The “old boys network” creates problems of effective enforcement of competition law in many of these countries. This increases the chance for parallel behaviour of firms and collusive practices. Gal argues that clearly and narrowly defined goals are even more important in small than in large economies<sup>154</sup> and the balance between economic and non-economic goals should be carefully reconsidered.<sup>155</sup>

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<sup>152</sup> Green Paper Damages actions for breach of the EC anti-trust rules, COM (2005) 672 final, White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165, 2.4.2008, Case C-453/99 *Courage v. Crehan* ECR (2001) I-6297, para 26.

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<sup>154</sup> Competition policy in a small economy should try to minimize the undesirable economic effects of concentrated market structures. Competition policy must particularly focus on deterring the creation and maintenance of artificial barriers to entry and on facilitating innovation and adaptation in the form of new products and methods of production and distribution. One of the methods to achieve such a goal is to adopt a strict anti-collusion and anti-exclusionary conduct. Besides collusive practices, predatory pricing, tying or exclusive dealing are also such areas. Collusive practices and abuse of a dominant position is because of the highly concentrated market more prevalent and in these cases remedies should be more conduct oriented and not structural. *supra* n 24, Gal, 63-64.

<sup>155</sup> Non-economic goals are difficult to pursue through competition law, which can only make a marginal contribution to it. Non-economic interests can better be subject to direct regulation. Moreover, when it conflicts with economic efficiency there is a limitation on the ability of judicial and regulatory bodies to make sound decisions concerning complex economic issues and the balancing of conflicting interests. *Supra* n 24, Gal, 34-38.

As a consequence of rent seeking and interdependence of stakeholders the self-correcting mechanisms of the market cannot be relied on in the same way as in large jurisdictions. This has important implications for enforcement and institutional design. These characteristics influence the way enforcement modalities are chosen, for example they might favour stricter sanctions like criminal sanctions including custodial sentences. They also alter the divide between public and private enforcement. The reliance of private actors on market-based solutions such as tort, contract and property rights is less feasible in these legislations at least for the time being. Institutional design therefore favours public agencies but at the same time a stricter adherence to principles such as independence, accountability, transparency and administrative efficiency should be guaranteed.

Furthermore, the focus of the economy in these countries was the promotion of contestable markets within domestic economies through regulatory tools such as bankruptcy law, company law and competition law. EU competition law is in the first place aimed at market integration i.e. achieving a level of playing field within industries and economies. The investigated CEECs first had to reform structural distortions, improve efficiency of allocating resources and promote foreign investments and thus build markets before they could concentrate on market correcting mechanisms. While some of these goals are short-lived like correcting structural distortions and dissolution of state monopolies, others are medium-term problems like less and more cautious reliance on free market forces and persisting problems with regard to unfair trade practices.

In the transition economies creation of a level of playing field required fair trading rules. Competition law has been often used for the correction of a wide range of market failures as a substitute of other market regulatory tools. For example, consumer protection as such was either non-existent or it was in its infancy at the beginning of the 1990s. There was neither a firm legislative nor an institutional basis for. Although protection of consumers was not the main goal of either competition legislation or competition authorities, some of the CEECs adopted competition acts including rules on unfair trade practices. This integrated approach was also reflected in the competences of the agencies enforcing these laws. Moreover, market failures in the field of specific sectors, like telecommunications or electricity had been addressed by competition law tools in the absence of sector specific regulation. Thus besides the “classical” competition rules the CEECs have often adopted competition legislation covering other relevant fields of market law such as unfair competition, advertising, unfair trade practices or even sector regulatory issues.

**TABLE IV: Competences of the NCAs in the NMS**

<b>Scope of competition law includes unfair competition or consumer protection</b>	<b>Competence of competition agency Includes other than competition law</b>	<b>Shift in the institutional balance</b>
Bulgaria, Poland, Hungary, Lithuania, Latvia, Estonia	Bulgaria, Poland, Hungary, Lithuania, Latvia, Estonia, Czech Republic	Poland, Bulgaria, Lithuania, Latvia

Further research will examine whether this process had concern for the fact that the CEECs were in the first place engaged in building markets. Has the transfer of European rules perceived enforcement problems of the transition economies and assisted adaptation to local social and economic circumstances? Are there examples of more extensive competition legislation, for example, by including definitions of relevant market, market dominance or referring to case-law in the substantive rules? The substantial economic differences that existed between the CEECs and the EU, namely that most of these countries are small and they are in transition have significant repercussions for legislation and law enforcement.

## 4.2 External factors

The process of enlargement in 2004 had made the relevance of enforcement for the effective working of Community rules manifest.<sup>156</sup> While previously issues of enforcement and institutional structures were regarded to rest in the exclusive competence of the Member States according to the Community principles of procedural autonomy and institutional neutrality, enlargement has pushed crucial questions of enforcement and institutional choice to the forefront of the EU agenda. This change was also visible in the modernization of EU competition law, which was launched by the 1999 White Paper.<sup>157</sup> The reform was aimed at finding more effective enforcement methods in order to prevent outright violations of competition law and substantial economic harm to society.<sup>158</sup> In order to achieve this objective a number of initiatives have been taken. The adoption of Regulation 1/2003 decentralised the enforcement of EU competition law establishing the European Competition Network, DG Competition reorganized its cartel busting work, the 1996 and then later the 2002 leniency programmes have been revised,<sup>159</sup> a discussion on how to facilitate private damages cases was launched<sup>160</sup> and the method of setting fines have been revised.<sup>161</sup>

While the transfer of substantive rules could rely on well-defined EU rules a clear guidebook for enforcement has been not presented. Accordingly, establishing effective enforcement and institutional design have formed the most serious challenge in the post-communist transformation of the legal and economic system. Crucial questions of enforcement and institutional choice were left unanswered. In the absence of a Community blueprint or a clear methodology for effective enforcement methods and optimal institutional design the countries analysed in this paper were left a considerable leeway to adapt the *acquis* to their own institutional preferences and legal system. Despite this freedom the NMS are ambitiously adopting the latest developments in the enforcement of EU competition law.

There can be several reasons for this development. One explanation could lie in the spill-over effects of the high convergence of substantive rules and, on the other, in the influential role of the ECN in the NMS. With the introduction of the decentralized enforcement of European competition law the public enforcement output of national competition authorities shifted to the focus of attention at EU level. Through the European Competition Network there is a constant awareness of the agencies' work in the first place with regard to the enforcement of European competition law but also national rules as such as leniency programmes and sanctions, which are discussed in the working groups of the ECN. The NCAs are being held accountable and they are evaluated by national control and audit mechanisms such as annual reports submitted to the parliaments. There seems to be a mechanism of "peer accountability" present within established international networks such as the ECN, where the annual reports of all NCAs are published in English on the website of the Commission's DG Competition.<sup>162</sup> Evaluation and control put increasing pressure on the agencies to quantify their enforcement and

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<sup>156</sup> A Bakardjieva-Engelbrekt, *Grey Zones, Legitimacy Deficits and Boomerang Effects: On the Implications of Extending the Acquis to Central and Eastern Europe* in : N Wahl, P Kramér (eds.), *Swedish Yearbook of European Law*, (Hart Publishing: Oxford, 2001), 1-36

<sup>157</sup> White Paper on modernization of the Rules implementing Articles 81 and 82 of the EC Treaty, Commission programme No 99/027, 28.04.1999.

<sup>158</sup> White Paper, 8,41,42, 75

<sup>159</sup> Commission notice on immunity from fines and reduction of fines in cartel cases (2002/C 45/03). Commission notice on immunity from fines and reduction of fines in cartel case, OJ C 298/17, 8.12.2006

<sup>160</sup> Green Paper Damages actions for breach of the EC anti-trust rules, COM (2005) 672 final, White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165, 2.4.2008, Case C-453/99 *Courage v. Crehan* ECR (2001) I-6297, para 26

<sup>161</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. OJ C 210/2, 1.09.2006.

<sup>162</sup> [http://ec.europa.eu/comm/competition/ecn/annual\\_reports.html](http://ec.europa.eu/comm/competition/ecn/annual_reports.html) accessed on 8th October 2007.

advocacy work.<sup>163</sup> This process is further generated by reputation mechanisms such as the OECD country reports, the International Competition Network or even the Global Competition Review rankings.<sup>164</sup> Evaluations and reputation mechanisms make actual enforcement modalities more visible and induce competition among the agencies. Even though enforcement methods legislated in soft law instruments on EC level does not oblige Member States to follow those guidelines, there is certainly some pressure both from the Commission as well as within the ECN to adopt similar instruments in national legislations. A prime example is the leniency programme, which has been adopted in 24 out of the 27 Member States and in 7 out of the eight CEECs being investigated in this paper.<sup>165</sup>

The NMS keep pace with their fellow agencies and they have tried to improve detection methods by strengthening investigation powers, establishing special cartel units, increasing corporate fines, introducing criminal sanctions and leniency programmes. In Poland there is even a marker system included in the leniency program à la the European Commission's 2006 Leniency Notice<sup>166</sup> and even a chief economist has been appointed in Hungary in 2006 and in the Czech Republic in 2009. There are also some recent reforms in the CEECs that go beyond the present EC enforcement rules. In Estonia competition offences became criminal offences on 1 September 2002<sup>167</sup>, Hungary<sup>168</sup> have introduced criminal sanctions in 2005 and many other countries followed the trend the last four years being recent examples the Czech Republic, Latvia and Slovakia. Actual invocation of criminal sanctions and procedures has only taken place in Estonia.

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<sup>163</sup> However, it has to be admitted that quantification of the enforcement work of national competition authorities lacks clearly defined and commonly agreed benchmarks. I Maher, *The Rule of Law and Agency: The Case of Competition Policy*, IEP WORKING PAPER 06/01 (March 2006) 4, see also W E Kovacic, *Using evaluation to improve the performance of competition policy authorities*, background Note, OECD, *Evaluation of the actions and resources of competition authorities*, DAF/COMP(2005)30.

<sup>164</sup> *Supra* n 66, Maher 4-5.

<sup>165</sup> List of National Competition authorities which operate a Leniency programme  
[http://ec.europa.eu/comm/competition/ecn/leniency\\_programme\\_nca.pdf](http://ec.europa.eu/comm/competition/ecn/leniency_programme_nca.pdf) accessed 14 October 2007

<sup>166</sup> Commission notice on immunity from fines and reduction of fines in cartel cases OJ C 298/17, 2.

<sup>167</sup> Penal Code was amended to allow for legal persons to be held criminally liable for competition offences (Art 399 - 402) with a penalty payment of up to 250 million EEK (16 million EUR). Physical persons can be punished by means of a fine (up to 25 000 EEK, or 1600 EUR, calculated by minimum income) or up to three years imprisonment. The ECB investigates criminal cases together with public prosecutors. Liability is imposed by way of court judgment. A Proos, *Competition Policy in Estonia* in K J Cseres, M P Schinkel, F O W Vogelaar, *Criminalization of Competition Law Enforcement, Economic and Legal Implications for the EU Member States*, (Edward Elgar, Cheltenham 2006)

<sup>168</sup> Section 14 of the Act XCI of 2005 amending the Hungarian Criminal Code, Act IV of 1978 and other acts



**TABLE V: Enforcement modalities**

	<b>Administrative based</b>	<b>Criminal based</b>	<b>Criminal law provisions for anti-competitive practices</b>	<b>Leniency</b>
NMS	Poland, Hungary, Czech Republic, Romania, Lithuania, Slovakia, Slovenia		Poland, Hungary (bid-rigging), Czech Republic, Lithuania, Slovakia, Slovenia, Latvia, Romania (imprisonment for fraudulent and decisive anti-competitive behavior)	All NMS Few number of cases Hungary, Czech Republic, Poland
CC	Macedonia, Turkey		Macedonia (competition restrains caused by the creation of monopoly position and market distortion –not enforced), Turkey (bid-rigging), Slovenia (imprisonment for anticompetitive behavior – no case law)	
PCC	Serbia		Serbia (abuse of dominant position – not enforced)	
NC	Moldova		Moldova	
Other partn.	Russia (no criminal liability of the legal persons at all)			

There is not only a need to systemize the available enforcement methods in the national competition rules and examine to what extent they follow the EC trend, but also to investigate what the formal or informal constraints are to actively invoke these enforcement schemes. The discrepancy between law on the books and active invocation and effective enforcement is still striking in these countries. Ambitious and formal transposition of rules often lacks active enforcement. For example, many countries adopted a leniency programme, but practical experience of the NCAs is scarce.<sup>169</sup> Another example is private enforcement, where legislative steps have been taken but outsourcing enforcement to the private sector has gained little ground. As the relevance of private enforcement of competition rules for the development of European private law is fundamental, this will be further discussed below.

<sup>169</sup> The Czech Office for the Protection of Competition has applied its leniency programme for the first time in 2004 with regard to a cartel agreement in the energy drinks market. Poland had its first leniency case in a cartel agreement 2006 and in Hungary leniency was applied for in a few cartel cases, but only one of these cases was already closed by the decision of the Competition Council. Annual Report, Office for the Protection of Competition, 2004, p. 12

[http://www.uokik.gov.pl/en/press\\_office/press\\_releases/art58.html](http://www.uokik.gov.pl/en/press_office/press_releases/art58.html) accessed 14 October 2007; Annual Report, GVH, Hungary (2004) 6.

### 4.3 Private enforcement

As mentioned above, in competition law there are good economic reasons in favour of public enforcement such as information advantages of competition authorities, the fact that social benefits of law enforcement deviate from private benefits as well as the expected size of sanctions support the dominance of public enforcement over private law enforcement. Public enforcement cures rational apathy to bring law suits, free-riding and it increases the expected sanction. Therefore, the question on public and private divide in competition law departs from the dominance of public enforcement. Still, public enforcement of competition law does not achieve optimal deterrence and private enforcement can complement public enforcement.

Private enforcement of competition law in the CEECs merits separate attention in the research on the CEECs' competition laws. First, private enforcement of competition law is a prime example of Europeanization of national law and influencing national competition and private law rules. Second, it cuts directly into national private law rules such as standing, damages, causality, fault. Third, while the obstacles to introduce private damages claims are numerous and involve complex legal and economic issues in all Member States<sup>170</sup> the CEECs face particular challenges. Fourth, it offers a distinctive case study to investigate how informal constraints prevent actual enforcement of formal rules. Fifth, it accentuates the role of institutions such as competition authorities, national courts and private individuals and the interplay between them in the enforcement of competition rules.

**TABLE VI: Private enforcement provision in competition acts**

	YES	NO
NMS	Hungary, Lithuania, Slovakia, Slovenia	Poland, Czech Republic (the Competition act until 2001 had a separate legal provision for private enforcement), Romania
CC	Macedonia, Turkey	
PCC		Serbia
NC	Moldova	
Other partners	Russia	

While some of the CEECs have implemented private enforcement of national competition rules, none of them has practical experience with private enforcement. There have been no final cases of private enforcement and therefore merely theoretical assumptions can be made about their future "success".

While some of the challenges are equally valid for the old Member States, the CEECs face some particular problems. Both private individuals and national authorities face the problems of assessing complex legal and economic issues of competition law. While most of the NCAs have built up sufficient legal and economic expertise with regard to competition law issues the same cannot be said about the national courts. National courts face a double barrier: on the one hand, they lack a basic knowledge of European law and on the other, they are unfamiliar with competition law issues. Thenew

<sup>170</sup> The Green Paper has identified a number of general obstacles to introduce this enforcement method such as access to evidence, passing on defense, standing for indirect purchasers and quantification of damages. Green Paper Damages actions for breach of the EC anti-trust rules, COM (2005) 672 final.

system of European competition law substantially raised the level of economic analysis in competition cases, which will most probably create problems. The main difficulties to be expected are among others how NCAs will deal with cases that spill over much beyond their narrow competition mandate,<sup>171</sup> how national courts as well as private undertakings will assess the application of the legal exception under Article 101 (3) TFEU.<sup>172</sup> National judges will need trainings and assistance in order to be able to manage expert witnesses and economic evidence that will be inherent and frequent parts of competition cases.

Further obstacles of private enforcement are inherent in the fact that transition in these countries is not yet complete. The relatively recent shift of these countries to a market economy and to a democratic judicial system still has its limitations. While economic changes have been fast moving legislative steps were often lagging behind. The legislative and institutional framework to guarantee swift law enforcement is not yet at place.

Private actors' readiness to bring damages actions to courts is further hindered by the low degree of awareness of competition rules, the weak and fragmented civil society, weak part autonomy and the often lacking recognition of involving private actors in law making and enforcement. Besides the lack of confidence in the judiciary the significant time, costs and complexity litigation means. These last three issues are especially a problem for consumers. The legal position of consumers and consumer organizations is often more restricted in these countries than in the old Member States. Access to justice of consumers and consumer organizations within and outside of the court system is often problematic or despite of existing legal rules practical difficulties hinder them to make effective use of those substantive rights. Collective consumer actions are rare either because of the lack of legal basis or other practical financial problems.<sup>173</sup>

The specific problems of the CEECs call for tailor made solutions and necessitates a more proactive approach. Such tailor made solutions aim at, for example, making use of the advantages earned during public enforcement. Such a useful element of the public enforcement is the expertise of the NCAs, who can assist the national courts as *amicus curiae* in adjudicating damages claims in competition cases.<sup>174</sup> Another recent example is a legal presumption of 10 % overcharge when calculating damages for hard-core cartels in Hungary.<sup>175</sup> In Bulgaria a more flexible procedural rules has been implemented

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<sup>171</sup> The NCAs' limited resources and procedural limitations might result in dealing with a limited number of cases.

<sup>172</sup> The application of Article 81 (3) to non-economic objectives can prove to be an especially dangerous exercise when national courts apply that provision, unlikely fit to assess whether the restriction of competition within the internal market can be justified by non-economic objectives of other Community policies. National authorities might justify anti-competitive practices on the basis of national policies. Therefore, as the Commission argues, a pure economic approach is more appropriate in the decentralized enforcement. NCAs will have to invest both in financial and humans resources in order to increase their capacity for economic analysis.

<sup>173</sup> See the National reports of Czech Republic, 20, Lithuania 17, Latvia 17 Estonia, 21-22, Slovenia, 21-22, Hungary, 16 in Ashurst, Study on the conditions of claims for damages in case of infringement of EC competition rules, (2004).

<sup>174</sup> In Hungary, for example, on the basis of Article 88/B of the Competition Act, a court shall immediately notify the Competition Office if the application of the competition law rules on cartels or abuse of dominant position arises in a civil action before the court. The Competition Office may submit observations or set forth its standpoint orally before the closing of the hearings. Upon a request of the court, the Competition Office shall inform the court about its legal standpoint concerning the application of the competition law rules in the given case. Thus, the Competition Office acts as an "amicus curiae" to the courts. Furthermore, if the Competition Office decides to initiate proceedings in a matter that is pending before the court, then the court shall stay its own proceeding until the Competition Office issues its final and legally binding decision, and the court is also bound by the final and legally binding decision of the Office concerning the finding of breach of the competition law rules or the lack thereof.

<sup>175</sup> In case of a horizontal hardcore cartels, except horizontal hardcore purchase cartels, it is presumed that the competition law violation caused a 10% increase in the market price. The new rule will apply to both EC and Hungarian competition law violations. The presumption is rebuttable.

for damages claims for competition law violations. The Competition Act provides that all legal and natural persons, to whom damages have been caused, are entitled to compensation even where the infringement has not been aimed directly against them. This special rule allows the compensation of damages suffered by persons or entities (e.g. final customers and consumers) which have not been a direct counterparty of the infringer/s but the results of the infringement were passed on to them by the intermediate commercial operators.<sup>176</sup>

Such tailor made solutions can provide useful insights into the specific legal, economic and social barriers of private enforcement in the CEECs and perhaps formulate some ideas what the optimal incentives could be to make private enforcement work also in the other European jurisdictions.

## 5. *Institutions*

It is crucial to understand the influence of economic institutions on economic performance and why a certain policy proves to be successful or fails in different institutional contexts. Institutions consist of formal and informal rules that determine the behavior of individuals and organizations. Formal rules such as laws and regulations and informal rules such as constraints on behavior derived from culture, tradition, custom and attitudes. Formal rules and informal constraints are interdependent and in constant interaction. Similar measures will lead to different outcomes because of diverging informal rules and informal constraints in different economies. Institutional change is a process that is subject to path dependency. Institutional path dependency is the downstream institutional choices inherent in any institutional framework and which makes it difficult to alter the direction of economy once it is in a certain institutional path. Formal rules can be changed overnight, but informal constraints change slowly.<sup>177</sup> These insights from institutional economics<sup>178</sup> proved helpful in explaining the experience of the transition process from central planning to a market economy in the CEECs. The failure to take institutions into account when designing reform policies has generated serious difficulties and challenges.<sup>179</sup>

As has been said above in the new Member States the accession process merely required an adequate administrative capacity through well-functioning competition authorities. Article 35 of Regulation 1/2003 required the Member States to designate the competition authority or authorities responsible for the application of Articles 101 and 102 TFEU before 1 May 2004. These authorities could be administrative or judicial. The only requirement imposed by Article 35 was that the authorities have to be designated in order to guarantee that the provisions of Regulation 1/2003 are effectively complied with. Neither further requirements nor formal rules have been formulated on the powers and procedures of these competition authorities.<sup>180</sup> The competences of the national authorities are set out

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<sup>176</sup> *International Comparative Legal Guide, Enforcement of competition laws*, Petrov P. Bulgaria, 2009, p. 44.

<sup>177</sup> D C North (1997), *The Contribution of the New Institutional Economics to an Understanding of the Transition Problem*, *WIDER Annual Lectures*, Helsinki, March 1997, 13.

<sup>178</sup> The relevance of institutions has been already emphasized by Stiglitz, who argued that stages of development indicates how far an economy has advanced to generate institutions necessary for well-functioning market economy and the capability of economy's institutional apparatus to generate wealth for its citizens. J Stiglitz, *Participation and Development: Perspectives from the Comprehensive Development Paradigm*, in: *Review of Development Economics*, (Vol. 6, 2, June, 2002), Special Issue on Democracy, Participation and Development, 163-182, 164.

<sup>179</sup> OECD, *OECD Global Forum on Competition, Small economies and competition policy: background paper*, CCNM/GF/COMP(2003)4, 9-10.

<sup>180</sup> Although national procedural rules had to provide for admission of the Commission as *amicus curiae* in national procedures, NCAs will have to be empowered to conduct examinations in accordance with the Regulation, and Member States will have to fulfil obligations to report to the Commission. The Commission retains broad supervisory powers that allows him to intervene in proceedings before the national authorities and to of the Commission discretionary powers "primus inter pares". See Article 11 (6)

in Articles 5 and 6 of Regulation 1/2003.<sup>181</sup> Due to this institutional deficit the process of institutional choice and design was guided by a learning process characterized by improvisation and experimentation and in some cases it resulted in several reorganizations and shifting legislative powers between regulatory agencies.

There is presently a wide diversity of institutional design among competition authorities across the EU. These are based on a large variety of country-specific institutional traditions and legacies. Traditionally the CEECs heavily relied on public agencies to enforce regulations and therefore without specific advice and assistance from the EU on institutions they resorted broad market regulatory tasks to these agencies, sometimes with overlapping competences. Many of the young competition authorities were launched on the administrative basis and with the staff of previous public administration without suitable resources, facilities and adequate expertise in the field of competition law.<sup>182</sup>

Even though the difficulties and characteristics of the initial stage by now belong to the past, one striking characteristic in the CEECs is the fact that NCAs have enforcement powers in several fields of market regulation, notably in unfair trade practices. They seem to take up (quasi-)regulatory roles as well. Competition authorities are in comparison with other public agencies, for example consumer authorities are relatively independent, reasonably well funded and have acquired substantial legal and economic expertise in market regulatory issues. These features are probably the reason that the NCAs resources and expertise are used for certain “spillovers” in other fields of market regulation such as consumer protection and regulating network industries.<sup>183</sup>

However, with regard to private law the role of national courts has to be investigated. In fact, we know little about what the national courts do. This lack of data is evident in the recent Report on the functioning of Regulation 1/2003 and its accompanying Staff Commission Paper.<sup>184</sup> Moreover, there is an overall lack of reported case-law on the Commission website for national judgments applying Articles 101 and 102 TFEU.<sup>185</sup>

However, the role of the national courts in reviewing decisions of the NCAs and adjudicating private actions is crucial in the overall effective enforcement of competition law. Further research will be conducted collecting data on case-law and the way courts deal with competition law and inherent private law issues.

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<sup>181</sup> Article 5 lists the type of decisions national competition authorities can adopt when applying Articles 81 and 82.

<sup>182</sup> See the contributions from Latvia, Lithuania, Czech Republic, Slovakia, Hungary, Bulgaria, Slovenia to the OECD, Global Forum on Competition, Challenges faced by young competition authorities, [http://www.oecd.org/document/33/0,3343,en\\_40382599\\_40393105\\_41512929\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/33/0,3343,en_40382599_40393105_41512929_1_1_1_1,00.html)

<sup>183</sup> For example in Slovakia and the Czech Republic the NCAs have a disciplining role in the regulation of network industries. Article 11 of the Czech Competition Act, Article 8 of the Slovak Competition Act

<sup>184</sup> [Communication from the Commission to the European Parliament and the Council, Report on the functioning of Regulation 1/2003](#) (COM(2009) 206 final, 29.4.2009; Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003 (SEC(2009) 574 final, 29.4.2009)

<sup>185</sup> Out of the ten new Member States two countries (Hungary, Lithuania) have each one judgment published on this website. <http://ec.europa.eu/competition/eojade/antitrust/nationalcourts/>

**TABLE VII: Specialized national courts in the NMS**

	<b>NO</b>	<b>YES</b>
<b>Specialized national courts for dealing with competition issues in the context of civil proceedings</b>	Bulgaria, Czech Republic Estonia, Hungary Latvia, Lithuania, Poland Romania, Slovenia	Slovakia (Regional court in Bratislava is dealing in first instance as the general court for competition issues for the whole territory of the Slovak Republic, Highest court in Bratislava is the second instance body)
<b>Does (or will) national law include provisions to facilitate the use of amicus curiae (Art. 15.3, Reg.)?</b>	Bulgaria, Czech Republic (No specific provisions, but it is made possible by the Czech code of civil procedure.) Estonia (The NCA must be consulted by national civil courts in antitrust cases) Latvia (The NCA may be consulted by national civil courts in antitrust cases.) Romania (The Competition Council shall communicate its point of view on any competition issue, at the request of national courts.) Slovenia (amendments under Consideration)	Hungary, Lithuania, Poland, Romania, Slovakia

Source: Results of the questionnaire on the reform of Member States' national competition laws after EC Regulation No. 1/2003

**TABLE VIII: Specialized national courts in the CC, PCC, NC and partners**

<i>Has there been a reform of the judiciary to implement the new tasks and which (if any)?</i>	<b>YES</b>	<b>NO</b>
<b>CC</b>	<i>Macedonia (Administrative court – complaints against the NCA)</i>	<i>Turkey</i>
<b>PCC</b>		<i>Serbia</i>
<b>NC</b>		<i>Moldova</i>
<b>Other partners</b>		<i>Russia</i>

Source: Results of the questionnaires from the national reporters

Beyond these figures research will study the interplay and the changing institutional balance between competition authorities, national courts, other regulatory agencies and private actors.

Furthermore, there is a more general question of cost-benefit distribution within the framework of the Member States. Regulation 1/2003 delegated enforcement powers to the Member States thereby

imposing higher burden of workload and additional costs on the national authorities. The fact that all actors enforce the same European rules suggests that they have the same enforcement aims and the distribution of costs and benefits are similar. However, different institutional settings of law enforcement generate different costs and benefits. It seems that the competition authorities of the investigated countries will also invest substantial work in assisting national courts and private actors (consumers and consumer organizations) in filing private damages actions. The fact that party autonomy in the CEECs is still weak has relevant ramifications for institutional design and law enforcement. However, this puts a higher burden on the CEECs' NCAs to meet their enforcement "quota" as compared to other NCAs.

Accordingly, the distributive effects of enforcement seem to be different for the CEECs. The consequences should be investigated. For example, does the fact that the present EU enforcement framework and their domestic competences impose a greater enforcement burden on the NCAs of the CEECs would form a reason to resort to more severe punishments such as criminal custodial sanctions?

## V. Securities Law (Olha O. Cherednychenko)

### I. Introduction

Financial services, such as loans, mortgages, investment or insurance, have become an essential part of the everyday life of EU citizens. Such services facilitate citizens' full participation in the economy, enabling them to plan for the long term and protecting them from unforeseen changes in circumstances. Financial services are also of great significance for the EU economy. A single market in (retail) financial services, which has been the overall EU objective in the last decade,<sup>186</sup> would 'act as a catalyst for economic growth across all sectors of the economy, boost productivity and provide lower cost and better quality financial products for consumers, and enterprises'<sup>187</sup>. This fact explains the increasing number of EC regulation in the area of financial services, in particular investment services in the securities field, in the last two decades.

The following analysis focuses on the impact of the EC securities regulation, in particular with regard to the conduct of business rules when providing investment services, on securities laws of CEECs (i.e. New Member States (NMS), Candidate Countries (CC), Potential Candidate Countries (PCC), Neighbouring Countries (NC) and Partners).

Investment services involve the supply of financial instruments (such as shares or bonds) or investment products (such as investment insurance), and services (such as investment advice), by one party (the investment firm) according to the specific needs and instructions of another party (the client). As early as in 1993, the EC adopted the Investment Services Directive (ISD)<sup>188</sup> which aimed to ensure a minimum harmonisation of some conditions governing the operation of regulated markets and the initial authorisation and operating requirements for investment firms when providing services in the securities field. In 2004 the ISD was replaced by the Markets in Financial Instruments Directive (MiFID).<sup>189</sup> This directive introduced a comprehensive regulatory regime in the area of investment services and secondary capital markets<sup>190</sup>, which has led some to describe it as Europe's 'new constitution' for these areas.<sup>191</sup>

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<sup>186</sup> White Paper on Financial Services 2005–2010, COM (2005) 629; Green Paper on Retail Financial Services, COM (2007) 226; Initiatives in the Area of Retail Financial Services: Accompanying Document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (COM, 2007) 724 final.

<sup>187</sup> Conclusion of a discussion among economy and finance ministers, the ECB president and governors of National Central Banks, at the informal ECOFIN meeting in Brussels in April 2002, in a report on financial integration drawn up by a Working Group of the Economic and Financial Committee (EFC).

<sup>188</sup> Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, OJEC L 141/27.

<sup>189</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJEC 2004 L 145/1.

<sup>190</sup> Primary markets are involved in bringing securities to the market for the first time and transactions between the issuer seeking capital and the investor providing capital. Secondary markets involve all transactions in securities which take place after their issue, or after the initial distribution. Both the stock exchange market and the markets outside the stock exchanges are considered to belong to the secondary markets in securities.

<sup>191</sup> See, for example, K.J. Hopt, 'Grundsatz- und Praxisprobleme nach dem Wertpapierhandelsgesetz – insbesondere Insidergeschäfte und Ad-hoc-Publizität', *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht*, 159 (1995), p. 135, 135; H-D. Assmann/U.H. Schneider, *Wertpapierhandelsgesetz* (Cologne: Otto Schmidt, 2006), Introduction n. 1. For the comprehensive overview of the EC regime for securities regulation, see, for example, N. Moloney, *EC Securities Regulation*, (Oxford, 2008).



Both the ISD and MiFID contain *inter alia* rules which investment firms should observe when dealing with their (potential) clients – the so-called ‘conduct of business rules’. In contrast to most other provisions of these directives, the relevance of the conduct of business rules to a *private law* relationship between an investment firm and its (potential) client is almost undisputed.<sup>192</sup> The MiFID conduct of business rules build upon the broadly formulated principles laid down in Article 11 of the ISD, considerably clarifying and supplementing these principles. The core of the conduct of business rules under the MiFID is formed by the general duty of loyalty; the duty to provide clear, fair and not misleading information; various disclosure obligations, in particular concerning the risks involved in a particular investment service or product and concerning the conflict of interests; the duty to know one’s client and to ensure the ‘appropriateness’ or ‘suitability’ of an investment service, financial instrument or investment product to one’s client; the duty to ensure ‘best execution’ of the client’s order.<sup>193</sup> The meaning of these rules is further fleshed out in the Directive implementing the MiFID.<sup>194</sup>

The rapid development of the EC regulation in the securities field has coincided with the process of transformation from the totalitarian rule and command economy to democracy and market economy in most CEECs in question<sup>195</sup> and with the process of EU enlargement to the east and south. The enlargement process in a broad sense of this term ranges from the accession of some CEECs to the EU to strengthening the co-operation with other CEECs without offering the prospect of the EU membership in the near future.

Although the EC securities regulation has played an important role in shaping securities laws of these countries, hardly any in-depth legal research has been done insofar as to how EC law has influenced the development of securities laws and the institutional framework for their adoption and enforcement in different CEECs.<sup>196</sup> There are at least three major reasons why further research in the field of Eastern and Central European securities law is urgently needed.

*First*, there is a deep lack of knowledge on the relationship between the national private legal orders as far as they exist(ed) in CEECs and the emerging securities laws in these countries. It should be taken into account that the rapid adoption of the securities regulation in the post-communist CEECs has coincided with the revival of private law and the revision of the civil law codifications. Such codifications are also highly important for the establishment of the appropriate legal framework to facilitate private transactions on the market, including those in the securities field. The relationship between the two processes has, however, been largely underinvestigated. The revival of classical private law and the role of private law courts in this process deserves special attention when investigating the impact of the EC conduct of business rules on Central and Eastern European securities law and, in particular, the role of the institutions involved in adopting and enforcing such rules in CEECs.

*Second*, the discussion of the impact of the EC securities regulation on securities laws of CEECs has in so far largely focused on the question of whether CEECs managed to transpose black-letter rules

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<sup>192</sup> On the relationship between the EC securities regulation and private law, see O.O. Cherednychenko, ‘European Securities Regulation, Private Law and the Investment Firm-Client Relationship’, *European Review of Private Law*, 17 (2009), p. 925.

<sup>193</sup> Articles 18-24 MiFID.

<sup>194</sup> Directive 2006/73/EC of the EC Commission of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational and operating conditions for investment firms and defined terms for the purposes of that Directive, OJEC L 241/26.

<sup>195</sup> With the exception of Turkey, all CEECs in question are former communist countries.

<sup>196</sup> The studies available so far are limited to providing general information and analysis on the functioning of financial markets in CEECs. See, in particular, M. Balling *et al.* (eds.), *Financial Markets in Central and Eastern Europe: Stability and Efficiency Perspectives*, (London and New York: Routledge, 2004).

contained in the EC measures in their national legal orders. The focus on the formal adoption of EC law on paper in CEECs was also characteristic of the overall approach adopted by the European Community, at least in the initial phase of the accession process. Although both the ISD and the MiFID obliged all Member States, including NMS, to establish an effective system of supervision over investment services industry, no comprehensive investigation has been made in so far into the role of supervisory authorities of these countries in the adoption and enforcement of the conduct of business rules of investment firms placed under their supervision and the effectiveness of public enforcement in this area. Similarly, little is known about the private enforcement of the conduct of business rules by individual investors or their groups in practice. Moreover, hardly any data are available today concerning the institutional implications of the adoption of the EC securities regulation in CEECs, in particular for the institutional balance between public and private governance in these countries. An in-depth analysis of the institutional infrastructure and the effectiveness of enforcement mechanisms is therefore necessary to fill in these gaps in our knowledge and understanding of the impact of the EC securities regulation in CEECs. The shift in focus from the law on the books to the law in action is crucial in this respect.

*Third*, the current approach of the European Community to the harmonisation of the conduct of business rules in Europe does not take into account the different economic, social and local needs of the NMS, the countries which apply for EU membership or which merely seek a close cooperation with the EU outside a formal membership in the Union. It is notable in this context that initially the EC pursued only a minimum harmonisation of the conduct of business rules in Europe. Under the 1993 ISD Member States were allowed to exceed the level of investor protection envisaged in this directive. In contrast to its predecessor, however, the 2004 MiFID generally aims to bring about a *maximum* harmonisation of the conduct of business rules.<sup>197</sup> The current policy reflected in the MiFID is based on the assumption that investors in the EU deserve the same level of protection all over the EU, including the non-Member States, and that the EC conduct of business rules fit to the needs of investors in each CEEC. The question which needs to be asked, however, is whether the economic, social and cultural needs of non-professional investors in countries with highly developed capital markets, such as the UK, are the same as the needs of non-professional investors in post-communist countries with largely underdeveloped capital markets, such as Romania. In addition, it should be taken into account that CEECs do not necessarily have the same needs as far as the conduct of business rules are concerned. Poland, for example, has a much more developed capital market than many other CEECs, which may affect the needs of investors in this country. Yet, in so far, the export of the Western type of EC securities regulation to NMS and other CEECs has not been studied in the context of the economic, social and local needs of these countries. An in-depth research in this area may produce useful results which could be used when making the EU policy in the securities field and, in particular, when defining the conduct of business standards for investment firms.

The assumption is that the Europeanization of Central and Eastern European securities law can no longer be regarded as a one way process in which the EU defines the standards to be implemented in CEECs without a thorough analysis of the starting conditions and special needs of these countries. A flow back from CEECs to the EU level is urgently needed in order to establish the connection between the EC securities regulation and the particular circumstances of CEECs. Without having such connection it is difficult to learn about the impact of the EC securities regulation in these countries and hence to ensure its effectiveness in practice.

As will be demonstrated in the next sections, investigating the impact of the EC securities regulation within a particular context of the conduct of business rules may provide particularly useful insights into the process of the Europeanization of securities laws in CEECs.

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<sup>197</sup> See, in particular, Article 4 of the Commission Directive 2006/73/EC implementing the MiFID which allows Member States to retain or impose requirements additional to those in this Directive only in exceptional cases.

## 2. *Continuity vs. Discontinuity*

The Europeanization process in CEECs can hardly be understood without taking into account the legal and institutional framework which had existed in these countries before alignment with EC law was sought. The continuity/discontinuity paradigm may affect the implementation of substantive EC law, the institutional choices which are made in the course of this implementation and the way the established institutions operate in practice.

When it comes to the adoption of the EC securities regulation in post-communist CEECs, one should take into account that capital markets and hence specific laws regulating such markets virtually did not exist in the centrally planned economies. In Poland, for example, as a result of the regime transformation after World War II, Polish securities laws were largely abolished. Only the Bills of Exchange Act and the Cheques Act remained in force, as they turned out to be to a certain extent useful within the system of command and control economy.

Moreover, it is notable that the conduct of business rules, which now form part of the EC regulatory framework for investment services, have largely originated within the national private laws, in particular contract laws, of the old EU Member States, and, primarily as a result of the need to strengthen investors' confidence in the financial market, have subsequently been casted as the EC supervision standards and strengthened by public law enforcement mechanisms in the EC securities regulation.<sup>198</sup> Thus, for example, the provider's duty to know one's client when providing investment advice, which is now included in art. 19 (4) of the MiFID, largely corresponds to the rules earlier established in the famous *Bond* case decided by the German Supreme Court in private law matters (*Bundesgerichtshof*) in 1993.<sup>199</sup> Similarly, a forerunner of the extensive duty of disclosure concerning financial instruments and proposed investment strategies now laid down in art. 19 (3) can be found in English common law, which generally opposes any disclosure obligations.<sup>200</sup> National private law courts of many old Member States have accordingly played an important role in the development of the legal framework for the provision of investment services.

In contrast to Western European countries, however, in post-communist CEECs the conduct of business rules could not develop within their own private law systems. Such a development could not take place before the communist era because investment services as such hardly existed before the regime transformation took place. During the communist era, the centrally planned economy in CEECs precluded the development of investment services and hence the development of general private law rules in this area.

As a result, one of the serious challenges faced by post-communist CEECs in the transition period was the need to introduce modern market-oriented rules in the field of securities and to set up appropriate institutions for their enforcement. As such rules have not developed within their own (private law) legal systems, neither before nor during the communist era, post-communist CEECs had to start nearly from scratch.

In a relatively short time, the laws governing securities trading in the primary and secondary markets were adopted and the regulatory bodies in the field of securities were established. A major role in setting up a legal framework for the functioning of capital markets in post-communist CEECs was played by the state which resorted to public law. Private law has not played any significant role in this respect. The active role of the state resulted in the rapid development of the capital markets in some

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<sup>198</sup> On this in more detail, see O.O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions*, (Munich: Sellier, 2007), chs. 7 and 8.

<sup>199</sup> BGH 6 July 1993, BGHZ 123, 126 = NJW 1993, 2433 (*Bond*).

<sup>200</sup> See, for example, *Rust v. Abbey Life Insurance Co Ltd* (1978) Lloyd's Rep 386.

CEECs, in particular in Poland. At present, it is not entirely clear what role in this development has been played by the 1993 ISD and the 2004 MiFID outside the legal obligations of CEECs to adopt the EC securities regulation and whether there has been any relationship or tension between the impact of the securities acquis driven by the legal obligations of CEECs towards the EU and the impact driven by economic factors. The experience of NC, such as Moldova and Ukraine, and partners, such as Russia, may be particularly interesting in this respect. What is clear, however, is that there is hardly any continuity between the new rules on investment services introduced in CEECs in the course of the implementation of the EC securities regulation and the old system existing before and/or during the communist era.

At the same time, at a more abstract level there might be a certain continuity between the institutional setting existing in CEECs during the communist era, in particular, for enforcement of consumer standards, and the institutional setting for enforcement of the current EC securities regulation as laid down in the MiFID. Both communist regimes and the EU legislator rely on statutory intervention into private law relations and both presuppose the existence of a public enforcement mechanism for ensuring the compliance with the regulatory standards. While in the communist times public agencies (inspectors) were responsible for controlling the quality of products, under the MiFID public agencies (financial supervisory authorities) are responsible for ensuring compliance of investment firms with the conduct of business rules and other standards contained in the MiFID as implemented in national legal systems. The legal culture in which public authorities play a key role in enforcing certain standards is thus not something new under the sun for CEECs. It may also affect the institutional setting for public enforcement of the EC securities regulation and the way administrative agencies operate in this field. Using the old experience, however, involves dangers for the adequate implementation and enforcement of the EC securities regulation. In the first place, the task of monitoring the securities market and the quality of investment products and services is quite different from the task of controlling the quality of consumer goods. Moreover, post communist CEECs generally have to cope with the problem of the 'command and control' type of administrative agencies.<sup>201</sup> In addition, strong reliance on public enforcement may be problematic from the point of view of the protection of individual investors. Such legacies of the communist past as the underdeveloped system of civil justice and civil society<sup>202</sup> may preclude those investors who have already suffered losses as a result of a breach of the conduct of business rules by investment firms from obtaining compensation. These peculiarities of post-communist CEECs need to be considered when analysing the institutional framework for the adoption of the EC securities regulation in these countries and, in particular, its effectiveness as far as the enforcement of black-letter rules is concerned.

Furthermore, although we can hardly trace any continuity between substantive private laws of CEECs and the EC conduct of business rules, general private laws of these countries may nevertheless play an important role in the establishment of the appropriate legal framework to facilitate private transactions on the market, including those in the securities field. As will be discussed in more detail below, general private laws of these countries may become particularly relevant for private enforcement of the EC conduct of business rules by aggrieved investors. It is here that in some CEECs the continuity

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<sup>201</sup> On this see, for example, A. Bakardjieva Engelbrekt, 'The impact of EU Enlargement on Private Law Governance in Central and Eastern Europe: The Case of Consumer Protection', in F. Caffaggi/H. Muir Watt (eds.), *Making European Private Law: Governance Design*, (Cheltenham (etc.) Edward Elgar, 2008), p. 98; K.J. Cseres, 'Governance Design for European Private Law: Lesson from the Europeanization of Competition Law in Central and Eastern Europe', in Caffaggi/Muir Watt (eds.), *Making European Private Law: Governance Design*, p. 138; N. Reich, 'Transformation of Contract Law and Civil Justice in the New EU Member Countries: The Example of the Baltic States, Hungary and Poland', in F. Caffaggi (ed.), *The Institutional Framework of European Private Law*, (Oxford University Press, 2006), p. 271.

<sup>202</sup> *Ibid.*

between the old private law system existing prior to the adoption of the EC securities regulation and the current private law rules on remedies in contract and tort for acting in breach of the statutory provisions may be established. The old private law tradition may accordingly affect private enforcement of the conduct of business rules.

### **3. Modes of Implementation**

#### **3.1 Implementation through legislature and executive**

Although the ISD, and particularly the MiFID, contain many mandatory contract-related rules to be observed by investment firms in the relationship with their (potential) clients, it is notable that these rules are not written for and from the perspective of the *private law* relationship between the investment firm and the client.<sup>203</sup> The extensive regulatory framework established under the MiFID is directed at ensuring the effective supervision over the compliance by investment firms with the new supervision standards.<sup>204</sup>

Furthermore, of particular importance in the present context is the fact that the new regulatory regime for investment services is based on the new four-level approach to the legislative process, the so-called Lamfalussy architecture.<sup>205</sup> At level 1, the European Parliament and the Council of Ministers adopt a piece of legislation, establishing the core principles of the regulatory regime. The MiFID has been adopted at this first level. The law then progresses to level 2, where these core principles are further elaborated with detailed technical implementing measures. These technical measures are adopted by the European Commission assisted by the European Securities Committee (ESC) – a regulatory committee in the securities field, taking into account the views of the European Parliament. An important role at this level is also played by the Committee of European Securities Regulators (CESR) – an advisory committee which draws up a technical advice on the implementation measures. The legal measures taken at this level include the above-mentioned directive implementing the MiFID as regards organisational requirements and operating conditions for investment firms, and a regulation implementing the MiFID as regards the standard of recordkeeping obligations for investment firms, transaction reporting, market transparency and admission of financial instruments to trading.<sup>206</sup> The next levels, level 3 and level 4, of the Lamfalussy structure mainly concern the implementation and enforcement of the EC legislation adopted at level 1 and level 2 in the national legal orders of the EU Member States. Level 3 is based on cooperation and networking amongst national regulators through the CESR to ensure consistent and equivalent transposition of Levels 1 and 2 measures. Level 4 concerns the strengthening of the enforcement of the new EC regulation. The major responsibility for

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<sup>203</sup> Compare H.-W. Micklitz, 'Anlegerschutz – Analyse des EG-Rechts' in J. Keßler and H.-W. Micklitz (eds.), *Anlegerschutz in Deutschland, Schweiz, Großbritannien, USA und der Europäischen Gemeinschaft*, (Baden-Baden: Nomos Verlagsgesellschaft, 2004), p. 267, 324.

<sup>204</sup> Compare Micklitz, in *Anlegerschutz in Deutschland, Schweiz, Großbritannien, USA und der Europäischen Gemeinschaft*, p. 324; C.M. Grundmann-van de Krol, *Het effectenrecht tussen publiek- en privaatrecht*, (Den Haag: Boom Juridische uitgevers, 2002), p. 4.

<sup>205</sup> The Lamfalussy Committee was established by the Economic and Financial Affairs Council (ECOFIN) on 17 July 2000 with a mandate to assess the current conditions for the implementation of securities market regulation in the European Union. On the Lamfalussy structure, see, in particular, G. Ferrarini, 'Contract Standards and the Markets in Financial Instruments Directive (MiFID): an Assessment of the Lamfalussy Regulatory Architecture', *European Review of Contracts Law*, 1 (2005), p. 23.

<sup>206</sup> Regulation (EC) Nr 1287/2006 of the EC Commission of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards recordkeeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive, OJEC 2006 L 241/1.

doing so lies on the European Commission, although all actors, including national regulators, have a role to play in this respect. The Lamfalussy architecture is intended to provide several benefits over traditional law-making, including more consistent interpretation of the regulatory standards, convergence in national supervisory practices, and a general boost in the quality of legislation on financial services.

Against this background, it is not surprising that the MiFID and the implementing directive, including the extensive conduct of business rules contained therein, were implemented by CEECs within the *supervision* legislation as supervision standards whose compliance must be checked by supervisory authorities. Following the Lamfalussy architecture, these rules were implemented not only within the primary legislation, but also within the secondary legislation. In Poland, for example, an important role in further elaborating and supplementing the conduct of business rules implemented *inter alia* in the Financial Instruments Trading Act 2005 has been played by the Ministry of Finance.<sup>207</sup> In Romania, the transposition of these rules mainly took place through the regulations of the National Securities Commission – the Romanian supervisory authority in the securities field.<sup>208</sup> Similarly, the supervisory authority – the Securities Commission – played an important role in the adoption of the EC conduct of business rules in Lithuania by specifying more general provisions concerning the conduct of business rules in the Markets in Financial Instruments Act 2001.<sup>209</sup>

The first issue which needs to be investigated in this context is how the adoption of the conduct of business rules took place, and what role has been played in this process by the executive, in particular national supervisory authorities. An important issue to be addressed here is to what extent the adoption of the EC conduct of business rules has been affected by the national political and socio-economic background and the institutional tradition of a particular CEEC. In particular, does the legal system tend to make use of the copy-and-paste technique or, as far as possible, to exercise discretion in implementing the standards prescribed by the EC measures and/or to add additional rules in areas related to but not directly regulated by the EC measures? If the legal system has implemented the minimum standards of business conduct envisaged by the 1993 ISD, has it limited itself to these minimum standards or has it gone further in specifying them and/or protecting investors? Has the legal system enacted any additional rules (e.g. a duty to check the (potential) client's 'room for expenditures' or the duty to check the compliance of the (potential) client's transactions in derivatives with 'margin requirements')? If so, which institutions took the initiative in this respect (the legislator itself or the executive, in particular, supervisory authorities)? Has the maximum harmonisation character of the MiFID conduct of business regime led to substantive modifications in the earlier enacted rules? In particular, has it resulted in the increase or decrease in the pre-existing level of investor protection in the law on the books? Has the legal system made use of the possibility to impose on investment firms additional requirements to that in the MiFID concerning the conduct of business regulated in this directive? If so, what institutions have taken the initiative and on which ground(s) have the additional requirements been justified? Does the legal system currently maintain any other conduct of business rules which have not been regulated by the MiFID? Does the legal system entrust the supervisory authority with the power to participate in the civil proceedings related to the financial market<sup>210</sup> and/or to resolve disputes between the aggrieved individual investors or their groups and investment firms?

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<sup>207</sup> See, for example, the draft Regulation of the Ministry of Finance on the procedures and conditions to be followed by investment firms and custodian banks in the course of their activities.

<sup>208</sup> Regulation of the National Securities Commission no. 12/2004.

<sup>209</sup> See Resolution of the Securities Commission of the Republic of Lithuania concerning the rules on the provision of investment services and acceptance and execution of client's orders of 31 May 2007.

<sup>210</sup> Such a power is given, for example, to the Polish Financial Supervisory Authority. See R. Stroinski and L. Gorywoda, 'Report from Poland,' *European Company law*, 3 (2006), p. 288, 290.

### 3.2 Implementation through judiciary and alternative dispute resolution boards

The implementation of the EC conduct of business rules in the *supervision* legislation also gives rise to the question concerning the relationship between the supervision standards and private law and, in particular, the role of private law courts and alternative dispute resolution boards in the adoption of these rules.<sup>211</sup>

Although the EC conduct of business rules have been implemented in the *supervision* legislation as supervision standards, they may have a double role to play in practice. The conduct of business rules aim, in the first place to ensure the adequate functioning of the securities market and therefore lie within the competence of supervisory authorities. At the same time, the conduct of business rules also represent contractual standards of behaviour which aim to protect investors. In fact, as has already been mentioned above, the conduct of business rules have originated from the private law of some old EU Member States and have subsequently been coined as the EC supervision standards and further elaborated as such standards. As contractual standards, the regulatory conduct of business rules now contained in the supervision legislation may also have effects in the private law relationship between the investment firm and its client, and thus have an impact on general private law.

The preliminary research has shown that the supervision legislation through which the EC securities regulation is implemented in CEECs, does not provide an exhaustive answer to the question concerning the relationship between the conduct of business rules and private law. Thus, for example, the Polish Act on Trading in Financial Instruments 2005 provides that the relevant provisions of the Polish Civil Code will apply to matters not regulated by its own provisions on investment services. At the same time, the Act does not clearly grant investors a right of action in case of a breach of the conduct of business rules, so that the investor may directly invoke the conduct of business rules.<sup>212</sup> The Lithuanian Markets in Financial Instruments Act imposes on the persons who acted in violation of the Act an obligation to *inter alia* carry out instructions of the Securities Commission to put an end to the violation, and reimburse the damage incurred. It is not clear, however, what this provision means from the perspective of the private law relationship between the investment firm and its client. Furthermore, it transpired that many other CEECs do not provide any clue at all as to the relationship between the conduct of business rules and private law.

As a result of the failure of the European legislator as well as the national legislators of CEECs to provide a clear answer to the question concerning the relationship between the conduct of business rules and national private laws, the issue in question has largely been left to national private law courts and alternative dispute resolution boards, if such are in place, to decide.

It is notable in this respect that under the MiFID, the Member States are obliged to ‘encourage the setting-up of efficient and effective complaints and redress procedures for the out-of-court settlement of consumer disputes concerning the provision of investment and ancillary services provided by investment firms, using existing bodies where appropriate’.<sup>213</sup> Next to the judiciary therefore, the

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<sup>211</sup> On this issue in more detail, see Cherednychenko, *European Review of Private Law*, 17 (2009), p. 925.

<sup>212</sup> Such a possibility is available, for example, in the UK where the Financial Services and Markets Act 2000 makes frequent use of the technique of expressly conferring a statutory right of action upon designated persons pursuant to section 150 of the FSMA where loss has been suffered as a result of a breach of duty under the Act or delegated legislation or other rules made under its aegis. The Financial Services Authority (FSA) has decided that a right of action would be available to a private person in respect of any rule within the Conduct of Business Source Book (FSA PS 45, para. 3.47). Invoking the tort of breach of an explicit statutory duty circumvents the need to establish that a duty of care should be recognized at common law.

<sup>213</sup> Article 53 of the MiFID. In some CEECs, the supervision legislation provided a basis for the establishment of such out-of-court settlement mechanisms. According to Article 74 of the Lithuanian Markets in Financial Instruments Act 2001,

alternative dispute resolution boards, set up by private organisations, such as professional associations in the financial services sector and/or consumer associations, may also become important vehicles of the Europeanisation in the securities field through the adoption of the conduct of business rules.

The second issue which therefore needs to be investigated is whether, and if so, to what extent private law courts and/or alternative dispute resolution boards give effect to the conduct of business rules of the EC origin in private law disputes. If these rules have been included exclusively within the supervision legislation and/or other regulatory acts, have the courts and/or alternative dispute resolution boards thrown any light on the nature of the conduct of business rules and their effects in the investment firm-client relationship? Can investors directly invoke such rules or do they have to ground their claim in the existing private law norms (such as defects of consent, non-performance of a general duty of care, tort for breach of such duty)?<sup>214</sup> Are the conduct of business rules accordingly of a purely supervisory (and thus public law) nature or both of a public- and semi-private law nature? Do courts and/or alternative dispute resolution boards take into account the conduct of business rules when interpreting and applying general private law concepts, in particular general duties of care of investment service providers? If so, to what extent?

#### 4. Enforcement

Another important area which needs to be examined in the present context is how the EC conduct of business rules are enforced in CEECs and whether the rules on the books actually work in practice.

##### 4.1 Public enforcement

Supervision standards are mandatory rules to be observed by investment firms when providing investment services. The firm which does not comply with these rules must be subject to *administrative* sanctions which must be effective, proportionate and dissuasive.<sup>215</sup> To ensure the effective administrative enforcement, both the ISD and the MiFID require the establishment of administrative bodies for the enforcement of the conduct of business rules.<sup>216</sup>

The first issue which therefore need to be considered is the effectiveness of the public (administrative) enforcement of the conduct of business rules in those CEECs which have adopted such rules. Has there been a reform of administration in CEECs in question to accommodate the creation of the new public supervisory authorities which would effectively act in the public interest. If so, to what extent such authorities have played an active role in enforcing the conduct of business rules? In which cases, if any, administrative sanctions have been imposed and which administrative sanctions have been chosen (e.g. administrative fines, cancellation of the authorisation, publication of the violation)? Are there any obstacles for the effective operation of supervisory authorities in CEECs (staff, financial etc.)? Do supervisory authorities cooperate with the respective authorities of other CEECs and with the CESR on a regular basis, and if so, in which areas?

Answering these questions should allow one to tackle a more general issue of whether supervisory authorities in all Member States, CCs and PCCs face more or less the same challenges in public enforcement of the EC securities regulation. If the investigation leads one to conclude that the NMS, CCs and PCCs face challenges in public enforcement which differ from their counterparts in the old

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for example, the Lithuanian Securities Commission shall encourage the setting-up and functioning of the entities ensuring an efficient alternative (out-of-court) settlement of disputes between investors and investment firms.

<sup>214</sup> It is also possible that the legal system leaves both options open for the aggrieved investor(s).

<sup>215</sup> See Article 27 of the ISD and Article 51 of the MiFID.

<sup>216</sup> See in particular, Articles 22-28 of the ISD and Articles 48-51 of the MiFID.



Member States, it may no longer be appropriate to view the Europeanisation as a one way process in which Western standards of enforcement are transferred to the East.

#### 4.2 Private enforcement

While both the ISD and MiFID aim to protect investors and for this purpose contain the conduct of business rules, they are silent upon the issue of their private enforcement. As has already been mentioned above, the main concerns of the EU legislator have been *public* enforcement of the EC securities regulation, including the investor protection measures contained therein, and the establishment of the appropriate institutional framework for such enforcement. In this respect, the EU legislator's approach in the securities field is different from its approach in the field of consumer law and competition law in which the concern for public enforcement has not replaced the concern for private enforcement altogether.

However, the double role of the conduct of business rules as supervision standards, on the one hand, and contractual standards highly relevant to the investment firm-client relationship, on the other, gives rise to a number of interesting issues concerning the private enforcement of these rules by individual investors or their groups in practice. In fact, strong emphasis placed by the EU legislator on *public* enforcement in the securities field is disturbing because *private* enforcement by individual investors or their groups is also important for the ability of the EC securities regulation to attain its policy goals. It is the combination of public and private enforcement which is necessary to ensure the effectiveness of legal standards in practice.<sup>217</sup> Besides, it remains to be seen whether, and if so, to what extent supervisory authorities, which are primarily concerned with protecting the general interest, will play a role in protecting the individual investor interests. In the absence of any guidelines concerning the private enforcement of the EC securities regulation by the aggrieved investors or their groups, CEECs have a wide discretion as to how to deal with it. It is not entirely clear therefore to what extent investors will really profit from the extensive conduct of business rules introduced by the EC securities regulation, and thus to what extent the latter will be able to ensure a high level of investor protection.

The second issue which accordingly requires a thorough examination is the effectiveness of the private enforcement of the conduct of business rules in CEECs taking into account their internal socio-economic and cultural circumstances. As has already been mentioned above, the legal system may allow individual investors or their groups to invoke the conduct of business rules directly and/or indirectly grounding their claims in the existing private law concepts (such as defects of consent, non-performance of a general duty of care or tort for breach of such a duty). The focus of this investigation is on the issue of how actively and before which institutions investors invoke the conduct of business rules, whether directly or indirectly, in practice, and the procedural and institutional difficulties which exist on the way towards ensuring the effective private enforcement of the conduct of business rules. More specifically, the following questions should be raised in this context.

How do private law courts in CEECs deal with the violations of the conduct of business rules considering that, in contrast to many old EU Member States, such rules have not incrementally developed within their own private law systems? To what extent are private law courts in CEECs well trained in giving effect to the conduct of business rules? In particular, do they use innovative

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<sup>217</sup> For well-articulated arguments in favour of such an approach in the law and economic literature, see, for example, Seminal S. Shavell, 'A model of the optimal use of liability and safety regulation', *Rand J. of Economics*, 15 (1984), p. 271 et seq.; S. Shavell, *Foundations of Economic Analysis of Law*, (Harvard: Belknap 2004), p. 589; C.D. Kolstad, T.S. Ulen and G.V. Johnson, 'Ex post liability for harm vs. ex ante safety regulation: substitutes or complements?', *American Economic Review*, 80 (1990), p. 888 et seq. Compare S. Rose-Ackerman, 'Tort Law in the Regulatory State', in P. H. Schuck (ed.), *Tort Law and the Public Interest - Competition, Innovation, and Consumer Welfare*, (New York: W.W. Norton, 1991), p. 80 et seq.

techniques when applying these rules? Do investors actively invoke the conduct of business rules in private law courts?

Are there alternative dispute resolution board available to investors? If so, how do they deal with the violations of the conduct of business rules in the investment firm-client relationship? How actively are they used by investors? Do investors prefer alternative dispute resolution boards to courts?

If individual investors do not actively resort to private law courts and/or alternative dispute resolution boards, what are the obstacles for doing so (e.g. procedural difficulties, a low level of awareness of the conduct of business rules, a low level of trust in state institutions in general and courts in particular, financial difficulties etc.)?

What mechanisms of collective redress, if any, are available to investors in cases of mass damage resulting from the violation of the conduct of business rules? Do investors actively make use of these mechanisms in practice? If not, what are the obstacles for doing so (e.g. underdeveloped civil society, procedural difficulties, financial difficulties etc.)?

Do supervisory authorities in CEECs have any role to play in handling the complaints of investors or interest groups and providing individual or collective redress? If so, to what extent do they contribute to the improvement of private enforcement in the legal system in question?

In the same way as in case of public enforcement, it is important to compare the situation with regard to private enforcement in CEECs to that in the old Member States in order to establish whether a different approach is required at the EC level as far as (certain) CEECs are concerned.

## **5. Institutions**

Building upon the investigation into the modes of implementation of the EC conduct of business rules and their enforcement as outlined above, the final step in the proposed research is to give a closer look at the institutional aspects of the adoption of the EC conduct of business regime in CEECs. The focus of this investigation is on the interplay between the executive, in particular supervisory authorities, judiciary and alternative dispute resolution boards in adopting and enforcing the conduct of business rules, and the implications of this interplay for the institutional balance between public and private governance.

It is notable in this context that in many old Member States the adoption of the conduct of business regime led to the shift in focus from private law, in particular contract law, towards the conduct of business obligations.<sup>218</sup> This development has manifested itself in private parties largely invoking the conduct of business rules rather than purely private law duties of care and courts and commentators largely focusing on the conduct of business rules. According to some, the MiFID will further intensify the shift in focus from the contract law standards to the supervision law standards, which will lead to a 'partial eclipse of contract law' in the area of investor protection.<sup>219</sup> This may also entail the shift in power from private law courts to supervisory authorities.

The major issue, which arises in this context, is to what extent this development is also true for CEECs and what factors cause particular institutional changes in these countries. Does one observe (the tendency towards) a complementarity or tension between the public and private governance and/or

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<sup>218</sup> This development has taken place in Germany, for example. See P.O. Mülbart, 'The Eclipse of Contract Law in the Investment Firm-Client-Relationship: the Impact of the MiFID on the Law of Contract from a German Perspective', in G. Ferrarini and E. Wymeersch (eds.), *Investor Protection in Europe: Corporate Law Making, the MiFID and Beyond*, (Oxford University Press, 2007), p. 299, 300 et seq.; S. Grundmann and J. Hollering, 'EC Financial Services and Contract Law – Developments 2005-2007', *European Review of Contract Law*, 4 (2008), p. 45, 62.

<sup>219</sup> Mülbart, 'The Eclipse of Contract Law in the Investment Firm-Client-Relationship', p. 320.

between different types of private governance (in particular, through private law courts and alternative dispute resolution mechanisms)? To what extent has the adoption of the conduct of business rules modified the institutional framework for the development and enforcement of securities law by re-shifting the institutional balance? In particular, has the implementation of the ISD and/or MiFID conduct of business rules strengthened the role of supervisory authorities at the expense of private law courts and/or alternative dispute resolution bodies? Has the ISD and/or MiFID implementation led to the decrease in the power of private law courts in private enforcement and the increase in the power of alternative dispute resolution bodies? Or has the role of the judiciary in enforcing the conduct of business rules remained the same, and if so, why?

In order to be able to answer these questions, it is necessary to analyse the role of the executive, private law courts and alternative dispute resolution boards in making and further developing the conduct of business rules and the relationship between different enforcement mechanisms. The following non-exhaustive list of questions may be of assistance in this respect.

Do private law courts, alternative dispute resolution boards and supervisory authorities co-operate with each other to ensure co-ordination and consistency in further developing and enforcing the conduct of business rules? Or do they operate wholly independently from each other? To what extent have the conduct of business rules had impact on the development of general private law concepts in CEECs? Do private law courts and/or alternative dispute resolution boards largely 'follow' the conduct of business rules when interpreting and applying general private law concepts, in particular general duties of care of service providers? Or do they tend to develop these private law concepts independently from the conduct of business rules contained in the supervision legislation and the decisions of supervisory authorities? Do private law courts take into account the decisions of alternative dispute resolution boards, if such are in place, when resolving similar cases, and *vice versa*?

The ultimate aim of the proposed analysis of the institutional aspects of the Europeanization process in the securities field in CEECs is to provide recommendations concerning the improvement of the present EU policy-making in the field of investment and other financial services, on the one hand, and the future EU enlargement, on the other.

## **VI. Preliminary Conclusions (H.-W. Micklitz)**

The analysis demonstrates an amazing lack of knowledge and even more amazing lack of intellectual concern over the transformation process of the national private legal orders in the NMS, CC and PCC through EU harmonisation measures. The European Commission starts from a one-size-fits-all approach which has been developed during the various rounds of enlargements and which was transposed with little modification to the NMS, CC and PCC.

The introduction is meant to provide for an analytical frame that allows for structuring the patterns of Europeanisation of private law and the different modes of adoption of EU legislation and General Principles. It enables us to understand the broader implications of a policy which ‘imposes’ on the NMS, CC and PCC, the *acquis communautaire* without taking the particularities of respective national private legal orders nor the socio-economic and institutional factors into account. We argue that the transformation process should be understood as a process that could and should be shaped along the line of the continuity/discontinuity paradigm. This requires first and foremost a deeper understanding of the national private legal orders as they stood prior to communist times, as they have developed during communism and then transformed in the aftermath of the liberation of the communist ideology. Only such a look back into the history under a given theoretical paradigm allows for understanding the implications of ‘forced’ harmonisation via EU law which could enhance continuity or promote discontinuity.

The transformation of European private law, this is the lesson to be learnt from the broader institutional framework of the enlargement strategy, has to be embedded into the overall policy of the European Community to engage into negotiations with the CEEs, the SEEs and the PCCs. The European Community has developed an ever more sophisticated enlargement strategy which tries to combine economic and social integration with political integration, i.e. with transforming socialist countries into Western type democracies. We do not know much about the way in which the enlargement strategy in its modifications with regard to CEEs, SEEs and PCCs affect the private law systems in these countries. And we neither know whether and to what extent the political integration, the process of democracy building, promoted a particular understanding of the private law system in these countries. The continuity/discontinuity paradigm contributes to a better understanding of if and how the imposed EU private law rules affect the remaining national private legal system.

The analysis of the three fields of private law, where the influence of the EU harmonisation policy is most obvious, consumer law, competition law and investor protection law, draws a more sophisticated picture of what can be anticipated from a more general theoretical analysis of the EU harmonisation policy as undertaken in the introduction. All three subject-related reports use the different ‘patterns of Europeanisation of private law’ (as spelt out in the introduction), as a guideline to draw together the existing research in the various fields and to provide for preliminary conclusions.

One major finding deserves to be highlighted. All three reports put emphasis on a regional approach, one which takes the economic, social and cultural patterns into account which do not vary only among the countries, but also among the regions. The question remains, how these regions have to be defined and under what criteria. The grouping together of the countries in CEEs, SEEs and PCCs makes sense from an EU perspective but only in a superficial and pragmatic sense. It suggests a kind of homogeneity which does not exist and which is most prominently the result of the political development in the aftermath of the break down of communism. There are different ways and means to approach the need for clarification. One might point to the obvious differences between the NMS and the SEEs, only the later suffered from a war which still affects the relationship between these countries. One might equally point to the role and function of Russia and Turkey which affect(ed) the EU integration policy with regard to the NMS and the CEEs. What is really needed, however, is an

approach which turns the perspective upside down and which intends to look at the EU enlargement policy through the eyes of those countries which are already members of the EU, which want to become members of the EU or which want to remain or are kept outside the EU. Only such a two way perspective paves the way for research that analyses the export of EU law to the NMS, CC and PCC as well as the re-import of NMS, CC and PCC to European private law.

The introduction does not only set the frame for analysing the substance of transformed EU private law, it also looks into the way in which the enlargement strategy affects the enforcement mechanism. Three modes have to be distinguished: administrative, judicial and private enforcement. The EU developed an ever stronger approach in its enlargement strategy which puts more and more emphasis on supervising and monitoring the establishment of appropriate enforcement mechanisms.

The three subject-related reports on consumer, competition and investor protection law reveal that EU the policy has not yet produced the intended results. This is still due to the strong focus on taking the law in the books as a yardstick for membership. Law enforcement involves the institutional architecture of the countries, the way in which the administration is organised, the independence and expertise of the judiciary as well as the shaping of the society in which non-governmental organisations should play a key role. The formal competences of the European Union are rather weak. If any they provide for remote and scattered procedural and institutional requirements depending on the area concerned. Seen from an aquis perspective, there is little what can be used to impose enforcement mechanism on the NMS, CC and PCC. What remains are the larger political requirements as defined in the Copenhagen Declaration and specified in the various enlargement agreements. They are much more difficult to implement, not only because of thier vagueness but also because they touch upon national and cultural sensitivities. Two major trends can nevertheless be identified, the strong emphasis on administrative enforcement and the development of ADR mechanisms outside the judiciary. The former might be a heritage from communist times, the later a response to the often underdeveloped and sometimes even corrupt judiciary.

Whether and to what extent the new and the old enforcement mechanisms produce visible and effective results is perhaps the biggest open issue in the overall project. Without empirical research as guided by the theoretical framework laid out, no valuable answer to the impact of European private law on the national legal systems in the NMS, the CC and the PCC can be given.





