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The 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 acceded to 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 on-going accession negotiations with Croatia and Turkey and other countries (Macedonia, Bosnia and Herzegovina, Albania Serbia and Montenegro, Ukraine and Moldova) are also interested in acceding to the EU. As well as these countries, Russia has also developed specific relationships with the EU which affect its private law system. Learning from previous experience may help in structuring a better pattern of Europeanization. But the broader question is whether the process of 'Europeanization' of private law in the CEECs can be considered as concluded with membership or rather whether 'regional policies' are needed to contextualize the implementation of EU law and to govern its spill-overs. This special issue brings together four different contributions on the impact of EU law on the national private law systems in the CEECs in three important fields of regulatory private law, i.e. competition law, consumer law and securities law, which have been profoundly affected by EU law. The overall conclusion is that the Europeanization of private law in the CEECs can no longer be regarded as a one way process in which the EU defines the standards to be implemented in the CEECs without a thorough analysis of the starting conditions and special needs of these countries. What is needed is an approach which turns the perspective upside down and looks at the EU enlargement policy through the eyes of the CEECs.

Keywords

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

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I. THE EUROPEANIZATION OF PRIVATE LAW IN CEECS:

INTRODUCTION*

Olha O. Cherednychenko and Hans-W. Micklitz

This Working Paper brings together four different contributions on the potential impact of the EU enlargement process on private law issues. They enjoy a common origin. The European University Institute organised a workshop in autumn 2008 that united private lawyers from all over the EU with a particular interest in Central and Eastern European (private) law. As part of the preparation of this workshop a survey was launched in order to get a clear picture of the stage of implementation and enforcement in Central and Eastern European Countries (CEECs) (i.e. New Member States (NMS), Candidate Countries (CC), Potential Candidate Countries (PCC), Neighbouring Countries (NC) and Partners). The result of these findings, as well as the conceptual underpinnings, is presented in the contribution by Fabrizio Cafaggi and Lukasz Gorywoda. They formed the starting point for a more detailed analysis of the Europeanization process in the aftermath of the conference, mainly in three important fields of regulatory private law, i.e. competition law, consumer law and securities law, which have been profoundly affected by EU law. As the choice of these three sectors shows, the concept of private law in our research is understood in a broad sense, meaning all legal rules concerning relationships between private parties regardless of the nature of the law, public or private, in which they have been included in national legal systems. The common denominator of the three selected fields of private law is that private law at EU level is very much based on regulation and can hence be understood as economic law. The choice of the three above mentioned sectors is motivated by the fact that the impact of EU law varies across these sectors and is linked to different EU policies followed in each specific sector. Analysing the Europeanization process in each field thus allows one to obtain a more complete picture of the impact of EU law on the private law systems in the CEECs and the problems faced by these countries in the course of the Europeanization process.

The three field studies included in this special issue differ in depth and in reach. However, they all follow the structure proposed and developed by Cafaggi and Gorywoda. The introduction looks into the patterns of Europeanization, the trigger for change, the interplay between substantive changes, the

* This working paper is a revised and updated version of a previous Law Department working paper, WP 2010/15 (see link: <http://cadmus.eui.eu/handle/1814/14740>). 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 Fejös, 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, available at <<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 O. Cherednychenko (University of Groningen)*, *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 7 October 2009 judge of the European Court of Justice) who presented the methodological draft report developed by the Working Group of Warsaw University.

development of appropriate institutions to enforce the law and the importance of historical and cultural particularities. The continuity/discontinuity paradigm focuses on the degree to which the implementation, be it after enlargement or during the process of negotiation, follows established patterns of existing law or whether, and to what extent, the opening towards the EU produced some sort of disruption. The modes of implementation look into the way in which the EU rules have been integrated, either by amending existing laws or by introducing separate laws. Enforcement has turned out to be one of the key issues which remain under-researched and under-theorised in the enlargement process. Therefore all papers put particular emphasis on enforcement institutions, be they administrative or judicial in nature.

By far the most advanced analysis is provided by K. Cseres and R. Karova on competition law. Most of the countries in Central and Eastern Europe did not previously have a competition law as this forms part of a competitive market society which did not exist. The contribution is in large parts a fully-fledged analysis of CEECs under inclusion of some neighbouring countries and partners. It not only provides an analysis of the existing laws as they stand but also of the emerging legal practices, derived from administrative authorities and the judiciary. Somewhere in between is the paper from H.-W. Micklitz on consumer law. The paper focuses on Western Balkans mainly and combines the experiences already documented on the law in the books and the law in action with a strong plea for further research. Communist countries had already adopted consumer laws, or at least a form of consumer law, long before the enlargement process started. Therefore consumer law constitutes an interesting area of research that combines the old institutions and the old law with the need for adaptation and change. Last but not least O.O. Cherednychenko embarks on an analysis of the regulation of investment services in consumer matters. Here again the CEECs had – and still have – to establish a new body of law, nearly outside existing patterns of national legal institutions and laws. Her contribution sets out the parameters for an analysis which still has to be undertaken. The conclusions are meant to combine the four papers, the conceptual considerations as well as the three field studies. They follow exactly the same pattern of analysis, the continuity/discontinuity paradigm, the modes of implementation, enforcement and institutional structures. Read altogether the contributions provide for a deep insight into the impact of the enlargement process on the private law systems in the CEECs and highlight the need for further research in this area.

Last but not least, a few words on the sources used in our research project. The contributions brought together in this special issue refer primarily to English-language sources concerning the impact of EU law on the national private law systems in the CEECs. The main reason for this lies in the aim pursued by the authors so far, i.e. to provide an overview of the Europeanization process across many different CEECs and to set a framework for further, more in-depth, research in this area across different sectors affected by EU law. Providing a thorough analysis of the relevant domestic literature in each CEEC, therefore, goes beyond the scope of this issue. However, this does not mean that the domestic sources have not played an important role in our research so far. Over the last ten years, legal discourse in the investigated countries has changed. Researchers from the CEECs have been increasingly publishing in English in order to be able to participate in the Europeanization process. Moreover, as the roots of most authors who contributed to this special issue lie in Central or Eastern European Countries, they have, as far as possible, also consulted the relevant non-English-language domestic sources and incorporated the results of their findings in their contributions to this issue. In view of their importance for understanding the Europeanization process in each country, domestic sources must play an even greater role in further research in this area.

II. THE EUROPEANIZATION OF PRIVATE LAW IN CEECS: CONCEPTUAL CONSIDERATIONS

Fabrizio Cafaggi and Lukasz Gorywoda

Since its creation, European Union (hereinafter: ‘the EU’) has experienced various enlargements¹. 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 acceded to 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 on-going accession negotiations with Croatia and Turkey and other countries (Macedonia, Bosnia and Herzegovina, Albania Serbia and Montenegro, Ukraine and Moldova) are also interested in acceding to the EU. Beyond these countries, Russia has also developed specific relationships with the EU which affect its private law system. Learning from previous experience may help in structuring better patterns of Europeanization. But the broader question is whether the process of ‘Europeanization’ of private law in CEECs can be considered as concluded with membership or rather ‘regional policies’ are needed to contextualize the implementation of EU law and to govern its spill overs.

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 possibility of codifying such rules. However, little attention has been given to the direct or indirect impact of the EU on national private law systems of new Member States (NMSs), candidate countries (CCs), potential candidate countries (PCCs), neighboring countries (NCs), and partners. Furthermore, in the search for common principles little attention has been devoted to the legal traditions and practices developed in CEECs.²

Europeanization has become a leading concept in the field of European studies and it denotes the 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’).³ An

¹ 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.

² Rafal Manko, “The Culture of Private Law in Central Europe after Enlargement: A Polish Perspective” 11 *European Law Journal* (2005), 527-548; Marek Safjan, Lukasz Gorywoda and Agnieszka Janczuk, “Taking the Collective Interest of Consumers Seriously: A View from Poland”, in Fabrizio Cafaggi and Hans-W. Micklitz (eds.), *New Frontiers of Consumer Protection: The Interplay Between Private and Public Enforcement* (Intersentia, Antwerpen, 2009), 171-206, and Christa Jessel-Holst, Rainer Kulms and Alexander Trunk (eds.), *Private Law in Eastern Europe: Autonomous Developments or Legal Transplants?* (Mohr Siebeck, Tübingen, 2010).

³ See, for example, Reinhard Zimmermann, “Civil Code and Civil Law: Europeanization of Private Law within the European Community and the Re-Emergence of a European Legal Science”, 1(1) *Columbia Journal of European Law* (1994), 63-105; Jonathan E. Levitsky, “The Europeanization of the British Legal Style”, 42(2) *American Journal of Comparative Law* (1994), 347-380, at 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

unfortunate aspect of these accounts is the absence of accurate theoretical characterization and empirical testing of the consequences of Europeanization for the New Member States (hereinafter: ‘the NMS’), Candidate Countries (hereinafter: ‘the CC’), Potential Candidate Countries (hereinafter: ‘the PCC’), Neighbouring Countries (hereinafter: ‘the NCC’), and Partners. These contributions also tend to treat Europeanization as a product instead of viewing it as an interactive process.⁴ Such an approach neglects the fact that legal systems affected by the Europeanization are not only ‘law-takers’ but also ‘law-givers’.⁵ 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 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 acceded to the Union but also on those of neighbouring countries that have signed agreements with EU. The analysis takes into account both the unilateral process of approximation of laws in NMS and neighbouring 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 analyses not only the legal tools used by each country in its approximation process, but it also takes into account 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 paper 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**’ (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) may be summarized as follows:

(Contd.)

restrained role in the nation’s political system); Giovanna D’Alfonso, “The European Judicial Harmonization of Contractual Law: Observations on the German Law Reform and ‘Europeanization’ of the BGB”, 14(6) *European Business Law Review* (2003), 689-726; Guido 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).

⁴ Important exceptions are Fabrizio Cafaggi, “Una governance per il diritto europeo dei contratti”, in Fabrizio Cafaggi (ed.), *Quale armonizzazione per il diritto europeo dei contratti?* (CEDAM, Padova, 2003) and Christian Joerges, “Europeanization as Process: Thoughts on the Europeanization of Private Law”, 11(1) *European Public Law* (2005), 62-82, at 63.

⁵ One of the exceptions is Tanja Borzel, “Member State Responses to Europeanization”, 40(2) *Journal of Common Market Studies* (2003), 193–214. (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); Rolf Knieper, “Möglichkeiten und Grenzen der Verpflanzbarkeit von Recht”, 72(1) *Rebels Zeitschrift für ausländisches und internationales Privatrecht* (2008), 88-112.

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 of 2008 by a group of young researchers from the CEECs. Accordingly, it is based on the evidence produced by a team of national reporters through a questionnaire, interviews and subsequent following up.

1. 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’.⁶ 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. the widening of the group of actors whose actions and relations are normatively structured.⁷ 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.⁸

⁶ Ian Bache and Andrew Jordan, “Europeanization and Domestic Change”, in *Ian Bache and Andrew Jordan* (eds.), *The Europeanization of British Politics* (Palgrave Macmillan, Basingstoke, 2006), at 30. On the concepts and mechanisms of Europeanization see also Christoph Knill and Dirk Lehmkuhl, “How Europe Matters: Different Mechanisms of Europeanization”, 3(7) *European Integration Online Papers* (1999) available at <<http://eiop.or.at/eiop/pdf/1999-007.pdf>> (accessed 6 June 2009); Helen Wallace, “Europeanization and Globalization: Complementary or Contradictory Trends?”, 5(3) *New Political Economy* (2000), 369-381; James Caporaso, Maria Green Cowles and Thomas Risse (eds.), *Transforming Europe: Europeanization and Domestic Change* (Cornell University Press, Ithaca, 2001); Kevin Featherstone and Claudio Radaelli (eds.), *The Politics of Europeanization* (Oxford University Press, Oxford, 2003), Maarten Vink, “What is Europeanization?”, 3(1) *European Political Science* 63 (2003), 63-74; Simon Bulmer and Claudio Radaelli, “The Europeanisation of National Policy”, in Simon Bulmer and Christian Lesquesne (eds.), *The Member States of the European Union* (Oxford University Press, Oxford, 2005) and Simon Bulmer, “Theorizing Europeanization”, in Paolo Graziano and Maarten P. Vink (eds.), *Europeanization: New Research Agendas* (Palgrave Macmillan, Basingstoke, 2007), 46-58.

⁷ See Frank Schimmelfennig and Ulrich Sedelmeier, “Theorizing EU enlargement: research focus, hypotheses, and the state of research”, 9(4) *Journal of European Public Policy* (2002), 500-528, 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.’

⁸ 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).

In this project Europeanization is operationalized as a concept referring to five phenomena within vertical, horizontal and diagonal Europeanization:⁹ (1) transposition of the *acquis communautaire*; (2) influence on national institutional frameworks (institutional design); (3) compliance with transposed *acquis communautaire*; (4) spill over 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* is to investigate the influence of the EU on private law in different groups of European countries. The *second* is to conduct an analysis enabling us 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 for the 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 analyse which ones promote and which ones resist Europeanization within each legal order.

2. 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.

The choice of 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.¹⁰ Second, the pool of CEECs is not a single unit of analysis as the countries have different approximation obligations which translate into different patterns of Europeanization. Third, they also have different market and political regimes influencing the modes and constraints of Europeanization. Finally, a further level of heterogeneity within CEECs stems from the different degrees of influence their historical legacies have 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.

The partitioning of the countries into different groups is justified, given their diverse relationships with the EU. However, the preliminary research suggests that the legal status alone 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 because some differentiation between the former communist states had already begun to occur by the beginning of 1990s.¹¹ In general, European agreements were negotiated between the EU and the CEECs from the 1990s onwards. However, as early as December 1990, the EU negotiated with Czechoslovakia, Hungary and Poland on the content of the agreement that was to be 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-

⁹ On vertical and diagonal interactions see Christoph Schmid, "Vertical and Diagonal Conflicts in the Europeanization Process", in Christian Joerges and Oliver Gerstenberg (eds.), *Private Governance, Democratic Constitutionalism and Supranationalism* (European Communities, 1998).

¹⁰ Important exceptions are Norbert Reich, "Transformation of Contract Law and Civil Justice in the New EU Member Countries: The Example of the Baltic States, Hungary and Poland", in Fabrizio Cafaggi (ed.) *The Institutional Framework of European Private Law* (Oxford University Press, Oxford, 2006) and Monika Jozon, "Integration of the European Developments in Private Law into Domestic Civil Law: Factors Framing the Reception of the DCFR in Romania", *XIV Juridica International* (2008), 156.

¹¹ Frank Schimmelfennig and Ulrich Sedelmeier (eds.), *The Europeanization of Central and Eastern Europe* (CUP, Ithaca, 2005), who demonstrate that there has been variation in the speed and extensiveness with which rules were adopted both across sectors and across countries in CEECs.

type capitalist models. However, they have not all done so at the same pace or to the same degree.¹² 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. A 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. In this project we have adopted the horizontal approach covering five groups of countries, i.e. NMS, CC, PCC, NC and Partners.

Second, three sectors have been chosen for preliminary investigation: consumer law,¹³ competition law¹⁴ and securities law.

The choice of the sectors is motivated by the fact that the notion of the *acquis communautaire*¹⁵ 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 the modes of implementation and thereby the Europeanization strategies. Furthermore, the obligations concerning the modes of implementation vary from sector to sector and bring about different results. Finally, the sectors chosen vary as regards 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 their transition from command and control economies and totalitarian rule to market economies with some degree of compliance with the rule of law. What makes the Europeanization of CEECs special is the conditionality and the fact that the Europeanization of these countries has 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 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.

¹² David Lane, "Post-Communist States and the European Union", 23 *Journal of Communist Studies and Transition Politics* (2007), 461-477, at 468.

¹³ Hans-W. Micklitz, "The Law of the Western Balkan Countries in the Mirror of Consumer Law", in Marija Karanikic, Hans-W. Micklitz and Norbert Reich, *Modernising Consumer Law – the Experience of the Western Balkans* (2012 forthcoming).

¹⁴ On Europeanization of competition law in CEECs see Katalin J. Cseres, "Governance Design for European Private Law: Lesson from the Europeanization of Competition Law in Central and Eastern Europe", in Fabrizio Caffaggi and Horatia Muir-Watt (eds.), *Making European Private Law: Governance Design* (Edward Elgar, Cheltenham, 2008), 138-193 and Anna Gwiazda, "Europeanization of Polish Competition Policy", 29(1) *Journal of European Integration* (2007), 109-131. See also Frank Emmert, "Introducing EU Competition Law and Policy in Central and Eastern Europe: Requirements in Theory and Problems in Practice", 27(2) *Fordham International Law Journal* (2004), 642-678.

¹⁵ On the concept of *acquis communautaire* see Christine Delcourt, "The *Acquis Communautaire*: Has the Concept Had its Day?", 38(4) *Common Market Law Review* (2001), 829-870.

3. Institutional Approach

The 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 one context to another. 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* the 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’.¹⁶

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 affected the balance? Third, from a dynamic perspective, the question is whether Europeanization is tilting this balance in certain direction (deliberately or unintentionally). 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 looks to whether it is possible to identify different ‘varieties of post-communisms’¹⁷ in CEECs and, if the answer is in the affirmative, a follow-up question arises as to the extent to which the current Europeanization strategy accommodates these varieties.¹⁸

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.¹⁹

It follows that the Europeanization strategy not only induces change in private law systems of CEECs but also that CEECs are a factor which influences the equilibrium at EU level. For that reason the analysis of Europeanization cannot be conducted within a stationary framework but rather 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,²⁰ in the system of private law both at the CEECs and EU level.

¹⁶ Neil Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press, Chicago, 1994), at 177.

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

¹⁸ On Europeanization and institutional choice in general and with relation to consumer law in specific see Antonina Bakardjieva Engelbrekt, “The impact of EU enlargement on private law governance in Central and Eastern Europe: The Case of Consumer Protection”, in Fabrizio Cafaggi and Horatia Muir-Watt (eds.), *Making European Private Law: Governance Design* (Edward Elgar, Cheltenham, 2008), 98-137.

¹⁹ See Manuela Alfé, Thomas Christiansen and Sonia Piedrafita, 18 *ARENA Working Paper* (2008), September 2008, available at <http://www.arena.uio.no/publications/working-papers2008/papers/wp08_18.pdf> (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 Christoph 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).

²⁰ Cf. Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990).

4. 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 the diachronic analysis is to identify points of change in the development of national private laws, comparing pre- and post-communist stages, the 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 through the identification of time periods when critical events or turning points took place. The diachronic approach therefore implies that when studying the 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.²¹

A brief illustration may 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 points to a less important role for the judiciary, continuity would see it being of greater importance. A scenario of a more important judiciary brings the issue of different judicial attitudes into play. Accordingly, judges may either act as a barrier to Europeanization or, instead, may facilitate the process of the 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, and often greater, impact than ordinary courts.

On a macro level, it seems plausible to expect that, for an applicant state, the decision to join the EU constitutes a major institutional policy reorientation whereas, for the existing Member States, the decision to enlarge the EU is more a matter of policy continuity.²² 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 the legal traditions of these countries matter as far as the Europeanization of private law is concerned?²³

²¹ On the reform of judiciary in CEECs see Frank Emmert, "Administrative and Court Reform in Central and Eastern Europe", 9(3) *European Law Journal* (2003), 288-315. See also Frank Emmert, "The Independence of Judges – A Concept Often Misunderstood in Central and Eastern Europe", 3(4) *European Journal of Law Reform* (2001), 405-409.

²² See Frank Schimmelfennig and Ulrich Sedelmeier, "Theorizing EU enlargement: research focus, hypotheses, and the state of research", 9(4) *Journal of European Public Policy* (2002), 500-528, at 514.

²³ 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 Marek Safjan, Lukasz Gorywoda and Agnieszka Janczuk, "Taking the Collective Interest of Consumers Seriously: A View from Poland", in Fabrizio Cafaggi and Hans-W. Micklitz (eds.), *New Frontiers of Consumer Protection: The Interplay Between Private and Public Enforcement* (Intersentia, Antwerpen, 2009), 171-206.

In contrast, a 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, a synchronic analysis zooms in on identified periods of change to discover where the changes derive from.

5. 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, at least in that the states started to adopt their rules prior to their formal accession in the expectation of becoming a full member. In fact, this has predominantly affected the answer to the ‘how’ and not to the ‘if’ question. Accordingly, the underlying hypothesis of the project is that the 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 concerns the relationship between legal obligations to adopt European legislation and legislative initiatives introducing European-like legislation undertaken outside of the legal obligations. The second question, in turn, deals with the relationship between institutional and socio-economic factors driving towards the 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.

First, and in its most simple form, the 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). This is where the EU actually prescribed an institutional model to which domestic arrangements had to be adjusted. Thus, countries had only a limited degree of discretion when deciding on specific arrangements in order to comply with European requirements. Here the question is how legal obligations influenced the 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 factors²⁴ inducing the adoption of EU-like legislation. For example, a given non-EU state could be incentivised to adjust its legal standards when entering into trade arrangements with the EU, regardless of the political pressure. In this case, states have a much higher degree of discretion when deciding on adjustments of their domestic regimes (allowing them room for innovation) than in the first scenario (Europeanization by legislation). Under this scenario the European influence alters domestic trading structures.

Third, another example of indirect influence is how 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

²⁴ On market-driven integration see Daniel Verdier and Richard Breen, “Europeanization and Globalization: Politics Against Markets in the European Union”, 34 (3) *Comparative Political Studies* (2001), 227–62, at 227.

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.

5.1. *Legal Factors and Diversity of Obligations*

Even before the collapse of the communist system, the EU had already conducted negotiations on an individual basis with the CEECs. 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 an EU-Turkey customs union in 1996. European association agreements were important to the extent that they defined the countries with which the EU considered the market economy and electoral democracy models to be most compatible.

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 the 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, particularly affecting state subsidies and freedom of competition.

The PHARE program (Poland and Hungary: Assistance for Economic Reconstruction)²⁵ was introduced in 1990. It provided support for building institutional capacity for the adoption and implementation of EU law, while numerous sector-level projects were also 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 the 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 membership²⁶ 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.²⁷ It has been noted in the

²⁵ The PHARE program was later extended to other countries.

²⁶ 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. John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000).

²⁷ See also Ulrich Sedelmeier, "Pre-accession conditionality and post-accession compliance in the new member states: a research note", in Wojciech Sadurski, Jacques Ziller and Karolina Zurek (eds.), *Apres Enlargement: Legal and Political Responses in Central and Eastern Europe* (RSCAS, Florence, 2006), 145-160; Geoffrey Pridham, "The Effects of the European Union's Democratic Conditionality: The Case of Romania during Accession", 23(2) *Journal of Communist Studies and Transition Politics* (2007), 233-258, at 241; Geoffrey Pridham, "Status Quo Bias or Institutionalisation for Reversibility?: The EU's Political Conditionality, Post-Accession Tendencies and Democratic Consolidation in Slovakia", 60(3) *Europe-Asia Studies* (2008), 423-454. On the enlargement process see the contributions in Marise Cremona (ed.) *The Enlargement of the European Union* (Oxford University Press, 2003).

literature that agreements between the EU and CEECs were asymmetrical in character as the EU was able to unilaterally dictate conditions to these countries.²⁸

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.²⁹ In 1994 a pre-accession strategy 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 Market³⁰ 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 was 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 different areas of EU activity were examined with the measures divided into two stages, in order of priority, so as 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

²⁸ In some cases, though, the EU used its political power to secure its objectives. In the case of Romania, for example, it has been documented that ‘EU pressure was the decisive factor in explaining Romania’s compliance with and implementation of conditionality’; Geoffrey Pridham, ‘Romania’s Accession to the European Union – Political Will, Political Capacity and Political Conditionality: the Perspectives of Brussels and Bucharest’, XV *International Issues & Slovak Foreign Policy Affairs* (2006), 52-67, at 66.

²⁹ ‘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.’ David Lane, ‘Post-Communist States and the European Union’, 23(4) *Journal of Communist Studies and Transition Politics* (2007), 461-477, at 467.

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

in the areas of legislation covered in the White Paper. A legislative database was established by the Office.

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 in 1996 a series of legal studies were published outlining its path to approximation.

Preparation of the candidate CEECs focused almost exclusively on harmonisation 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 pass 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.’³¹

Table 1: Level of Integration Achieved by an Agreement with the EU

Countries/ Agreements	Cooperation Agreement	Europe Agreement / SAA	Application for Accession	European Partnership	Accession Partnership	Accession to the EU
Poland		1991	1994		1999	2004
Hungary		1991	1994		1998	2004
Czech Republic		1993	1996		1998	2004
Slovakia		1993	1995		1998	2004
Romania		1993	1995		1998	2007
Lithuania	1992	1995	1995		1998	2004
Estonia		1995	1995		1998	2004
Latvia		1995	1995		1998	2004
Slovenia		1995	1996		1998	2004
Macedonia	1997	2001	2004	2006	2008	
Serbia	2004, 2006	2008	2009	2008		
Turkey		1963	1987		2001	

³¹ Monika Jozon, “The Enlarged EU and Mandatory Requirements”, 11(5) *European Law Journal* (2005), 549-565 (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 (EU Moldova Action Plan)	Negotiations on new Association Agreement are currently pending (January 2012)
Russia	1994	2003 and 2005 ('Four Common Spaces' as a basis for cooperation)	Negotiations on New EU-Russia Agreement were launched in June 2008

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 the Europe Agreements with Romania, Slovakia, Czech Republic, Lithuania, Estonia and Slovenia. However, there is no reference to ensuring compatibility in a *gradual* way in the Europe Agreements with Poland or Hungary. Furthermore, whereas the relevant clause for Poland imposed an obligation to use their '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 in the Europe Agreements with the Czech Republic, Hungary, Poland, Romania or 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 the Europe Agreements with the Czech Republic, Poland, Romania, Slovakia or Slovenia, it is listed 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). Conversely, there is no mention of either telecommunications or product liability in the Partnership and Cooperation Agreement between the European Communities and their Member States and the Republic of Moldova.

Whereas some of the Europe Agreements stress the need for 'rapid progress' in the approximation of law in given fields, others omit such a qualification. There are also examples of 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.³²

³² 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 February 2008.

Some of the instruments refer to the ‘progressive approximation of legislation’ (Common Strategy of the European Union of 4 June 1999 on Russia, 1999/414/CFSP). Furthermore, some differences in the way the obligations are framed seem to relate to specific sectors and vary in the level of detail with which the requirements are spelled out. Finally, institutional mechanisms envisaged in the agreements with NMS, CC, PCC, NCC and Partners also show some degree variety.³³

This variety in the wording and structures of the clauses reflects how some elements were more or less binding than others and also shows the different degrees of discretion granted to certain states when adjusting their private law systems to EU policies.

At the beginning, in the context of enlargement, the candidate states basically 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. The candidate countries were obliged to accept upon accession ‘the basic principle (...) that the entire *acquis communautaire* must be accepted as binding’³⁴ which was accompanied by the ‘importance (...) of ensuring its effective application through appropriate administrative and judicial structures’.³⁵ The *acquis communautaire* therefore currently constitutes 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.³⁶ This leads inevitably to the question of the precise content and contours of this framework.³⁷

5.2 Market-Driven Factors Inducing Adoption of EU-like legislation

The questionnaire has identified various patterns of Europeanization of national private law grounded in the 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 rather from the need to enter into trade relationships with the EU in order to increase its GDP.

5.3 Socio-Economic Factors

As an example of indirect influence, socio-economic factors may play a role in the strategies of Europeanization of private law.³⁸

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

³³ For a description of the adaptation process to the EU requirements undertaken by Ukraine see Roman Petrov, “How Far to Endeavour? Recent Developments in the Adaptation of Ukrainian Legislation to EU Laws”, 8(1) *European Foreign Affairs Review* (2003), 125-141.

³⁴ Case C-259/95, *Parliament v. Council* (1997) ECR I-5313, para. 17.

³⁵ Regular reports from the Commission on progress towards accession by each of the candidate countries, COM (1998) 712 final 17 December 1998, p. 19. See Antje Wiener and Guido Schweltnus, “Contested Norms in the Process of EU Enlargement: Non-Discrimination and Minority Rights”, in George Bermann and Katharina Pistor (eds.), *Law and Governance in an Enlarged Europe* (Hart Publishing, Portland, 2004), 451-483, at 452.

³⁶ See also Roman Petrov, “Exporting the *Acquis Communautaire* into the Legal Systems of Third Countries”, 13(1) *European Foreign Affairs Review* (2008), 33-52.

³⁷ See Christine Delcourt, “The *Acquis Communautaire*: Has the Concept Had its Day?”, 38(4) *Common Market Law Review* (2001), 829-870. See also Carlo Curti Gialdino, “Some reflections on the *Acquis Communautaire*”, 32(5) *Common Market Law Review* (1995), 1089-1121.

³⁸ This argument is based on Polanyi’s social embeddedness theory, see Karl Polanyi, *The Great Transformation* (Boston, 1957). Polanyi argued that since regulation of the market and the market itself are embedded in a particular society, and thereby they are interrelated, they cannot function properly when they get disconnected.

from a project on the implementation of the methodology of Supervisory Review Process for investment firms in accordance with the Capital Requirements Directive.³⁹

At the same time, CEECs have been an object of various programs involving exchange of officials and consultancy arrangements, the latter also within a global framework 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 the legal culture, and ultimately the 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 enhancing corporate governance has essentially failed.⁴⁰ On the other hand, some of them have succeeded.⁴¹

Furthermore, after the 1989 turning point many foreign law firms – mainly of US origin – established 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.⁴² Further evidence is needed to test the accuracy of this proposition.

6. Patterns of Legal Europeanization of Private Law

Notwithstanding the growing number of studies, a 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 high level of 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.⁴³ 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.

³⁹ Dimitar Doychinov 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).

⁴⁰ Bernard S. Black, Reinier H. Kraakman and Anna Tarassova, “Russian Privatization and Corporate Governance: What Went Wrong?”, 52 *Stanford Law Review* (2000), 1731-1808. See also Viktor Meier, “The Transition in Eastern Europe: What Went Wrong?: The Responsibility of the West”, 24 *Est-Ovest* (1993), 9.

⁴¹ See, for example, Edward L. Glaeser and Andrei Shleifer, “The Rise of the Regulatory State”, 41(2) *Journal of Economic Literature* (2003), 401-425, discussing the reform of the Polish securities market and the factors which made it successful. In general see David Nelken, “The Meaning of Success in Transnational Legal Transfers”, 19 *Windsor Yearbook of Access to Justice* (2001), 349–366, at 350. For CEECs see Thomas W. Waelde and James L. Gunderson, “Legislative Reform in Transition Economies: Western Transplants – A Short-Cut to Social Market Economy Status?”, 43(2) *International and Comparative Law Quarterly* (1994), 347-378.

⁴² On the influence of US law and lawyers in Europe see Wolfgang Wiegand, “Reception of American Law in Europe”, 39(2) *American Journal of Comparative Law* (1991), 229-248. For CEECs see Charles-Edward Anderson, “Exporting Democracy: US Lawyers Help Eastern Europe Draft New Constitutions”, 76(6) *ABA Journal* (1990), 18-19, and Joan Davison, “America’s Impact on Constitutional Change in Eastern Europe”, 55 *Albany Law Review* (1992), 793-814.

⁴³ Christoph Knill, “Implementing European Policies: the Impact of National Administrative Traditions”, 5(1) *Journal of Public Policy* (1998), 1-28; Christoph Knill and Andrea Lenschow, “Coping with Europe: the Impact of British and German Administration on the Implementation of EU Environmental Policy”, 5(4) *Journal of European Public Policy* (1998), 595-614; Tanja Borzel and Dirk 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).

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

A third pattern deals with Europeanization within the EU due to legal transplants between MS beyond EU legislation, especially related to the process of recodification. Here, the important role played by the Dutch Civil Code, the Swiss Civil Code and 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.⁴⁴

In general, horizontal and vertical legal transplants have been identified. Horizontal legal transplants imply some degree of interaction among different legal systems, which can take place in the case of individual rules or institutions or for entire branches of law, and can be determined by different reasons which range from prestige to forced imposition.⁴⁵

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.⁴⁶ A 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.⁴⁷ The Better Regulation initiative is a conscious exercise of legal transplanting. This borrowing has been both horizontal and vertical.

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

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

⁴⁴ In the literature see Paul H. Brietzke, "Designing the Legal Frameworks for Markets in Eastern Europe", 7 *Transnational Lawyer* (1994), 35-65, at 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 David Lane, "Post-State Socialism: A Diversity of Capitalisms?", in David Lane and Martin Myant (eds.), *Varieties of Capitalism in Post-Communist Countries* (Palgrave Macmillan, Basingstoke, 2007), 13-39, at 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.'

⁴⁵ See Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, Athens, 2nd edn, 1993) and Alan Watson, "From Legal Transplants to Legal Formants", 43(3) *American Journal of Comparative Law* (1995), 469-476. Turkey and Armenia are examples of extreme borrowing from codes of other countries, see Alan Watson, "Legal Transplants and European Private Law" available at <http://www.alanwatson.org/legal_transplants.pdf> (accessed 13 June 2009).

⁴⁶ See, for example Daniela Borcan, "New Bankruptcy Laws in Central Europe: The influence of American, French and German law", 33(4) *Revue d'Etudes Comparatives Est Ouest* (2002), 93-123. See also Gianmaria Ajani, "By Chance and Prestige: Legal Transplants in Russia and Eastern Europe", 43 *American Journal of Comparative Law* (1995), 93-117.

⁴⁷ A framework of legal borrowing that adds the vertical dimension (between states and federal and international bodies) is developed in Jonathan B. Wiener, "Something Borrowed for Something Blue: Legal Transplants in the Evolution of Global Environmental Law", 27(4) *Ecology Law Quarterly* (2001), 1295-1371.

7. 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 the judiciary; and (4) through private organizations, including law firms (here we speak not about adoption but about Europeanization).

7.1 *Europeanization of Private Law through Legislation*

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

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

7.2 *Modes of Adoption through Administrative Agencies*

The next identified mode of adoption of EU law is through administrative agencies. The focus of the paper is on three issues. First, the role of the executive and in particular of administrative agency networks as a vehicle for the Europeanization of private law in NMS will be investigated. Second, in the competition field, the role of the network of competition authorities in ensuring Europeanization will be analysed. Finally, in financial markets, the role of ESMA (European Securities and Markets Authority), EBA (European Banking Authority) and EIOPA (European Insurance and Occupational Pensions Authority) will be addressed.

7.3 *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.

7.4 *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 played by multinational firms as ‘Europeanizers’ is also relevant. The role of NGO’s, in particular consumer and environmental organisations, is relevant but weaker than that of market players.

8. 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.

9. Conclusion

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 has been instrumental to the development of a framework enabling us 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 of recommendations for the 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. During 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 five identified groups in order to highlight the 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 back further than 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 the potential tension between a legal tradition which is based on European models and any institutional traditions which have been highly influenced by Communism or, in other cases such as Turkey, by other types of constitutional or political traditions because this tension might affect the process of Europeanization.

Preliminary research has revealed that CEECs suffer from enforcement problems. Accordingly, the institutional perspective of the project will be developed in order to address the question of how soft law based strategies at the EU level might work in 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. Questionnaires provided the data to describe the landscape from which the project begins. Other instruments, such as impact assessment of judgments of the Court of Justice of the European Union (CJEU) to understand the institutional dynamics behind the Europeanization process are being considered.⁴⁸

Finally, the project has a double scope. The scientific scope will translate into a systematic characterization of the patterns of the Europeanization of private law in CEECs. In its institutional guise, 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.

⁴⁸ In particular, the following questions are being asked: Who uses CJEU judgments and for what purposes? What explains the tendency of lower courts to refer to CJEU judgments more than higher courts? What is the impact of CJEU judgments on administrative agencies?

III. THE EUROPEANIZATION OF PRIVATE LAW IN CEECS: THE CASE OF COMPETITION LAW

Kati Cseres and Rozeta Karova

1. Introduction

At first sight competition law seems to be lacking a direct link to the developments of private law. However, it plays a significant disciplinary 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*, as well as the leverage of EU law, in the way competition laws have 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 a source of 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 (CEECs). However, an in-depth analysis of this extraordinary law transfer, and the way EU 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 of 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*.¹

This top down approach dealt with 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 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.

¹ Marjo Ojala, *The Competition Law of Central and Eastern Europe* (Sweet & Maxwell, London, 1999); Damien Geradin and Daniel Henry, “Competition Law in the New Member States – Where Do We Come From? Where Do We Go?”, in Damien Geradin and Daniel Henry (eds.), *Modernisation and Enlargement: Two Major Challenges for EC Competition Law* (Intersentia, Antwerpen, Groningen, 2004), 273-310; Michael Fritsch and Hendrik Hansen, (eds.), *Rules of competition and East-West integration* (Kluwer Academic Publishers, Dordrecht, Boston, 1997).

Second, the experience of the NMS indicates that EU leverage has been the most noticeable and direct influence on the statutory enactments of competition law, however, it has also influenced enforcement methods and institutional choices in an indirect way. This unusual process of rule transfer highlighted the exceptional influence the EU has had on the competition rules of the NMS. This is 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 design of economic law merit more 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 room for domestic discretion 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, it can still be 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 CC 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 the fact they were in transition from a 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.²

Fourth, in the CEECs there seems to be a significant difference between the black letter of the law and its active enforcement. It is important to investigate why and how the CEECs reconcile their legal obligations not only with the need to address specific market failures of their transition economies but also with the need to develop enforcement methods and institutional structures that are suitable for their local socio-economic circumstances.

Fifth, there are crucial developments in competition policy that directly intervene with national private laws. The CJEU's judgment in *Courage*³ 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.⁴ Recent policy papers such as the Green Paper of 2005⁵, the White Paper of 2008⁶ on damages claims and the most recent consultation paper from the Commission on collective redress⁷ 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.⁸ The documents actually argue that the differences among the various models of tort laws jeopardize the effective

² Jens Hölscher, Johannes Stephan, "Competition Policy in Central East Europe in the light of EU Accession", 42(2) *Journal of Common Market Studies* (2004), 321-345; Mark A. Dutz, Maria Vagliasindi, "Competition Policy Implementation in Transition Economies: An Empirical Assessment", EBRD Working papers, 1999; Saul Estrin and Peter Holmes, "Competition Policy for Central and Eastern Europe: The Challenge of the Europe Agreements", in Saul Estrin and Peter Holmes (eds.), *Competition and Economic Integration in Europe* (Edward Elgar, Cheltenham, 1998), 97-108; Michal 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.

³ Case C-453/99 *Courage v. Crehan* (2001) ECR I-06297, para 26.

⁴ Such as the 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.

⁵ Green Paper Damages actions for breach of the EC anti-trust rules, COM (2005) 672 final, 19 December 2005.

⁶ White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165, 2 April 2008.

⁷ Towards a coherent European approach to Collective Redress, SEC(2011)173 final, 4 February 2011.

⁸ In both documents the Commission concluded that the exercise of a right to damages in Europe still faces 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."

private enforcement of European competition law.⁹ The Commission, in fact, makes a far-reaching attempt to bridge “what until now seemed to be the “unbridgeable””.¹⁰

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 while also delegating an active role to 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 the private enforcement of competition law easier and encouraged private actors to enforce competition rules before their own domestic courts. The im(com)plexities 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 EU 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.

⁹ At the same time they also clearly contrasted the high convergence of competition laws with the considerable divergences in tort laws. Francisco Marco and Albert Sánchez Graells, “Towards a European tort law? Damages actions for breach of the EC antitrust rules: harmonizing tort law through the back door?”, 16(3) *European Review of Private Law* (2008), 469–488, at 472-473.

¹⁰ Walter Van Gerven, “Bridging the unbridgeable: Community and national tort laws after *Francovich* and *Brasserie*”, 45 *International and Comparative Law Quarterly* (1996), 507-544.

TABLE I: An Overview of the Pre-Existing Competition Laws in the Investigated Countries

When did an identifiable body of competition law develop?	Pre-IIWW	Communist	Post-communist/Pre-association	Post association/Pre accession
NMS	Act on cartels: Czech Republic (1870, 1934), Poland (1933) Hungary (1931)	Poland (1987) Hungary (1984)		Poland (1990, 2000); Hungary (1990); Czech Republic (1991, 2001); Lithuania (1992); Romania (1996); Slovakia (1991); Slovenia (1993, 1999)
CC				Macedonia (1999, 2004); Turkey (1994)
PCC				Serbia (1996, 2006)
NC				Moldova (1992)
Other partners				Russia (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 the 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 there was merely a law concerning unfair competition, but it concerned commercial law, not cartel 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 of 1994. Even though its drafting started in 1971, it was only promulgated later in the course of the implementation of the *acquis* due to the legal obligation to draft an act on the protection of competition stemming from the Association Agreement of 1963.

Competition was actually non-existent in those countries based on central planning. Administratively planned market activities and the central allocation of resources took the place of free competition and trade. The countries examined here had to build competition laws from scratch and, even more importantly, they had to create a competition culture. Competition law and policy played a significant role in the process of transition more generally in the former socialist countries as they were of great importance in creating a functioning market economy. Not only did they support and stimulate the economic changes, they also had a demonstrative role as well. The introduction of competition law signalled these countries' commitment to a market economy and, similarly, competition advocacy also proclaimed the principles of correct economic activity and fair market practices.

While many of these countries also looked to the competition laws of countries such as Germany, the US, other NMS and even invited foreign experts for guidance on drafting competition acts, the EU competition rules provided the most 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 their legislation with 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 a 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 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

	Equivalent to art. 101 TFEU			Equivalent to art. 102 TFEU	
	Notification procedure		Block Exemptions		Abuse of superior bargaining power
	YES	NO			
NMS	Slovakia (not compulsory)	Poland, Hungary (repealed in 2005), Czech Republic, Romania, Lithuania, Slovenia	Poland, Hungary, Czech Republic, Romania, Lithuania, Slovakia (EU rules apply - no national ones)	Poland Romania (more ex. of abuse), Czech Republic (presumption of dominance from ECJ case law), Slovakia (Act on buyer power has been enacted – in force from January 2009 – that focuses on the problem of supermarkets and their supplier), Slovenia	
CC	Macedonia, Turkey (not		Macedonia, Turkey	Macedonia (the notion “dominant position” is explained)	

	compulsory)			
PCC	Serbia		Serbia	Serbia (exact wording)
NC	Moldova (no application - no guidelines yet)		Moldova (NO)	Moldova (more ex. of abuse that could be found in ECJ case law)
Other partners	Russia		Russia	

a) The new Member States

The legal, economic and political requirements of the CEECs' accession to the EU were first laid down in the so-called Copenhagen criteria¹¹ of the 1993 Copenhagen European Council and were later given 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.¹² The relations between the CEECs and the EU had been institutionalised through bilateral association agreements, the so-called Europe Agreements¹³ 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, the transposition of the competition and state aid *acquis*, effective enforcement of the competition and state aid rules and the strengthening of the administrative capacity through well-functioning competition authorities were among the obligations of the candidate countries.¹⁴

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.¹⁵ 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.¹⁶

¹¹ 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.

¹² 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 on Preparation of the associated countries of Central and Eastern Europe for integration into the Internal Market of the Union, COM (95) 163, May 1995.

¹³ 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.

¹⁴ 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, *op cit.* note 12.

¹⁵ 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.

¹⁶ 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.

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.”¹⁷

Moreover, it accentuated the importance of institution building, by requiring that viable rules regarding procedures be put in place to ensure effective enforcement and thus the functioning of the state aid and competition 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.¹⁸

The European Commission has also provided substantial financial and technical assistance to the candidate countries through the PHARE program that aimed at, among other things, strengthening public administrations and institutions so as they would function effectively inside the European Union.¹⁹

In sum, at the time when they were candidate countries the NMS 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 in order 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 1/2003²⁰ 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.²¹

3.1.1. Harmonization of substantive rules

Throughout the whole accession process it has not been made clear what institutional and substantive solutions the candidate countries were to implement in their respective legal system beyond the obligation to bring their competition rules into conformity with EU law. The candidate countries were never given the exact parameters of their obligation to harmonize their competition laws. Therefore it can be argued that harmonization 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 in deciding what kind of substantive and institutional regime they would opt for.

¹⁷ White Paper, *op cit.* note 12, at 49, 51.

¹⁸ White Paper, *op cit.* note 12, at 52-53, 55-56, 59.

¹⁹ The Programme of Community aid to the countries of Central and Eastern Europe (Phare), see http://europa.eu/legislation_summaries/enlargement/2004_and_2007_enlargement/e50004_en.htm.

²⁰ 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.

²¹ 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.

This freedom is, however, not unlimited. Article 4 (3) TEU requires the Member States to take all appropriate measures to ensure the fulfilment of obligations arising out of the EU Treaty and facilitate the achievement of the Community's tasks. Moreover, they should “abstain from any measure which could jeopardize 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.²²

Obligations flowing from Regulation 1/2003

Beyond these general obligations, the Member States had to meet a number of more specific requirements that the new procedural framework has laid down. Regulation 1/2003 introduced a new procedural framework of the application of Articles 101 and 102 TFEU, where the notification system had been abolished and Article 101 became directly applicable in its entirety, thus including Article 101(3). Agreements that fulfil these requirements of Article 101 are deemed legal without the need for notification and a prior administrative decision. The new procedural framework of EU competition law forms a system of decentralized 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 while the Commission has a central role in the network in order to ensure to the consistent application of the rules.

The most important legal obligations that stemmed from Regulation 1/2003 for all the Member States were laid down in Article 3, namely the obligation for national competition authorities and national courts to apply Articles 101 and 102 as well as the convergence rule for Article 101, and in Article 35 when read in conjunction with Article 5, namely the obligation to empower national competition authorities. Article 3 of Regulation 1/2003 has directly influenced the substance of national competition rules. Article 3 (1) defines the principle of simultaneous 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), or which fulfil the conditions of Article 101 (3) or which are covered by a Regulation for the application of Article 101 (3). However, this principle of convergence does not apply with regard to prohibiting and imposing sanctions on unilateral conduct engaged in by undertakings.²³ Article 3 (3) further excludes from the principle of convergence national merger laws and laws having a different objective than the protection of competition.²⁴

Still, some areas of leeway exist for national law even under Article 3 (2), such as inherent restrictions, national group exemptions and national statutory *de minimis* rules. The block exemptions found in the CEECs largely follow the European Commission's Block Exemption Regulations (BERs), although some CEECs, such as Estonia and Czech Republic, have specific exemptions from the competition rules for agricultural products while others, like Latvia, have special provisions for dominant positions in the retail trade. One remarkable exception from the convergence rule is the application of stricter

²² This doctrine, which has no explicit legal basis in the EC Treaty, used to be founded on Article 3(1) (g) (now implemented in a Protocol No. 27 on the internal market and competition) read in conjunction with Article 10 (now Article 4 (3) TEU) and Articles 81 and 82 EC (now Articles 101 and 102 TFEU). Case 267/86 *Van Eycke v. ASPA* (1988) ECR 4769, para. 16.

²³ Recital 8 of Regulation 1/2003.

²⁴ Recital 9 of Regulation 1/2003.

national rules for unilateral conduct. Recital 8 of Regulation 1/2003 explicitly mentions provisions regulating cases of abuse of superior bargaining power or economic dependence. The assessment of unequal bargaining power is currently subject to vigorous discussion in competition law and one of the questions being discussed is whether competition law or private law or other specific legislation should regulate this issue and, if regulation exists, whether competition authorities or civil courts should enforce it. Both the EU Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003²⁵ and a recent survey of the International Competition Network²⁶ discussed the controversial topic of abuse of superior bargaining power (ASBP).²⁷

Some jurisdictions, for example Germany, employ specific provisions in their competition law prohibiting the abuse of superior buying power but others, including France, use them in different contexts such as tort liability under the commercial code. In yet other jurisdictions we can find a private civil remedy, such as in Italy, or separate administrative regulation of retail chains. A separate administrative act is often the legislative model opted for by the CEECs, like in Hungary²⁸, Slovak Republic²⁹ and a draft law in the Czech Republic.³⁰ However, in Latvia the provision is part of the competition law.³¹ The enforcement of these rules rest with the respective NCAs, except in the Slovak Republic where the Slovak Antimonopoly Office refused to be the controlling body and the fear is that present act, just like its predecessor in 2003, is likely to fail due to the same weakness – that is, the lack of an experienced body responsible for controlling its fulfilment and enforcement.

Beyond these legislative alignments 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

²⁵ Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003, SEC(2009) 574 final, 29 April 2009, at paras 160-169, 180-181.

²⁶ ICN Report on Abuse of Superior Bargaining Position Prepared by the Task Force for Abuse of Superior Bargaining Position, available at <http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/ASBP_1.pdf>; see also Frédéric Jenny, “*The “Coming Out” of Abuse of Superior Bargaining Power in the Antitrust World*”, Ad-Hoc Expert Group on the Role of Competition Law and Policy in Promoting Growth and Development, Geneva, 15 July 2008, available at <http://www.unctad.org/sections/ditc_ccpb/docs/ditc_ccpb0008_en.pdf>.

²⁷ Abuse of superior bargaining power typically includes, but is not limited to, a situation in which a party makes use of its superior bargaining position relative to another party with whom it maintains a continuous business relationship to take any act such as to unjustly, in light of normal business practices, cause the other party to provide money, service or other economic benefits. A party in the superior bargaining position does not necessarily have to be a dominant firm or firm with significant market power. ICN Report, *ibid.*, at 3.

²⁸ Act on Trade of 2005 lists abuses of “significant market power”, created basically for supermarket practices against suppliers. It introduced specific rules on undertakings of significant market power and empowered the GVH (NCA) to apply the procedural rules on abuse of dominance in cases of infringements of the prohibitions enumerated by the Act on Trade.

²⁹ Act on Unfair Conditions in Business Relationships (AUC) of April 11 2008.

³⁰ There have been several attempts to introduce the prohibition of the abuse of economic dependency into national law. A proposal currently being discussed in parliament suggests that such a position on the relevant market, which enables an undertaking to establish substantially more favourable business conditions with an economically dependent undertaking than it could without such a position, shall be considered an abuse of economic dependency and shall be prohibited. It seems that at least concerning food, the described regulations will be introduced. Dagmar Bicková and Arthur Braun, “Czech Republic”, in *Cartels & Leniency 2009* (Global Legal Group, 2009); ICN Report on Abuse of Superior Bargaining Position, *op cit.* note 26, at 6; Commission Staff Working Paper, *op cit.* note 25, at paras 160-169.

³¹ Section 13 (2) of the Competition Act provides that a dominant position in the retail sector is held by such market participant or several market participants, which, taking into consideration its purchasing power for a sufficient length of time and dependency of suppliers in the relevant market, has the capacity to directly or indirectly apply or impose unfair and unjustified conditions, provisions and payments on the suppliers and has the capacity to significantly hinder, restrict or distort competition in any relevant market in the territory of Latvia. Any market participant that holds the dominant position in the retail sector is prohibited from abusing such dominant position in the territory of Latvia. The relevant section then provides an exhaustive list of abuses of a dominant position in the retail sector.

prohibited horizontal agreements and resale price maintenance.³² The attempt to avoid introducing the prohibition of vertical agreements in 1996 was unsuccessful 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.³³ 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.³⁴ These changes revived the previous Hungarian approach that was more open to economic analysis, less formalistic and completely in harmony with the 1999 EC rules.³⁵ Similarly, in Lithuania the Competition Act of 1992 did not prohibit vertical agreements unless one of the parties was a dominant undertaking.³⁶

3.1.2. Harmonization of procedural rules

Regulation 1/2003 also contains procedural rules with regard to the powers of the national competition authorities. Article 5 lists the powers of the NCAs when they apply Articles 101 and 102 – indeed it constitutes a list of decisions, such finding an infringement, ordering interim measures, accepting commitments and imposing fines which the NCAs can take. The Staff Commission Working Paper accompanying the Report on Regulation 1/2003 admitted that Article 5 is a very basic provision and does not formally regulate or harmonize the procedural rules followed by the NCAs or the ECN beyond Article 5.³⁷ This means that the NCAs apply the same substantive rules but in divergent procedural frameworks and they may impose different sanctions as well. These procedural differences had, to some extent, been addressed in Articles 11 and 12 of Regulation 1/2003 with regard to the cooperation within the ECN. Despite this, the Member States have voluntarily converged their procedural rules to the EU provisions applicable to the Commission and these procedures apply both for the enforcement of the Treaty provisions as well as national competition rules. Table II below shows that the same voluntary convergence has taken place in the CEECs. However, compared to the total number of the Member States, the CEECs more often diverge or partially diverge from the provisions of Regulation 1/2003.³⁸ Moreover, despite the convergence of these procedural rules in the CEECs, in fact, the NCAs sometimes could not or did not actually enforce these rules due to other factors. This is for example, the case with regard to the power to investigate private premises in the Czech Republic, Estonia, Hungary, Romania, Slovenia and the Slovak Republic.³⁹ Similar experience has been found with regard to leniency programs. It should also be noted that the fact that most of the CEECs have introduced criminal sanctions either for the most severe violations of cartel rules or for specific cartel cases such as bid-rigging, adds to or replaces the administrative rules on how

³² 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 Barry E. Hawk, “System failure: vertical restraints and EC competition law”, 32(4) *Common Market Law Review* (1995), 973-990, at 980.

³³ 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.

³⁴ Government Regulation 55/2002 (III.26.) on the exemption from the prohibition of the restriction of competition for certain groups of vertical agreements.

³⁵ Background report on the role of competition policy in the regulatory reform of Hungary, OECD, available at <<http://www.oecd.org/dataoecd/27/16/34768045.pdf>> (accessed 14 October 2007), at 10-11.

³⁶ OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Lithuania, DAF/COMP/GF/WD(2008)57, available at <<http://www.oecd.org/dataoecd/18/58/41830909.pdf>>, at 5.

³⁷ Staff Commission Working Paper, *op cit.* note 25, para. 200.

³⁸ For comparison see ECN Working Group on Cooperation Issues, Results of the questionnaire on the reform of Member States' national competition laws after EC Regulation No. 1/2003, 14 April 2008, available at http://ec.europa.eu/competition/ecn/ecn_convergencequest_April2008.pdf.

³⁹ Staff Commission Working Paper Paper accompanying the Report on Regulation 1/2003, *op cit.* note 25, para. 202.

investigations are initiated, how investigative powers and rights of defence are regulated and what kind of information can be used or transmitted to EU leniency applications. These issues of actual enforcement will be discussed further below in section 3.1.1.

TABLE II: Powers of NCAs: Legislative Implementation after Regulation 1/2003

Convergence of national competition laws with Regulation 1/2003	YES	NO	Partial implementation
Power to impose structural remedies	Czech Republic, Slovenia	Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia	Bulgaria, Romania
Power to order interim measures	Poland, Hungary, Czech Republic, Romania, Lithuania, Slovakia, Slovenia	Estonia	Bulgaria
Power to adopt commitments	Bulgaria, Romania, Lithuania, Hungary, Slovenia, Czech Republic, Poland	Estonia, Slovakia	Bulgaria, Latvia,
Power to seal business premises, books	Lithuania, Hungary, Slovakia, Czech Republic, Poland	Slovenia	Bulgaria, Latvia, Romania
Power to inspect private premises	Estonia, Hungary, Poland, Czech republic, Slovakia, Slovenia, Romania	Bulgaria	Lithuania
Calculation of fine Max. 10% of undertaking's turnover	Czech Republic, Slovenia, Slovakia, Latvia, Romania, Lithuania, Bulgaria, Hungary, Poland	Estonia (fixed),	
Fines on association of undertakings	Hungary, Latvia Lithuania	Estonia, Slovakia, Slovenia, Poland, Romania	Czech Republic, Bulgaria
Informal guidance	Latvia, Poland, Romania, Slovenia	Czech Republic, Hungary, Estonia	Lithuania, Slovakia, Bulgaria,
Leniency	Czech Republic, Slovakia, Hungary,		Estonia ⁴⁰ and Slovenia ⁴¹

⁴⁰ There is no clearly defined leniency policy with regard to information provided by participants of cartels. However, Estonian Code of Criminal contains provisions allowing the Prosecutor's Office, the Public Prosecutor's Office or the court (upon the application of the Prosecutor's Office) to terminate the criminal proceedings initiated against the suspect. Kaja Leiger and Kätlin Kiudsoo, "Estonia", in *Enforcement of Competition Law* (Global Legal Group, 2009), at 62.

	Poland, Latvia, Lithuania, Romania, Bulgaria		
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Source: Results of the questionnaire on the reform of Member States' national competition laws after EC Regulation No. 1/2003; International Comparative Legal Guide, Enforcement of Competition Law 2009, Global Legal Group, Cartels & Leniency 2009, Country Reports, 2009

Table II follows the overview provided on the Commission's website in the course of the review of Regulation 1/2003. The Commission's Staff Working Paper acknowledges that there are further differences in national procedural rules of competition law enforcement but provides neither data nor an overview of these divergences. Such a divergence can be clearly seen with regard to handling of complaints.

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, which is represented by Macedonia and Serbia in this research, 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 regional cooperation as well as eventual membership of the EU. The Stabilisation and Association Agreements (SAP) was tailor-made according to the circumstances of each country. However, each agreement is intended to have the common purpose of achieving formal association with the EU.

Before concluding the SAP, the above mentioned countries have concluded Cooperation Agreements with the EU, for example as Macedonia did in 1997.⁴² In this Agreement cooperation is promoted in different fields without mentioning competition law separately.

However, this Agreement states that Macedonia "shall endeavour to ensure that its legislation would gradually be made compatible with that of the Community" for which "the Community shall provide appropriate technical assistance."⁴³ Accordingly, it could be concluded that some aligning of the competition legislation is required in these countries as well. In the SAP there is a separate title covering the approximation and law enforcement,⁴⁴ 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 to set a deadline for the approximation of the competition laws.

Besides this obligation, Article 69 SAP covers the competition provisions and in fact re-states the wording of the EU competition rules. It furthermore includes a legal obligation to assess competition law cases on the basis of criteria arising from the application of not only the rules of Articles 101, 102

(Contd.) _____

⁴¹ A true leniency program does not exist. However, according to article 76 of the Competition Act the fine applicable to an undertaking in a cartel may be waived by the Office if the certain conditions are fulfilled. Pipan Nahtigal and Ziva Zoric, "Slovenia" in *Cartels & Leniency* (Global Legal Group, 2009), at 219.

⁴² Cooperation Agreement between the European Community and the former Yugoslav Republic of Macedonia, OJ L 348, 18 December 1997, 2-167.

⁴³ Article 11(2), Cooperation Agreement between the European Community and the former Yugoslav Republic of Macedonia, OJ L 348, 18 December 1997, 2-167.

⁴⁴ 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, OJ L 084, 20 March 2004, 13-197.

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.”⁴⁵

The European and Accession Partnerships address the issues of enforcement in competition law and state aid control, ensuring independence of the state aid authority as well as strengthening the administrative capacity of the competition authority.⁴⁶

The implementation of the legal obligations stemming from these legal agreements between the EU and the candidate, or the potential candidate, countries is 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, 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 Union 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, CCs, PCs and EU rules.

Interim conclusions on legislative implementation

In sum, two conclusions can be formed about the legislative implementation in the countries examined here. The Treaty rules on competition and the provisions of Regulation 1/2003 affected the way national authorities have to enforce EU 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 adopting 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. The thinking has clearly been that implementing similar or identical rules on national level will ease the parallel application of national and EU competition law and help to achieve a uniform and consistent enforcement system. However, there are parts of national competition rules which are visible and mostly converge with EU rules, such as the powers of NCAs summarized in Table II, and then there is a substantial part of national procedural rules which are less visible and where substantial differences exist. These invisible procedural rules, however, can considerably influence the way EU and national competition rules are enforced and may eventually lead to different outcomes. The different groups of investigated CEECs allow us to examine 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

⁴⁵ See Article 70 SAP with Macedonia.

⁴⁶ 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, OJ L 035, 07 February 2006, 57-72.

group of CEECs acceded in 2004. In particular, it will be assessed whether the 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. National courts apply European competition law when they review administrative decisions of NCAs, 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 courts may make references to EU case-law, which can provide an insight into the level of judicial implementation.⁴⁷ Table IV represents an overview of the judicial implementation of EU competition law by national courts in the NMS.

TABLE III: Judicial Implementation

Application of Articles 101 and 102 TFEU by national courts	Judicial review	Private enforcement Legal basis in competition law
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

There are several difficulties with studying judicial implementation in the NMS. While in some countries it was considered that the reference by the NCA to European competition law jurisprudence improved and supported effective law enforcement,⁴⁸ the national courts in general seem to be reluctant to apply EU competition law. The degree of application of Articles 101 and 102 by national courts is much lower than by administrative agencies.⁴⁹ Moreover, national courts do not properly notify the Commission about cases where Articles 101 and 102 are applied – something which is striking in the case of the NMS. On the Commission website, where national judgments are registered there are two single cases from the NMS, one from Lithuania on public procurement for the assignment of concessions in the sector of waste collection and one other case from Hungary.⁵⁰ The role of national courts in implementing European law cannot be underestimated in the effective enforcement of competition law. This role will be further discussed in the next section on judicial

⁴⁷ Katalin J. Cseres and Jurian Langer, “Tetra Laval *à la Hongroise*”, in Oda Essens, Anna Gerbrandy, Saskia Lavrijssen (eds.), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing, Groningen 2009), 127-144.

⁴⁸ OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Latvia, DAF/COMP/GF/WD(2009)2, at 5, International Chamber of Commerce, “EC Regulation 1/2003: views on its functioning, prepared by the Commission on Competition”, Document no.225/653, 23 October 2008, at 17.

⁴⁹ Staff Commission Working Paper accompanying the Report on Regulation 1/2003, *op cit.* note 25, para. 270.

⁵⁰ Hungary: Gazdasági Versenyhivatal / Magyar Államvasutak ZRT 7 K 34364/2006/16; Lithuania: Tew Baltija / Kauno m. savivaldybes administracijos direktorius (Director of administration of the municipality of the city of Kaunas) Civil case 2- 1068- 52/ 05.

enforcement. In the next section the active invocation of the competition rules are investigated with regard to the NCA first and then with regard to the judicial power.

4. Enforcement

The central query in the overall research focuses on the questions of 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 the 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 – which tend to support the dominance of public enforcement over private law enforcement. Accordingly, the European jurisdictions predominantly pursue public enforcement of competition law. The discussion on how to facilitate private enforcement of competition law in Europe has been recently launched⁵¹ by the Commission and the active invocation of competition rules in national courts is still scarce.

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 and constraints, both formal and informal, which have a decisive impact on whether and how the implemented rules are actively invoked. These socio-economic factors are related to the transition of economy, especially to the lack of previously existing market mechanisms or experience with free markets and how markets interact with regulations, the many constitutional and institutional changes, as well as the parallel revival of private law and private law courts in all the investigated countries. Second, significant influence has been, and is still being, exercised through the way the new enforcement framework of EU 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

The influence of economic institutions on economic performance is fundamental in measuring successful law enforcement and in understanding why a certain legal rule proves to be successful or fails in different institutional contexts. This theory of the relevance of institutions is an imperative insight when analysing law and enforcement in the CEECs. Insights from institutional economics⁵² 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.⁵³

⁵¹ Green Paper on Damages actions for breach of the EC anti-trust rules, COM (2005) 672 final, 19 December 2005, White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165, 2 April 2008, Case C-453/99 *Courage v. Crehan* ECR (2001) I-6297, para. 26.

⁵² 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. Joseph E. Stiglitz, "Participation and Development: Perspectives from the Comprehensive Development Paradigm", 6(2) *Review of Development Economics*, Special Issue on Democracy, Participation and Development (2002), 163-182, at 164. Douglass Cecil North, *The Contribution of the New Institutional Economics to an Understanding of the Transition Problem*, *WIDER Annual Lectures*, March 1997, Helsinki, at 13.

⁵³ OECD, OECD Global Forum on Competition, "Small economies and competition policy: background paper", CCNM/GF/COMP(2003)4, at 9-10.

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 presence of “old boys’ networks” 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 economies⁵⁴ and the balance between economic and non-economic goals should be carefully reconsidered.⁵⁵

As a consequence of rent seeking and the interdependence of stakeholders, the self-correcting mechanisms of the market cannot be relied upon 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 primarily 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 the efficiency with which resources were allocated and promote foreign investments – thereby building markets before they could concentrate on market correcting mechanisms. While some of these goals are short-lived like correcting structural distortions and the dissolution of state monopolies, others are medium-term problems like tackling the reluctant and cautious reliance on free market forces and persisting problems with regard to unfair trade practices.

In transition economies, the creation of a level 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 for other market regulatory tools. For example, consumer protection as such was either non-existent or was in its infancy at the beginning of the 1990s. There was neither a firm legislative nor an institutional basis for it. Although the 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.

⁵⁴ Gal argues that competition policies in a small economy should minimize the undesirable economic effects of concentrated market structures. In particular, competition policies should focus on eliminating artificial entry barriers by facilitating innovation in the form of new products and methods of production and distribution. In order to achieve this goal the law should address strict anti-collusion and anti-exclusionary conduct such as collusive practices, predatory pricing, tying or exclusive dealing. Michal 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, at 63-64.

⁵⁵ Non-economic goals are difficult to pursue through competition law because it can only make a marginal contribution to achieving such goals. Non-economic interests can better be dealt with through direct regulation. When there is a conflict with economic efficiency, the ability of judicial and regulatory bodies to make sound decisions concerning complex economic issues and the balancing of conflicting interests is limited. Gal, *op cit.* note 54, at 34-38.

4.2 External Factors

The process of enlargement in 2004 had made the relevance of enforcement for the effective working of Community rules manifest.⁵⁶ While previously issues of enforcement and institutional structures were regarded as falling within 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.⁵⁷ 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.⁵⁸ 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 and established the European Competition Network, DG Competition reorganized its cartel work, the 1996 and then later the 2002 leniency programmes have been revised,⁵⁹ a discussion on how to facilitate private damages cases was launched⁶⁰ and the method of setting fines has also been revised.⁶¹

The implementation of Regulation 1/2003 in the CEECs has taken place as part of an extraordinary law transfer. The CEECs had to create a functioning market economy and a competitive business environment within a short period of time. The implementation and enforcement of competition law had a notable role in the transition from planned economy to market economy. 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. Due to the lack of an identifiable body of competition law⁶² these countries had to build competition laws and, more importantly, create a competition culture from the scratch. Faithful adoption of EC rules has been in line with the new Member States' desire for rapid accession and their joint interest with the EU to demonstrate fast and visible results. The process of competition law transfer has been governed by the clear determinacy of the accession agenda by EU conditionality.⁶³

One explanation for the above mentioned "informal harmonization" process of substantive and procedural rules could lie in the spill-over effects of the high convergence of substantive rules and the influential role of the European Competition Network. With the introduction of the decentralized enforcement of European competition law, the public enforcement output of national competition authorities shifted the focus of attention at EU level. Through the ECN there is regular discussion and

⁵⁶ Antonina Bakardjieva-Engelbrekt, "Grey Zones, Legitimacy Deficits and Boomerang Effects: On the Implications of Extending the *Acquis* to Central and Eastern Europe", in Nils Wahl and Per Kramér (eds.), *Swedish Yearbook of European Law* (Hart Publishing, Oxford, 2001), 1-36.

⁵⁷ White Paper on modernization of the Rules implementing Articles 81 and 82 of the EC Treaty, Commission programme No 99/027, 28 April 1999.

⁵⁸ *Ibid.*, at 8, 41, 42, 75.

⁵⁹ 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 December 2006.

⁶⁰ Green Paper *op cit.* note 5, White Paper, *op cit.* note 6, 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 April 2008, Case C-453/99 *Courage v. Crehan* ECR (2001) I-6297, para 26.

⁶¹ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210/2, 1 September 2006.

⁶² The competition legislation that existed in the CEECs before World War II were set aside and became invalid after 1945.

⁶³ Frank Schimmelfennig and Ulrich Sedelmeier, "Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe", 11(4) *Journal of European Public Policy* (2004), 661-679.

cooperation among the NCAs with regard to the enforcement of European competition law but also national rules such as leniency programs and sanctions, which are discussed in the working groups of the ECN. While 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.⁶⁴ Even though the ECN was primarily created in order to ensure the uniform and consistent enforcement of Articles 101 and 102 TFEU, it has proved to be a notable forum for discussing enforcement methods, for mutual learning and even informally leading to the converging of enforcement policies such as the Leniency Model and the Article 82 review and guidelines show. The ECN is a significant channel of Europeanization and harmonization in a bottom-up perspective. The ECN, alongside other informal cooperation networks such as the ICN and the OECD evaluations and controls, put increasing pressure on the agencies to quantify their enforcement and advocacy work.⁶⁵ 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.⁶⁶ These mechanisms make actual enforcement modalities more visible and may even induce competition among the agencies. Even though the enforcement methods set down in soft law instruments at EU level do 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 program, which has been adopted in 24 out of the 27 Member States and in 8 out of the ten CEECs being investigated in this paper.

Administrative enforcement by the NCAs

Neither the CEECs nor the undertakings in these countries were granted any transitional periods for the implementation of the new, decentralized system of EU competition law.⁶⁷ Regulation 1/2003 delegated an active role to local actors and established a system of close cooperation between the EU and the national authorities. 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 EU 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.⁶⁸ The new enforcement system inherently involved a process of increased Europeanization/convergence of competition law in all Member States. The parallel application of national and EU rules as well as the close institutional cooperation between national authorities and the Commission form significant channels of the convergence process. The next two sections will disentangle further this Europeanization process and its constraints by looking at the administrative and judicial enforcement of competition rules.

⁶⁴ Annual Reports , available at <http://ec.europa.eu/comm/competition/ecn/annual_reports.html> (accessed on 8 October 2007).

⁶⁵ However, it has to be admitted that quantification of the enforcement work of national competition authorities lacks clearly defined and commonly agreed benchmarks. Imelda Maher, “The Rule of Law and Agency: The Case of Competition Policy”, *IEP Working Paper* (March 2006) No.1, at 4; see also William E. Kovacic, “Using evaluation to improve the performance of competition policy authorities, background note”, in OECD, *Evaluation of the actions and resources of competition authorities*, DAF/COMP(2005)30.

⁶⁶ Maher, *Id.*, at 4-5.

⁶⁷ The negotiations on transitional arrangements were conducted on the basis of the principle that they must be strictly limited in scope and duration. Janne Känkänen, “Accession negotiations brought to successful conclusion”, *Competition Policy Newsletter* (2003) No.1, at 26.

⁶⁸ The interaction between the European Commission and the national competition authorities is required by Article 11 of Regulation 1/2003.

Looking further into national practice of competition law enforcement, some post-transition characteristics are still present but the competition agencies seem to produce a fairly similar output as their colleagues in the old Member States. Most of the CEECs' agencies had difficulties with enforcing the substantive competition rules in their initial start-up period. Enforcement powers were often insufficient to conduct investigations, reach decisions and impose persuasive fines.⁶⁹ Being charged with several market regulatory tasks, many NCAs devoted much time and resources to wider activities such as unfair competition or consumer protection. Moreover, they often lacked priority setting or strategic planning and were obliged to follow up on all complaints.⁷⁰ For example, Poland had no provision for dismissing meritless complaints by private parties while the Czech Republic required firms that had a dominant position – according to a legislative presumption based on a fixed market share (30%) – to notify and register with the NCA.⁷¹ This still seems to be the case in Bulgaria. This phenomenon could be well understood by looking at the inherent nature of the transition economies, namely the fact that they first had to build markets and, after only a short initial period, had to begin with market surveillance in the classical sense. The creation of a level playing field required fair trading rules so competition authorities were often used for the correction of a wide range of market failures as a substitute for 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. Nor was there a firm legislative or institutional basis for it. Although the 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 some specific sectors, like telecommunications or electricity, had also 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.

When the privatization process had been completed and sector regulatory agencies were formed, the NCAs could turn to more traditional competition law enforcement, although many of them still have wider regulatory tasks assigned to them. In the course of modernization of EU competition law, the NCAs have also adopted new enforcement tools identical to those of the Commission, such as leniency programs. However, even the strengthened enforcement tools have not always delivered the expected results in actual enforcement. An example is the leniency programs which are often praised as the model for procedural convergence and a clear result of the cooperation mechanism within the ECN. All the CEECs have a clearly defined leniency program, except Estonia and Slovenia. However, even these two jurisdictions apply some other provisions that make the termination of proceedings or fine reductions possible. Despite the fact that the majority of CEECs have a leniency program, their application has been limited so far. The first adopted programs proved to be unproductive due to insufficient transparency or uncertainty about eligibility. Many programs have therefore been recently revised and slowly the programs are beginning to operate with a few number of cases in each country. The Czech Office for the Protection of Competition applied its leniency program for the first time in 2004 with regard to a cartel agreement in the energy drinks market. Poland had its first leniency case

⁶⁹ OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Latvia, DAF/COMP/GF/WD(2009)2, at 3; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Poland, DAF/COMP/GF/WD(2009)76, at 4; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Bulgaria, DAF/COMP/GF/WD(2009)56, at 4; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Czech Republic, DAF/COMP/GF/WD(2009)6, at 6; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Slovak Republic, DAF/COMP/GF/WD(2009)62, at 3.

⁷⁰ OECD, Global Forum on Competition, Challenges faced by young competition authorities, Note by the Secretariat, DAF/COMP/GF (2009)3/REV1, at 4-5, 13-14.

⁷¹ *Ibid.*, at 18.

in a cartel agreement in 2006 but revised its 2004 leniency program in 2009 due to several shortcomings with the previous model.⁷² In the Czech Republic, Hungary and in Slovakia a marker system exists as well.⁷³ However, in the Czech Republic the decision to grant a ‘marker’ lies fully at the discretion of the Antimonopoly Office.⁷⁴ 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 in 2007.⁷⁵ However, even Hungary has a leniency program for provisions on the prohibition of unfair and restrictive market practices since 2009.⁷⁶ In the next section the implications criminal law enforcement of competition law may have for the administrative enforcement will be briefly discussed.

The interplay with criminal enforcement

As has been mentioned above, there are also some recent reforms in the CEECs that go beyond the present EU enforcement rules and may influence the administrative enforcement of national and EU competition rules. As Table VII shows, most of the CEECs have introduced criminal sanctions either for the most severe violations of cartel rules or for specific cartel cases such as bid-rigging. In Estonia, competition offences became criminal offences on 1 September 2002.⁷⁷ Hungary⁷⁸ introduced criminal sanctions in 2005 and many other countries followed the trend in the last four years, with recent examples being the Czech Republic, Latvia and Slovakia. Actual invocation of criminal sanctions and procedures has only taken place in Estonia.

⁷² Regulation of the Council of Ministers of 26 January 2009 concerning the mode of proceeding in cases of enterprises’ applications to the President of the Office of Competition and Consumer Protection for immunity from or reduction of fines.

⁷³ Michal Zahradnik and Helga Madárová, “Slovakia”, in *Cartels & Leniency 2009* (Global Legal Group, 2009), at 214; Dagmar Bicková and Arthur Braun, “Czech Republic”, in *Cartels & Leniency 2009* (Global Legal Group, 2009), at 54; Gusztáv Bacher and Judit Budai, “Hungary”, in *Cartels & Leniency* (Global Legal Group, 2009), at 102.

⁷⁴ Dagmar Bicková and Arthur Braun, *ibid.*, at 54.

⁷⁵ The Competition Council found the leniency notice of the GVH to be applicable to a vertical agreement case. The Competition Council made it clear that despite the fact that according to international and Hungarian legal practice leniency policy is applied to horizontal agreements, it regarded leniency policy to be applicable and to be applied in the case at hand. Vj-81/2006.

⁷⁶ Leniency policy related provisions of Act No LVII of 1996 on the prohibition of unfair and restrictive market practices (2009).

⁷⁷ 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. See Aini Proos, “Competition Policy in Estonia”, in Katalin J. Cseres, Maarten P. Schinkel and Floris O.W. Vogelaar, *Criminalization of Competition Law Enforcement, Economic and Legal Implications for the EU Member States*, (Edward Elgar, Cheltenham, 2006), 307-311.

⁷⁸ Section 14 of the Act XCI of 2005 amending the Hungarian Criminal Code, Act IV of 1978 and other acts.

TABLE IV: Administrative and Criminal Sanctions in the Competition Law Enforcement

	Administrative law sanctions	Criminal law sanctions	Leniency
NMS	Poland, Hungary, Czech Republic, Romania, Lithuania, Slovakia, Slovenia	Poland (bid-rigging), Hungary (bid-rigging), Czech Republic, Lithuania, Slovakia, Slovenia, Latvia, Romania	All NMS Few number of cases Hungary, Czech Republic, Poland
CC	Macedonia, Turkey	Macedonia (competition restraints caused by the creation of monopoly position and market distortion –not enforced), Turkey (bid-rigging), Slovenia (imprisonment for anticompetitive behaviour – 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)		

The legislative implementation of criminal sanctions for the enforcement of competition law in the CEECs was mentioned above. All the countries except Bulgaria have introduced criminal sanctions for at least certain severe cases of cartel forming. However, practical experience exists only in Estonia. The first criminal judgment was enforced in the field of prohibited agreements. The Estonian experience shows that criminal proceedings are complicated and time-consuming but sometimes the only instrument to establish and stop a violation. Close cooperation between the NCA and the Public Prosecutor's Office and the Police Board seemed indispensable and delivered valuable practical experience.⁷⁹ The Estonian procedural rules related to competition law enforcement are rather complicated as three types (administrative, misdemeanour and criminal) of proceedings are possible. This has caused problems in practice and on a number of occasions the ECA's decisions resulting in misdemeanour proceedings have been overruled due to procedural infringements. The choice of the type of proceedings, and hence the applicable measures and sanctions, is to a great extent in the ECA's discretion as there is no case law setting out clear principles in the respect. Furthermore, in some instances, it is theoretically possible that the same case could be investigated simultaneously in different proceedings. Therefore, it is often difficult to predict possible consequences of competition law violations.⁸⁰ The effectiveness of criminal sanctions and the consequences of this type of enforcement methods will have to be checked in the future development of these countries' practices. One of the main problems is the division of competences between the NCAs as the administrative enforcer of competition law, and the public prosecutors as the enforcers of criminal law. The NCAs are competent to investigate alleged infringements of competition law, including the enforcement of administrative offences and the imposition of administrative fines on both individuals and undertakings. However, where the competition law infringement is a criminal offence the competence

⁷⁹ Estonian Competition Board, Annual Report, 2004, at 3.

⁸⁰ Elo Tamm and Katri Paas, "Estonia", in *Enforcement of competition law 2009* (Global Legal Group, 2009), at 214.

for the criminal prosecution of the individual, for example, switches to the public prosecutor, while the competence for the prosecution of the undertaking remains with the NCA. Another relevant concern is related to leniency applications. Leniency programs often do not cover criminal sanctions. Accordingly, the undertakings may avoid fines or get a reduction of the applicable fine but the individuals cannot escape criminal sanctions. This means that the interests of the undertaking and its employees may diverge and hamper leniency application altogether as, on the one hand, it delays the application and on the other, it hinders the efficient collection of information from individual employees for which an undertaking must rely on in order to file a successful leniency application.⁸¹

Furthermore, the differences between national criminal and competition laws present significant challenges to the successful investigation and enforcement of EU competition rules within the ECN. For example, Article 12 (3) of Regulation 1/2003 only permits the exchange of information between NCAs where national law imposes sanctions of similar kind.⁸² Those Member States that impose criminal sanctions for violations of Articles 101 and 102 could be restricted from fully benefiting from the exchange of information within the ECN and at the same time this would jeopardize the effective, proportionate and dissuasive application of EU competition law.⁸³

If one accepts that the impact of Regulation 1/2003 was also meant to improve the enforcement of both EU and national competition rules then introducing harsh criminal sanctions can be considered, on the one hand, as an attempt of the CEECs to live up to this goal while, on the other hand, also representing a puzzle between two enforcement tools with the same goal.

Interim conclusions on administrative enforcement

In the absence of a Community blueprint or a clear methodology for effective enforcement methods and optimal institutional design, all Member States have been left a considerable degree of leeway in adapting the *acquis* to their own institutional preferences and legal system. Despite this freedom, the NMS are ambitiously adopting the latest developments in the Commission's competition law enforcement practice. The CEECs have tried to improve detection methods by strengthening investigative powers, establishing special cartel units, increasing corporate fines, introducing criminal sanctions, professional disqualification and leniency programs. Direct settlement has existed in the Czech Republic since 2008 in the form of so-called alternative solution of certain competition cases

⁸¹ Dirk Schroeder and Silke Heinz, "Requests for leniency in the EU: experience and legal puzzles", in Katalin J. Cseres, Maarten P. Schinkel and Floris O.W. Vogelaar, *Criminalization of Competition Law Enforcement, Economic and Legal Implications for the EU Member States*, (Edward Elgar, Cheltenham, 2006), 161-175, at 161-163.

An NCA's promise for immunity from fines or not to bring a case does not automatically bind a criminal prosecutor. This is even less so in countries where prosecutors have no discretion as to whether they prosecute a case if there is sufficient evidence. Such a discretionary power does by definition exist after a leniency application but not in countries where it is mandatory to prosecute criminal offences. Thus the concern is that the diverging interests of undertakings and individuals increases when competition law infringements trigger criminal liability and therefore criminal prosecution decreases the likelihood of leniency applications and therefore can negatively affect administrative enforcement. It is generally accepted that a criminal offence must be accompanied by leniency rules for automatic immunity, otherwise the leniency programme loses its attractiveness and the detection probability be significantly reduced. Florian Wagner-von Papp, "Criminal Antitrust Law Enforcement in Germany: 'The Whole Point is Lost If You Keep it a Secret! Why Didn't You Tell the World, Eh?'" in Caron Beaton-Wells and Ariel Ezrachi (eds.), *Criminalising Cartels: Critical studies of an interdisciplinary regulatory movement* (Hart Publishing, Forthcoming), available at <<http://ssrn.com/abstract=1584887>> accessed 5 April 2010.

⁸² See also Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101/43, at point 28 c.

⁸³ Anthony Dawes and Orla Lynksy, "The ever-longer arm of EC law: the extension of Community competence into the field of criminal law", 45(1) *Common Market Law Review* (2008), 131-158, at 152.

and was first applied in the summer of 2008.⁸⁴ A chief economist was appointed in Hungary in 2006 and in the Czech Republic in 2009.⁸⁵

There is an inevitable need in the CEECs not only to systemize the available enforcement methods in the national competition rules, but also to investigate the formal or informal constraints on actively invoking these enforcement schemes in specific country settings. The discrepancy between the 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. The example of generally adopted but scarcely applied leniency programmes is noteworthy. 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. The enforcement of competition rules by the national courts is an essential area of the enforcement of competition law but it remains rather rarely examined. The next section will address both judicial review procedures and private enforcement.

Judicial enforcement by national courts

Judicial appeal

In general it can be stated that while the application of EU competition law by national courts is weak⁸⁶ there is also the problem of a lack of data on such national judgments as the Commission has not worked out a specific system for transmitting judgements to the Commission.⁸⁷

Judicial review of the administrative decisions of NCAs plays a crucial role in the overall enforcement of competition law. Judicial review serves as the ultimate control of the legality of the administrative authorities' decisions. The intensity of the standard of judicial review depends on the specific judicial system. The standard of judicial review is presently subject to an extensive debate: especially whether this review should be intense or restrained when it comes to the assessment of the NCAs' economic analysis of cases.⁸⁸ It is presently argued that more intensive judicial control is one way to address the emergence of independent national competition and other regulatory authorities with often wide-ranging discretionary powers in order to counterbalance the lack of political and administrative accountability.⁸⁹ While it can be argued that the cooperation mechanisms within the ECN and with the Commission represent a certain degree of administrative accountability control, national judicial

⁸⁴ First, in February 2008, the Office issued its rules on so called alternative solution of certain competition cases. Notice on the alternative solution of certain competition issues, Experience with Direct Settlement in Cartel Cases: The Czech Republic, available at <http://www.compet.cz/fileadmin/user_upload/Sekce_HS/Direct_Settlement.pdf>.

⁸⁵ Gergely Csorba, (*Chief Economist*, Hungary, GVH); Milan Brouček, Chief Economist of the Czech competition authority.

⁸⁶ The Staff Commission Working Paper, *op cit.* note 25, in point 40 remarks that “[J]udgments in the Member States that joined the EU in 2004 and 2007 involving the application of Article 101(3) are still relatively infrequent which can to a certain extent be attributed to the fact that EC competition law became applicable as of the date of accession only, with the effect that judicial proceedings under Article 101 are naturally less numerous and/or may not have reached the state of judgment yet.” The Working Paper also admits that there is overall scarcity of judgments. Point 41 of the Staff Commission working Paper states that “[O]verall, the relative scarcity of judgments involving Article 81(3) EC seems in the first place to stem from what appears to be a relatively low level of enforcement of EC competition law in general by national courts in the EU. This corresponds to the criticism made by some stakeholders that not all national courts have sufficient experience and/or expertise to apply Articles 81 and 82 EC.”

⁸⁷ Staff Commission Working Paper, *op cit.* note 25, point 291.

⁸⁸ Oda Essens, Anna Gerbrandy, Saskia Lavrijssen (eds.), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing, Groningen, 2009); Cseres and Langer, *op cit.* note 47.

⁸⁹ Saskia Lavrijssen and Maartje de Visser, “Independent Administrative Authorities and the Standard of Judicial Review”, 2(1) *Utrecht Law Review* (2006), 111-135.

review is indispensable with its complementary function of judicial accountability. Accordingly, the fact whether the national courts are inclined or reluctant to review the decisions of the NCAS with more rigour is decisive in an effective enforcement framework.

In its landmark ruling *Tetra Laval*⁹⁰ the ECJ defined a moderate standard of judicial review of competition decisions taken by the European Commission.⁹¹ Accordingly, the appraisal of complex economic issues should be reviewed in a marginal way. Under this limited test, courts should check whether the procedural requirements are satisfied, that the reasons for the decision taken are properly stated, that the facts are accurately stated and that there has not been a manifest error of assessment or a misuse of powers.

It is beyond the scope of this paper to provide a comprehensive analysis and evaluation of judicial review in the CEECs. Moreover, it seems rather difficult to form a judgment on how judicial review functions in the CEECs. This is due to a number of factors. First, there is little data available on judicial appeal cases: most of it concerns the short English summary of statistics on the upholding or overturning of NCA decisions and no access to the content of the cases. There is even less known about the way in which national courts apply EU or national competition law and the rate of references they make to EU jurisprudence. The available data on appeal cases in many countries demonstrates a high rate of success of the NCAs.⁹² At the same time, agencies express certain scepticism with regard to the expertise of national judges to assess competition law issues. Moreover, the standard of judicial review may differ according to the country and the way courts apply this standard requires case specific in-depth research.

Certain jurisdictions even consider judicial review to be an important impediment to the efficient and effective enforcement of the competition law. They argue that judges are unfamiliar with the principles of competition law analysis and find it difficult to come to grips with competition law. The competition agency may find itself losing an unacceptable number of its cases in court. Moreover, judicial review processes may take too long and thus frustrate effective law enforcement.⁹³ Experience showed that those countries where specialized courts existed faced fewer problems than where general courts dealt with competition cases. Table VIII provides an overview of the court system dealing with competition cases.

⁹⁰ Case C-12/03P *Commission v. Tetra Laval BV* (2005) ECR I-987.

⁹¹ The ECJ considered that Community courts must not perform a new investigation and substitute the Commission's analysis with their own assessment. Nonetheless, the Commission's assessment must not be left unchecked. The courts must fully verify whether the evidence put forward is accurate, reliable, consistent, exhaustive and capable of substantiating the conclusions drawn from it. Case C-42/84 *Remia BV and others v. Commission* (1985) ECR 2545 and Case C-68/94 *Kali und Salz* (1998) ECR I-1375. CFI, Case T-201/04 *Microsoft v Commission* (2007) ECR II-3601, paras. 87-89.

⁹² OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Latvia, DAF/COMP/GF/WD(2009)2, at 5; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Lithuania, DAF/COMP/GF/WD(2009)57, at 7; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Poland, DAF/COMP/GF/WD(2009)76, at 5; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Hungary, DAF/COMP/GF/WD(2009)47, at 13.

⁹³ OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Latvia, DAF/COMP/GF/WD(2009)2, at 5; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Slovak Republic, DAF/COMP/GF/WD(2009)62, at 5-6; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Czech Republic, DAF/COMP/GF/WD(2009)6, at 10-11.

TABLE V: Specialization of National Courts and Standard of Judicial Review

	YES	NO
Specialized national courts for dealing with competition issues in the context of civil proceedings?	Slovakia, Czech Republic	Bulgaria, Estonia, Hungary Latvia, Lithuania, Poland Romania, Slovenia
Standard of judicial review Restrained <i>à la Tetra Laval</i>	Bulgaria, Hungary, Estonia, Latvia, Romania Slovenia	Lithuania, Poland, Romania, Slovakia, Czech Republic

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

With regard to the specialization of courts dealing with competition cases, the Czech Republic had experience with both enforcement through a generalist court until 2003 and then through specialized courts. It argued that even though some specialization might be necessary due to the complexity and low frequency of competition cases, at the same time there might be a risk of the dominance of a single approach.

With regard to judicial review standards and actual enforcement, there is a striking lack of research and data, especially in the CEECs but also to some extent in the old Member States. However, as stated above, the role of judicial review in the overall competition law enforcement is fundamental: it is to provide a rigorous control of the administrative decisions and assessments of NCAs in situations where administrative accountability is often absent. The fact that there seems to be a reluctance of courts to engage in such complex and perhaps unfamiliar legal exercises, added to the fact that there is an overall lack of data on what and how the national courts are doing, is a problem that goes beyond the effective enforcement of mere competition law. It is a problem that speaks to a lack of accountability and transparency both at the EU and national levels.

4.3 Private Enforcement

As mentioned above, there are good economic reasons to favour public enforcement in competition law: for example, the information advantages of competition authorities, the fact that social benefits of law enforcement deviate from private benefits and the expected size of sanctions all serve to support the dominance of public enforcement over private law enforcement. Public enforcement counteracts the rational apathy to bringing law suits and the potential for free-riding while also increasing the expected sanctions. Therefore, the question on the public and private divide in competition law begins 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 the Europeanization of national law and the influencing of national competition and private law rules. Second, while the obstacles to introducing private damages claims are numerous and involve complex

legal and economic issues in all Member States,⁹⁴ the CEECs face particular challenges. Third, the chance for a distinctive case study arises in investigating how informal constraints prevent actual enforcement of formal rules. Fourth, it accentuates the role of institutions such as competition authorities, national courts and private individuals as part of the important interplay between them in the enforcement of competition rules.

While some of the CEECs have implemented private enforcement of national competition rules, none except Lithuania has practical experience with private enforcement. There have been no final cases of private enforcement and therefore only purely 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: not only are they unfamiliar with competition law issues, they also lack basic knowledge of European law. The new 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 deal with cases that exceed their narrow competition mandate⁹⁵ and how national courts as well as private undertakings will assess the application of the legal exception under Article 101 (3).⁹⁶ National judges need training 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 to private enforcement are inherent in the fact that the transitional phase 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, the necessary legislative steps were often left lagging behind. The legislative and institutional framework to guarantee swift law enforcement is not yet in place.

Moreover, 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 party autonomy and the often lacking involvement of private actors in law making and enforcement. Added to the lack of confidence in the judiciary are the problems posed by the significant time, costs and complexity that litigation entails. 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 for consumers and consumer organizations within and outside of the court system is often problematic because, despite the existence of legal rules, practical difficulties hinder them in making effective use of those substantive rights. Collective consumer actions are rare either because of the lack of legal basis or other practical financial problems.⁹⁷ These inefficiencies for consumers’ access to justice must also be considered in light of the Community’s argument, by way of justifying the selecting of priorities for NCAs and granting them wide discretion

⁹⁴ The Green Paper has identified a number of general obstacles to introducing 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.

⁹⁵ The NCAs’ limited resources and procedural limitations might result in dealing with a limited number of cases.

⁹⁶ The application of Article 101 (3) to non-economic objectives can prove to be an especially dangerous exercise when national courts apply that provision, as it is unlikely that they are 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 human resources in order to increase their capacity for economic analysis.

⁹⁷ See the National reports of Czech Republic, at 20, Lithuania at 17, Latvia at 17, Estonia, at 21-22, Slovenia, at 21-22, Hungary, at 16, in Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, *Study on the conditions of claims for damages in case of infringement of EC competition rules* (Ashurst, 2004).

on assessing complaints, that private individuals can also turn to national courts. Presently this argument does not hold with regard to consumers' access to national courts.

The specific problems of the CEECs call for tailor-made solutions and necessitate a more proactive approach. Such tailor-made solutions aim at, for example, making use of the advantages gleaned from public enforcement. One such useful outcome of the public enforcement system is the ever-increasing expertise of the NCAs, who can assist the national courts as *amicus curiae* in adjudicating damages claims in competition cases.⁹⁸ Another recent example is the legal presumption of a 10 % overcharge when calculating damages for hard-core cartels in Hungary.⁹⁹ In Bulgaria a more flexible set of procedural rules has been implemented 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 to whom the results of the infringement were passed on by intermediate commercial operators.¹⁰⁰

Studying tailor-made solutions can provide insights into the specific legal, economic and social barriers to private enforcement in the CEECs and could perhaps help formulate some ideas on the optimal incentives to make private enforcement work also in the other European jurisdictions.

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	

5. Institutions

While the transfer of substantive rules could rely on well-defined EU rules, a clear guidebook for enforcement questions was not provided by the EU. Accordingly, establishing effective enforcement and institutional design have posed the most serious challenges in the post-communist transformation of the legal and economic system, and they have continued even after 2004. Crucial questions of enforcement and institutional choice were left unanswered except for some very general rules in Regulation 1/2003.

⁹⁸ Article 15 Regulation 1/2003.

⁹⁹ 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.

¹⁰⁰ Peter Petrov, "Bulgaria", in *Enforcement of competition laws 2009* (International Comparative Legal Guides, 2009), 38-45, at 44.

Under Article 35 of Regulation 1/2003 each Member State had a clear obligation to draw up a national competition law and designate a competition authority responsible for the application of Articles 101 and 102 before 1 May 2004.¹⁰¹ However, the details of how this should be done were left to the Member States themselves. 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.¹⁰² The accession process merely required an adequate level of administrative capacity through well-functioning competition authorities so the new Member States had a great degree of freedom in designing the institutional framework of competition law enforcement. Beyond Article 35 of Regulation 1/2003, there were no further requirements nor formal rules formulated on the powers and procedures of these competition authorities.¹⁰³ The competences of the national authorities were very roughly set out in Articles 5 and 6 of Regulation 1/2003.

The Report on the functioning of Regulation 1/2003¹⁰⁴ acknowledged this institutional deficit. In the absence of a Community blueprint or a clear methodology, institutional choices were guided by a learning process characterized by improvisation and experimentation. In the CEECs it resulted in several reorganizations and shifting legislative powers between regulatory agencies. Prime examples are Poland and a recent institutional change that took place in Estonia. The Estonian NCA became an integrated authority, which merged with previously separate communications, energy market and railway regulators at the beginning of 2008. Since the merger, the ECA consists of three divisions – a competition division, a railway and energy regulatory division and a communications regulator. Hence, the different divisions of the ECA also regulate specific sectors.

5.1. Variations for Institutional Design

There is presently a wide diversity of institutional designs among competition authorities across the EU, which is 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 delegated broad market regulatory tasks to these agencies, sometimes with overlapping competences. One striking characteristic in the CEECs is the fact that NCAs have enforcement powers in several fields of market regulation, most notably in unfair trading practices. They seem to take up (quasi-)regulatory roles as well. Competition authorities are, in comparison with other public agencies such as consumer authorities, still 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 "spill overs" in other fields of market regulation such as

¹⁰¹ 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."

¹⁰² Point 2 of the Notice on cooperation within the Network of Competition Authorities provides that "Under general principles of Community law, Member States are under an obligation to set up a sanctioning system providing for sanctions which are effective, proportionate and dissuasive for infringements of EC law". See also, Case C-176/03 *Commission of the European Communities v Council of the European Union*, Judgment of 13 September 2005 (2005) ECR I-7879, at paras 46-55.

¹⁰³ Although national procedural rules had to provide for the 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 fulfill obligations to report to the Commission. The Commission retains broad supervisory powers that allows it to intervene in proceedings before the national authorities while the Commission's discretionary powers "primus inter pares". See Article 11 (6).

¹⁰⁴ Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003, *op cit.* note 25, at points 190 and 200.

consumer protection and regulating network industries.¹⁰⁵ Table IX provides an overview of the NCAs' competences.

TABLE VII: Competences of the NCAs

Scope of competition law includes unfair competition or consumer protection	Competence of competition agency goes beyond competition law	Shift in the institutional balance
Bulgaria, Poland, Hungary, Lithuania, Latvia, Estonia	Bulgaria, Poland, Hungary, Lithuania, Latvia, Estonia, Czech Republic	Poland, Bulgaria, Lithuania, Latvia, Estonia

As to the national courts it should be admitted that, in fact, we know little about what they are doing. This lack of data is evident in the recent Report on the on the functioning of Regulation 1/2003 and its accompanying Staff Working Paper.¹⁰⁶ Moreover, there is an overall lack of reported case-law on the Commission website for national judgments applying Articles 101 and 102.¹⁰⁷ 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.

TABLE VIII: Specialized National Courts in the NMS

	NO	YES
Specialized national courts for dealing with competition issues in the context of civil proceedings	Bulgaria, Czech Republic Estonia, Hungary Latvia, Lithuania, Poland Romania, Slovenia	Slovakia (Regional court in Bratislava acts in the 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)
Does (or will) national law include provisions to facilitate the use of amicus curiae (Art. 15.3, Reg.)?	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	Hungary, Lithuania, Poland, Romania, Slovakia

¹⁰⁵ 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.

¹⁰⁶ Communication from the Commission to the European Parliament and the Council, Report on the functioning of Regulation 1/2003 (COM(2009) 206 final, 29 April 2009; Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003 (SEC(2009) 574 final, 29 April 2009).

¹⁰⁷ Out of the ten new Member States two countries (Hungary, Lithuania) have each one judgment published on this website. Available at <<http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/>>.

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

TABLE IX: 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>	<i>YES</i>	<i>NO</i>
<i>CC</i>	<i>Macedonia (Administrative court – complaints against the NCA)</i>	<i>Turkey</i>
<i>PCC</i>		<i>Serbia</i>
<i>NC</i>		<i>Moldova</i>
<i>Other partners</i>		<i>Russia</i>

Source: Results of the questionnaires from the national reporters

The interplay between competition authorities and national courts has become more visible. A look to the national legislation in the CEECs shows that the cooperation between these two enforcement institutions is intensive and sometimes even required under legislative obligations. An important element of the public enforcement system is the expertise of the NCAs, who can assist the national courts as *amicus curiae* in adjudicating damages claims in competition cases. While in Estonia the NCA must be consulted by national civil courts in antitrust cases, in Latvia the NCA may be consulted by national civil courts. In Romania, whenever a party claims a breach of Articles 101 and 102, the judge may decide that the absence of a preliminary decision issued by the Romanian Competition Council represents grounds for inadmissibility for the claim. This rationale is based on the exclusive jurisdiction of the Romanian Competition Council for all cases relating to anti-competitive behaviour, and on the view that this preliminary administrative procedure has to be observed. In addition, the Competition Council's practice seems to base its decisions on Romanian legislation and not on EU legislation. Its decisions will rely on EU legislation only as a subsidiary argument.¹⁰⁸

In Hungary, 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 proceedings until the Competition Office

¹⁰⁸ See Decision 12/2008 (where the Competition Council refers to Article 81(1) only as a subsidiary argument in the rationale, stressing that the national correspondent provision covers the issue in a sufficient manner), Decision 19/2008 and Decision 15/2008. International Chamber of Commerce, "EC Regulation 1/2003: views on its functioning, prepared by the Commission on Competition", *op cit.* note 48, at 5.

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.

The present institutional balance between NCAs and national courts will probably change in the future. The role of national courts is fundamental both in competition law enforcement as well as in unravelling and adjudicating of cases on the “borderlines” of competition law, such as the above-mentioned abuse of a superior bargaining power,¹⁰⁹ unfair trading practices or even unfair contract terms. For the time being it is essential to study the interplay and the changing institutional balance between competition authorities, national courts, other regulatory agencies and private individuals in order to spot barriers to the emergence of effective enforcement frameworks and workable remedies.

6. Conclusion

The competition law part of the research addressed the legislative and judicial implementation of substantive and procedural competition rules, the active invocation of these rules by the NCAs and by the national courts, and the way institutional design has been given shape. These three different dimensions allowed for a departure from traditional top-down approaches to study the effect of EU law in national legislation as well as trying to address some less visible parts of the enforcement framework that actually raise fundamental questions of both good competition law enforcement and good administration.

With regard to the legislative implementation, this part of the research demonstrated that, even though there is a high convergence of substantive competition rules, relevant differences exist – in relation to unilateral conduct, for example. The emergence of these rules poses regulatory and enforcement questions and has implications not only for the NCAs but also for the national courts which need to differentiate among competition law and non-competition law issues and decide for example whether contract or competition law should govern a given situation. Similarly to the old Member States, the NMS followed by the PCs and CCs voluntarily converge with the Commission in respect of procedural rules; however, considerable differences remain in the less visible parts of procedural law. Diverging procedural rules demonstrate that national procedural autonomy is still a powerful influence on the ultimate outcome of enforcement of EU rules. In this process the role of the ECN as a transmitting mechanism among the NCAs and the European Commission and as a learning laboratory is noteworthy.

With regard to the active enforcement of competition rules, the investigated countries all exhibit legacies of their past. The discrepancy between the law on the books and active invocation and effective enforcement is still striking in these countries. Ambitious and formal transposition of rules sometimes lacks active enforcement. The increasing role and influence of criminal law enforcement raises another challenge for the enforcement of both national and EU law. Distinguishing between the enforcement by NCAs and by the national courts in this paper allowed us to point out the low levels of active enforcement by the courts and the overall lack of data on court cases. The function of the courts has been considered both in judicial appeal cases and in private enforcement.

¹⁰⁹ Behind provisions regulating economic dependence and superior bargaining power lies a regulatory dilemma: whether contract law or competition law should regulate unequal bargaining power and when such provisions should trigger enforcement. It has been submitted that the main distinctive feature is whether the aim of the provision is limited to regulating a contractual relationship with a view to protecting a weaker party against a stronger party or whether competition on the market is taken into account either in the elaboration of the rule or its application. Eddy de Smijter and Lars Kjoelbye, “The Enforcement system under Regulation 1/2003”, in Jonathan Faull and Ali Nikpay (eds.), *Faull and Nikpay: The EC law of competition* (Oxford University Press, Oxford, 2007), part 2.59. Staff Commission Working Paper accompanying the Report on Regulation 1/2003, *op cit.* note 25, at paras 180-181.

Together with the last section on institutions, the paper points to a picture where further research and analysis of national procedural rules and their implications for the overall enforcement framework is needed. Similarly, the institutions and the institutional interplay and balance between them, as well as their relationship with civil society, also merit further analysis. It can be argued that many of the NCAs in the investigated countries have passed the initial stage of young competition authorities and became mature law enforcers of competition law, even though they face certain drawbacks in their legislative or institutional environment. Conversely, the national courts are struggling with their enforcement tasks in competition law. The competence of national judges to assess competition law cases – especially in light of their overlaps with, and consequences for, private law – need to receive more attention in the future academic and public policy work.

While there is a high level of convergence in the substantive competition laws among the investigated countries, we must not overlook the divergences in the procedural laws and, even more importantly, the different institutional variations that eventually influence and determine how the rules are enforced. These differences have to be analysed in a broader context of sound administration by considering accountability, transparency, participation issues and institutional interactions in the new governance structure of EU and national competition law enforcement.

IV. THE EUROPEANIZATION OF PRIVATE LAW IN CEECS: THE CASE OF CONSUMER LAW

Hans-W. Micklitz

1. Introduction

The following analysis focuses on consumer law in NMS, CC and PCC. It brings together the fruits of a year-long research project into the accession process of the NMS, the CC, PCC and NC. The analysis follows the parameters set out in the conceptual considerations from F. Cafaggi and L. Gorowyda. It is meant to combine two purposes. The first is to provide a tentative analysis and the second is to pave the way for further research which needs to be undertaken. This paper bears a personal undertone. The author was involved in consultancies in NMS, CC, PCC and NC. To some extent, therefore, one may understand the report as a form of a testimony.¹

First and foremost there is a deep lack of knowledge on the basis from where these countries started and even more regarding how the consumer law looks today. This contrasts in an amazing way with extensive theories on the transformation process in these countries, the limits of legal transplants, and the role and function of culture and tradition.² However, there are variances between the different categories of countries and between the types of research undertaken. The theories are complemented by more technical analysis of the consumer laws. What is missing overall is the type of empirical research that would link the theories and the doctrinal research together. It seems as though none of the institutions involved, the European Commission, the donor organisations nor the recipient countries themselves, have a deeper interest in getting a clearer picture of the effects of ‘optimistic normativism’.³ What follows is a kind of a survey on the more technical side of research which has been undertaken in the last 20 years on consumer law.

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 only attempt so far 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.⁴ 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 anything, 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.⁵

¹ See for a similar approach Frederique Dahan and Janet Dine, “Transplantation for transition – discussion on the concept around Russian reform of the law on reorganisations” 23 (2) *Legal Studies* (2003), 284-310.

² See the introductory part by Cafaggi/Gorowyda in this issue.

³ Gianmaria Ajani, “By Chance and Prestige: Legal Transplants in Russia and Eastern Europe” 43 *American Journal of Comparative Law* (1995), 93-117, at 103.

⁴ They are on file with the author.

⁵ Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers (eds.), *Consumer Law Compendium, The Consumer Acquis and its transposition in the Member States* (Munich: Sellier European Law Publishers, 2008); Christa Jessel-Holst, Rainer Kulms and Alexander Trunk (eds.), *Private Law in Eastern Europe: Autonomous Developments or Legal Transplants?* (Mohr Siebeck, Tübingen, 2010).

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 PCCs. 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. At best, the consultants engaged at the different stages of the negotiations themselves might gain access to the documents. In this regard I would like to refer to my experience in Turkey, where I worked as a consultant between 2003 and 2007 in the field of consumer law,⁶ or in the Western Balkans where I worked on the new consumer law in Serbia between 2008 and 2010 and Albania since 2011. The situation is much better with regard to the Western Balkans, where the GTZ has sponsored a kind of a stocktaking not only of the consumer laws in the Western Balkan⁷ and where it promotes ‘social market economy values’.⁸

All these reports, whether they are publicly available or not, suffer from one deficiency – they 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 already contained 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 also set aside. Consumer law is analysed without its context in the civil law. This might explain why today two different legal worlds exist in most of the countries under review: the Europeanization of the national private law systems, as discussed within the Draft Common Frame of Reference; and the Europeanization of consumer law, as discussed in the consumer Acquis. However, a disclaimer has to be made in that neither the CFR principles nor the Acquis principles reach beyond a few CEECs, and even these are only taken into account to a very limited extent.⁹

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 spares the consultants from the difficulty of getting involved in sensitive political areas of law-making and law-enforcement. There are a few exceptions but these tend to emanate from academics focusing their research interests on their own home country or on

⁶ A more substantive analysis of the Turkish consumer law as it stands today is provided by Yeşim M. Atamer and Hans-W. Micklitz, “The Implementation of EU consumer protection Directives in Turkey”, 27(3-4) *Penn State International Law Review* (2009), 551-607.

⁷ With regard to consumer law see Hans-W. Micklitz, “The Law of the Western Balkan Countries in the Mirror of Consumer Law”, in Marija Karanikic, Hans-W. Micklitz and Norbert Reich, *Modernising Consumer Law – the Experience of the Western Balkan* (2012 forthcoming); in a more general dimension see the three volumes edited by GTZ (Gesellschaft für technische Zusammenarbeit), *Civil Law Forum for South East Europe: Collection of studies and analysis, First Regional Conference, Cavtat, 2010*. Volume III, 407, 411 deals with consumer law. The guiding line of the reports is the *Consumer Law Compendium*, edited by Schulte-Nölke, Twigg-Flesner and Ebers, 2008, *op cit.* note 5. The analysis remains very technical and does not touch upon the questions raised in this paper.

⁸ See Thomas Meyer (who was the regional director of the programme), “Social Market Economy Values in Legal Reform Projects in South East Europe (SEE)”, in Christa Jessel-Holst, Rainer Kulms and Alexander Trunk (eds.), *Private Law in Eastern Europe: Autonomous Developments or Legal Transplants?* (Mohr Siebeck, Tübingen, 2010), 41-58.

⁹ It is more or less Poland, the Czech Republic and to some extent the Baltic States which are represented in the two projects.

those countries with which they are familiar. The situation is even worse with regard to NCs or partner countries like Russia where very little knowledge on consumer law is available.¹⁰

Second: the overall approach of the European Community as enshrined in the accession policy concentrated, 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 that these countries had to adopt. 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.¹¹ 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 on-going negotiations with CCs and PCCs. 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 developments 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 watershed point for the EU policy. Since then the European Commission, in particular after the accession of the NMS, has taken 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.¹² 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 but the first step in the overall envisaged democratisation project. The shift in focus directs the intention to the role and functions 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, nowhere is this 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 further research 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.¹³ The benchmark for the whole EU policy with regard to NMS, CC, CCPs and NCs 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

¹⁰ See, with regard to Russia, Norbert Reich, "Die Entwicklung des Verbraucherrechts im postsozialistischen Russland: Vom Klienten zum Konsumbürger", in Hans-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), Nomos, Baden-Baden, 1996), 183-202.

¹¹ See for an early account of the EC policy, Thierrie 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 Hans-W. Micklitz (ed.), *ibid.*, 91-126.

¹² For a deeper theoretical discussion on the increased importance of institutions 'Hayek beats Coase' see Rainer Kulms, "Optimistic Normativism after Two Decades of Legal Transplants and Autonomous Developments", in Christa Jessel-Holst, Rainer Kulms and Alexander Trunk (eds.), *Private Law in Eastern Europe: Autonomous Developments or Legal Transplants?* (Mohr Siebeck, Tübingen, 2010), 7-14, at 8.

¹³ Again theory clashes with (political transformation) reality, Slobodan Perovic, "Extra-Legal Factors and Legal Order Universal Values and Cultural Identity", in *Civil Law Forum for South East Europe: Collection of studies and analysis, First Regional Conference, Cavtat, 2010*, Volume I, (GTZ (Gesellschaft für technische Zusammenarbeit), Belgrade, 2010), 17-57.

that the consumer law acquis which has been developed in the last three decades mostly in the old Member States fits 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, 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 and 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.¹⁴ 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, CCs and PCCs this very same threshold considerably reduces the protective ambit of the Directive.

Social and cultural differences are clearly seen in the degree to which certain market activities are of relevance for that particular country. A good example is the revised Directive 2008/122¹⁵ on time sharing which plays an important role in the old Member States where consumers buy this kind of service as a particular variant of their envisaged vacation strategies. For the Western Balkans the implementation of such a directive simply set aside the social reality. Here people might face all sorts of consumer problems but certainly not with regard to time sharing contracts. If anything, the Directive could be understood as a means of opening 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 as a simple shopper.

The differences in economic, social and cultural needs of consumers in an ever larger European Union challenge 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 consumer protection law rules¹⁶ does simply not suffice to deal with the economic, social and cultural realities of the European Union. Perhaps countries in transition need different laws and might ask for different priorities. The NMS, CCs and PCCs 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 a real need to take into account the research 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 newly transformed law then flows back to its sources.¹⁷ One obvious contradiction is that the resistance against full harmonisation comes mostly

¹⁴ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210/29.

¹⁵ Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, OJ L 33/10.

¹⁶ Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM (2008), 614 final. See Hans-W. Micklitz and Norbert Reich, "Crónica de una muerte anunciada: The Commission Proposal for a 'Directive on Consumer Rights', 47(2) *Common Market Law Review* (2009), 471–519; Geraint Howells and Reiner Schulze (eds.), *Modernising and Harmonising Consumer Contract Law* (Sellier European Law Publishers, Munich, 2009).

¹⁷ Rolf Knieper, "Möglichkeiten und Grenzen der Verpflanzbarkeit von Recht", 72(1) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (2008), 88-112.

from the old Member States whereas the NMS, supported by consumer organisations, tend to favour it. The reasons behind such an attitude will have to be elaborated.¹⁸

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 CCs and the PCCs 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 bring 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 CCs and the PCCs. 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 watershed; however, it is a long way down from policy declarations in the Council of Ministers to the reality of consumer law enforcement. Perhaps one of the most challenging questions is 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, CCs and PCCs is near to zero.¹⁹ Again institution building cannot be equated with enforcement of consumer law.

2. Continuity and Discontinuity

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

With regard to substantive law one might have to distinguish between countries with a civil law tradition and those with other backgrounds. Countries with an established civil law system amended their national laws in communist times paying tribute to the dominant ideology of the day. Whilst these ideological elements have been repealed since 1990, particular rules on what is called today consumer protection, mainly with regard to sales transactions and unfair terms, often remained in

¹⁸ 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 Hans-W. Micklitz, “The Relationship between National and European Consumer Policy – Challenges and Perspectives”, in Christian Twigg-Flesner, Deborah Parry, Geraint Howells and Annette Nordhausen (eds.), *Yearbook of Consumer Law 2008*, (Ashgate, Hampshire, Burlington, 2008), 35-66.

¹⁹ With a few exceptions, Hans-W. Micklitz and Thomas Roethe, *Produktsicherheit und Marktüberwachung im Ostseeraum – Rechtsrahmen und Vollzugspraxis* (Nomos, Baden-Baden, 2008).

place.²⁰ 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 so, 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 and securities.²¹

On the other end of the spectrum are those NMS which did not have a strong civil tradition or never 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 between the Communist States with the outside world and relations between businesses (state owned companies) and citizens (consumers).²² 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 rules, some of which were very consumer friendly e.g. with regard to consumer guarantees, remained in place.²³ 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.²⁴ One of the major characteristics 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, i.e. in Serbia, Croatia, Macedonia, Serbia and Bosnia Herzegovina. The Code forms some sort of a common basis which has survived the Balkan War of the nineties. It contains rules on consumer sales and on unfair contract terms legislation and has a 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: in the 1970's they all adopted 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 and, on the other, the pressure from West European companies which were ready to transfer the production of car

²⁰ With a few exceptions, Norbert Reich, "Transformation of Contract Law and Civil Justice in the New EU Member Countries: The Example of the Baltic States, Hungary and Poland", in Fabrizio Cafaggi (ed), *The Institutional Framework of European Private Law* (Oxford University Press, Oxford, 2006), 271-302; Antonina Bakardjieva-Engelbrekt, "The Impact of EU enlargement in Central and Eastern Europe: the case of consumer protection", in Fabrizio Cafaggi and Horatia Muir-Watt (eds.), *Making European Private Law: Governance Design* (Edward Elgar, Cheltenham, 2008), 98-137.

²¹ Tartu Conference on Recent Development in European Private Law, XIV *Juridica International* (2008) (Law Review University of Tartu); GTZ (Gesellschaft für technische Zusammenarbeit), *Civil Law Forum for South East Europe, Collection of studies and analysis, First Regional Conference, Cavtat, 2010*, Volume I, (GTZ (Gesellschaft für technische Zusammenarbeit), Belgrade, 2010).

²² See Norbert Reich, *Sozialismus und Zivilrecht. Eine rechtstheoretisch-rechtshistorische Studie zur Zivilrechtstheorie und Kodifikationspraxis im sowjetischen Gesellschafts- und Rechtssystem* (Athenäum, Frankfurt am Main, 1972) (präzise Analyse der Etappen der sowjetischen Zivilrechtsentwicklung).

²³ Uwe-Jens Heuer (ed.), *Die Rechtsordnung der DDR, Anspruch und Wirklichkeit* (Nomos, Baden-Baden, 1995).

²⁴ Jelena Perovic, "Contract Law in Serbia", in Christa Jessel-Holst, Rainer Kulms and Alexander Trunk (eds.), *Private Law in Eastern Europe: Autonomous Developments or Legal Transplants?* (Mohr Siebeck, Tübingen, 2010), 93-107.

parts, furniture or clothes to these countries provided the output met the West European quality standards. These newly adopted laws also constituted the nucleus for a first series of socialist consumer protection laws by providing remedies for consumers in case of unsatisfactory quality standards. The very burdensome and bureaucratic complaint mechanism still forms one of the pillars of consumer protection, not only in the NMS, but also in the CCs and the PCCs.²⁵

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 capable of also integrating the subsequent 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 encountered in the NMS, CCs and PCCs when handling 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 not interested in the starting conditions of the respective Member States. If such an approach had 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 even today create so much confusion in the minds of academics and practitioners.

At a more abstract level, however, there is a certain degree of 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 the early stages, seemed ready to rely on existing institutional structures in the NMS to give weight to consumer law. The entities (inspectorates) which in socialist times were 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.²⁶ Consumer law seemed to be the perfect area for such future activities. The new-found concern in enforcement matters, not only in the NMS, CCs and PCCs, seems to tilt the balance towards discontinuity.

²⁵ With regard to Turkey, see Atamer and Micklitz, *op cit.* note 6.

²⁶ Thomas Roethe, “Zum Konsumentenschutz in den MOE-Staaten”, in Hans-W. Micklitz (ed.), *Rechtseinheit oder Rechtsvielfalt in Europa? – Zur Rolle und Funktion des Verbraucherrechts in den MOE-Staaten und in der EG* (Nomos, Baden-Baden, 1996), 205-228.

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 a programme on how the consumer policy in Eastern Europe could look like much earlier than the EU.²⁷ It took 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 both at the EU level and between the EU and its Member States before consumer policy was given a role in the accession process. The overall mechanism was a two-step procedure which broke down the EU consumer law *acquis* of the day into two sets of rules, ranked according to their priority.²⁸

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, from Trade and Co-operation Agreements, Stabilisation and Co-operation Agreements to the obtaining of Potential Candidate or Candidate status, is associated with 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 this regard, it seems fair to say that the process is much more organic than it has been conceived in the negotiations with the CEECs.²⁹ The European Commission regularly publishes 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*. The two 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 Western Balkans 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

²⁷ Reprinted in Micklitz (ed.), *ibid.* and see the contribution of Erich Linke, "Consumer Policy Activities in OECD", in Hans-W. Micklitz (ed.), *Rechtseinheit oder Rechtsvielfalt in Europa? – Zur Rolle und Funktion des Verbraucherrechts in den MOE-Staaten und in der EG* (Nomos, Baden-Baden, 1996), 127-138.

²⁸ See the comprehensive analysis of Thierrie Bourgoignie, in Hans-W. Micklitz (ed.), *ibid.*, at 91.

²⁹ See for details Hans-W. Micklitz, "The Law of the Western Balkan Countries in the Mirror of Consumer Law", in Marija Karanikic, Hans-W. Micklitz and Norbert Reich, *Modernising Consumer Law – the Experience of the Western Balkan* (2012 forthcoming).

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 reconstructing in detail. If one compares the NMS and the (P)CC (mainly Western Balkans) it is striking to see that the whole EU system of surveillance and monitoring comes to a halt once 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 NMS and (P)CC (mainly Western Balkans). 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, CCs, and PCCs 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 clearly expressed a preference for either model. In this much the European Commission treats the CCs and the PCCs 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 CCs and the PCCs have limited choice. The strong pressure from the European Commission, the take-it or leave-it approach, the semi-official ambivalence towards the national starting conditions, national particularities and national economic, social and cultural differences urged the NMS, and continue to urge the CCs and the PCCs, to opt for the seemingly easier solution – the adoption of a separate body of consumer law. 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 also as an area of the legal system which remains only loosely connected to the national civil law rules or to the (judicial) enforcement mechanisms. Consumer law and national private law in NMS and (P)CC (mainly Western Balkan) (but only there) are separated

- by different legal languages: the national language enshrined in civil law and laws on measurements on one side, with 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 Europeanization of private law, the Draft Common Frame of Reference (DCFR), and, on the other hand, the consumer lawyers who have joined the Acquis principles,
- by different institutions responsible for enforcement: national courts with regard to the civil law, administrative authorities, i.e. ministries or public entities, with regard to consumer law, combined with a plethora 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 from all over Europe and further afield along with 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 NMS and (P)CC. In the initial phase of the EU enlargement towards Central and Eastern

Europe, the Centre de Droit de la Consommation assumed a near monopoly role. The European Commission granted the CDC a prominent position in the PHARE project which allowed it to engage consumer lawyers from all over Europe in 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 (P)CC (mainly Western Balkans) is different. The European Commission no longer granted one single institution a quasi-monopoly. Tendering became the rule which changed the institutional framework for the intermediaries considerably. The result might be discontinuity in advice, which has its own price in terms of confidence building, consistency and continuity. Law is not a product to sell to the potential recipient.³⁰ 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 certainly plays the role of a coordinator but 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 (P)CC (mainly Western Balkans). However, this would have to be tested.

One aspect has to be added: in the Western Balkans, the NCs and 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 gain a comprehensive view of the range of actors at play and their activities in these countries, even in the rather narrow field of consumer law. Furthermore, it is not clear whether different institutional settings will produce different legal solutions or different institutional choices in the different areas of consumer law.

In the very end, the work has to be done by individuals, by consultants, be they academics, activists, practising lawyers or public officials. It is plain that consultants, in the very end, favour the adoption of the national legal system they are most 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 deserves further investigation.

4. Enforcement

Looking into the area of enforcement opens up very sensitive issues not only for politics but also for research. The Copenhagen criteria have set the agenda in this area, and since then the Member States and the European Commission have had 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 (P)CC (mainly Western Balkans). A part of this are the progress reports which 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.

³⁰ Although this is very much in line with theoretical discussions on the character of law in the 21st century; e.g. University of Munich, Center for Advanced Legal Studies, Research Focus 'Law as a Product', available at <http://www.cas.uni-muenchen.de/schwerpunkte/recht_als_produkt/index.html>.

The NMS, however, are completely out of reach of any EU policy. Structural surveillance and monitoring ended once these countries joined the EU, although it is plain that the Copenhagen criteria are not yet fully met in all the NMS. Once a country has been accepted as a new member state, the European Commission, with all its consulting machinery, is out of the picture. In the light of the limited data currently 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 CCs/PCCs, suffer to a different degree from overstuffed but under-qualified bureaucracies. Usually the competent ministries are responsible for the enforcement process. In the field of consumer law they take the form of so-called market inspectorates which have to survey the market of consumer products. The market inspectorates were in charge of controlling the quality of products in the communist times. Consumer guarantees and consumer certificates played, and still play, a prominent role in this area. It might be worth looking into the origins of the market inspectorates and their transformation to genuine market surveillance authorities.³¹ Since the adoption of Regulation 768/2008³² the NMSs, the CCs and the PCCs 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.³³ The point then is to what extent the NMS, CCs and PCCs 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, the investigation of market surveillance could become a perfect case in which the one-way thinking – from the West to the East, from old to new Member States and/or CCs and PCCs – would have to be re-considered.

The situation with regard to the judiciary looks very similar. 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 in the role and function of judges in enforcing the law. In practice, there are huge differences between the NMS and between the NMS, the CCs and the PCCs. The conceptual question is how to define criteria which allow 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,³⁴ on governance through courts and judges, all this research is of limited importance for the field of consumer law, in particular in the CCs and PCCs. The starting hypothesis is that perhaps not all but most countries are very much relying on the establishment of appropriate ADR mechanisms which would allow the consumer easy access to justice while avoiding the difficult issues of how to access the (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 Germany³⁵ – and the development of out-of court mechanisms.

³¹ See Thomas Roethe, “The Serbian Consumer”, in Marija Karanikic, Hans-W. Micklitz and Norbert Reich, *Modernising Consumer Law – the Experience of the Western Balkan* (2012 forthcoming).

³² Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93, OJ L 218/30.

³³ A very telling example is the transformation of the enforcement policy in Sweden in preparation of the accession to the EU, see Nils Ringstedt, “Post Market Control of Technical Consumer Goods, Product Safety in Practice – the Experience of the national Swedish Board for Consumer Policies”, in Hans-W. Micklitz (ed.), *Post Market Control of Technical Consumer Goods* (Nomos, Baden-Baden, 1990), 85-102.

³⁴ Marek Safjan and Aneta Wiewiorowska-Domagalska, “Political Foundations of European Private Law: Rethinking the East-West Division Lines”, in Roger Brownsword, *et al.* (eds.), *The Foundations of European Private Law* (Hart Publishing, Oxford, Portland, 2011), 265-284.

³⁵ See in particular the research of Inga Markovits, *Gerechtigkeit in Lüritz : Eine ostdeutsche Rechtsgeschichte* (C. H. Beck, München, 2006).

Consumer organisations are on the political agenda as they are regarded as key actors in the development of civil society.³⁶ In western type democracies consumer organisations play a major role in the enforcement of consumer law, though to a varying degree. Most of the consumer laws 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 the nature of the 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.³⁷ It seems as if the administrations would like to keep a close eye on what these organisations are doing and what they should do. This is certainly a legacy of communist times, something which will only change over time. What matters in our context is the relationship between the underdeveloped courts and the non-existent or understaffed consumer organisations. If consumer organisations can go to court they might exert pressure on the development of a competent infrastructure, whereas if they are barred from standing they may only approach the ministries and authorities in charge of enforcement to move them into action.

5. Institutions

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.³⁸ However, the European Commission has gradually shifted the balance from private judicial to public administrative enforcement. This shift can be seen in the evolution from Directive 98/27 (now 2009/22) on injunctions to 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 put pressure indirectly on Member States to extend the competence of public authorities even to purely domestic 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 CCs and the PCCs from delegating enforcement to 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 CCs and the PCCs from fostering the development of a civil society in which consumer organisations may operate in practice. There is not much variation, at least not in the Western Balkans. They all rely mostly on

³⁶ Hans-W. Micklitz, “Verbraucherschutz West versus Ost – Kompatibilisierungsmöglichkeiten in der Europäischen Gemeinschaft – Einige Vorüberlegungen”, in Helmut Heiss (ed.), *Brückenschlag zwischen den Rechtskulturen des Ostseeraums* (Mohr, Tübingen 2001), 189-207.

³⁷ Hans-W. Micklitz et al., *Verbraucherschutz durch Unterlassungsklagen, Rechtliche und Praktische Umsetzung der Richtlinie Unterlassungsklagen 98/27/EG in den Mitgliedstaaten* (Nomos, Baden-Baden, 2007).

³⁸ See Fabrizio Cafaggi and Hans-W. Micklitz, “Collective Enforcement of Consumer Law: A Framework for Comparative Assessment” 16(3) *European Review of Private Law* (2008), 391–425.

administrative enforcement even in traditional areas of private law. Usually the ministries are then the addressees of law enforcement. The enforcement units within the ministries are not really kept separate from other policy tasks. Such a combination of executive policy making and law enforcement allows for the application of a political agenda to law enforcement. This is very much in line with the common administrative practice in the former communist countries and it is still alive in Member States that have a rather young history.³⁹

The same relative homogeneity may be found with regard to the role and function of consumer organisations. Quite often, the civil society is not really established or is rather vulnerable. Therefore consumer organisations face difficulties in being accepted as serious political actors and as partners in the development of a coherent consumer policy.⁴⁰ They are weak players and dependent on administrative subsidies. Competition between the consumer organisations over resources and for political recognition leads to a strange correlation between the huge number of consumer organisations and their political unimportance. The judiciary is usually not open for consumers, at least not in practice. The development of ADR mechanisms are regarded overall as a sound alternative for individual law enforcement. However, despite formal political backing, the ADR mechanisms are not really developed and play no role in practice. This is at least true for the Western Balkans.

The role and function of national ministries in NMS, CCs and PCCs during the accession, as well as after the accession process, deserves close attention. Roughly speaking, these countries were forced, under 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 and not with parliaments in order to implement 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 the available 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.

6. Conclusion

Consumer law serves as a prominent field which allows for deeper insight into the different civil law systems in the CEECs. Most of consumer law is civil law, but it is either insufficiently or not at all connected to the national private legal orders. Research on the linkages between consumer law and private law are urgently needed, in particular, as a number of the Eastern European Countries are currently revising their civil code, often totally unconnected from the impact of the Europeanization of private law via EU primary and secondary Community law.

The impact of the consumer acquis brings a certain degree of homogeneity in the consumer law systems, at least on the surface. A deeper understanding of the implementation process would require knowledge not only on how the implementation process is organised technically in the sense of whether it is done in the form of a separate law or by way of integration into the national private law code, but also on where the emphasis lies in respective given country. A well-established interplay between the code, the judiciary and the lawyers may be an important factor in measuring the potential impact of implementation. Consumer law would then benefit from being integrated into the national

³⁹ See our analysis of the enforcement practices in consumer safety in the Baltic Sea Alliance, Micklitz and Roethe, *op cit.* note 19.

⁴⁰ For a first account in the SEECs see Ruth Anna Büttner and Drago Trbojevic, "Consumer Organisations in Consumer Organisations in Serbia, Croatia, Montenegro and FYR Macedonia", in Marija Karanikic, Hans-W. Micklitz and Norbert Reich, *Modernising Consumer Law – the Experience of the Western Balkan* (2012 forthcoming).

private law system. But also the opposite might be true. A piece of law, in whatever form, which remains totally disconnected from the respective national private law system and organisation might pave the way for the development of a new, more democratic, legal community outside and beyond the national private law systems which are traditionally loaded with history.

The role and importance of enforcement is key for the future impact of consumer law on the respective societies. Whilst the European Commission has changed its rhetoric considerably over time, and in particular in the aftermath of the Eastern enlargement, the current practice in Central and Eastern Europe lacks serious attempts to invest into the enforcement structure. For sure, enforcement issues are not really consumer law related, but much more bound to the economic, social and political particularities of the respective countries. A workable enforcement structure implies the availability and the existence of accessible courts, accessible lawyers and a well-trained legal community which feels bound to the rule of law and which knows how to apply the newly integrated Europeanised consumer law rules. Similar conclusions apply to enforcement via administrative agencies which are in charge of bringing consumer law to life.

Deeper research in to the implementation and the enforcement in CEECs would not only improve our knowledge on what is going on in these countries, it would also pave the way for even broader research in the old Member States of the EU, where enforcement is a highly sensitive issue too.

V. THE EUROPEANIZATION OF PRIVATE LAW IN CEECS: THE CASE OF SECURITIES LAW

Olha O. Cherednychenko

1. 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,¹ 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'². This fact explains the increasing number of EU measures 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 EU securities regulation in 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 (an investment service provider, such as an investment firm or a credit institution) to another party (a client). As early as 1993, the EU adopted the Investment Services Directive (ISD)³ which aimed at ensuring 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).⁴ This directive introduced a comprehensive regulatory regime in the area of investment services and secondary capital markets⁵, which has led some to describe it as Europe's

¹ White Paper on Financial Services 2005–2010, COM (2005) 629, 1 December 2005; Green Paper on Retail Financial Services, COM (2007) 226, 30 April 2007; 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, 20 November 2007; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the European Central Bank on Regulating Financial Services for Sustainable Growth, COM (2010) 301 final, 2 June 2010, at 6-7. See also the recent speeches by the new EU Commissioner for the internal market and services Michel Barnier, in particular, "Forging a New Deal between Finance and Society: Restoring Trust in the Financial Sector" at the European Financial Services Conference, 26 April 2010, Brussels, and "A New Ambition for the European Market" at the European Parliament's Internal Market and Consumer Protection Committee, 28 April 2010, Brussels.

² 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).

³ Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, OJ L 141/27.

⁴ 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, OJ 2004 L 145/1.

⁵ 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.

‘new constitution’ for these areas.⁶ New changes to the current legal framework are expected to follow the MiFID review, which is now underway, and which should lead to the adoption of the MiFID II.⁷

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.⁸ 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.⁹ The meaning of these rules is further fleshed out in the Directive implementing the MiFID.¹⁰

The rapid developments in the EU’s regulation of 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 question¹¹ 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 co-operation with other CEECs without offering the prospect of the EU membership in the near future.

Although the EU securities regulation has played an important role in shaping securities laws of these countries, hardly any in-depth legal research has been done regarding how EU law has influenced the development of securities laws and the institutional framework for their adoption and enforcement in different CEECs.¹² 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, to the extent that 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 an appropriate legal framework to facilitate private transactions on the market, including those in the securities field. The relationship

⁶ See, for example, Klaus J. Hopt, “Grundsatz- und Praxisprobleme nach dem Wertpapierhandelsgesetz – insbesondere Insidergeschäfte und Ad-hoc-Publizität”, 159 *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* (1995), 135-163; Heinz-Dieter Assmann and Uwe H. Schneider, *Wertpapierhandelsgesetz* (Otto Schmidt, Cologne, 2006), Introduction n. 1. For the comprehensive overview of the EU regime for securities regulation, see, for example, Niamh Moloney, *EC Securities Regulation* (Oxford University Press, Oxford, 2008).

⁷ See Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (Recast), COM(2011) 656 final, 20 October 2010.

⁸ On the relationship between the EU securities regulation and private law, see Olha O. Cherednychenko, “European Securities Regulation, Private Law and the Investment Firm-Client Relationship”, 17(5) *European Review of Private Law* (2009), 925–952.

⁹ Articles 18-24 MiFID.

¹⁰ 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, OJ L 241/26.

¹¹ With the exception of Turkey, all CEECs in question are former communist countries.

¹² The studies available so far are limited to providing general information and analysis on the functioning of financial markets in CEECs. See, in particular, Morten Balling, Frank Lierman and Andy Mullineux (eds.), *Financial Markets in Central and Eastern Europe: Stability and Efficiency Perspectives* (Routledge, London, New York 2004).

between the two processes, however, remains largely under-investigated. The revival of classical private law and the role of private law courts in this process deserve special attention when investigating the impact of the EU 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 EU securities regulation on the securities laws of CEECs has so far largely been focused on the question of whether CEECs managed to transpose the black-letter rules contained in the EU measures into their national legal orders. The focus on the formal adoption of EU law on paper in CEECs was also characteristic of the overall approach adopted by the EU, at least in the initial phase of the accession process. While both the ISD and the MiFID presuppose the establishment of an effective system of supervision over investment services industry, no comprehensive investigation has yet been made into the role of supervisory authorities of the NMS and other groups of CEECs in the adoption and enforcement of the conduct of business rules and the effectiveness of public enforcement in this area. Even less is known about the effectiveness of private enforcement of the conduct of business rules by individual, or groups of, investors in these countries. Moreover, hardly any data is available today concerning the institutional implications of the adoption of the EU securities regulation in CEECs in general, 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 EU 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 EU to the harmonisation of the conduct of business rules in Europe does not take into account the different economic, social and local needs of NMS, the countries applying for EU membership or those which merely seek closer cooperation with the EU without formal membership of the Union. It is notable in this context that initially the EU 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.¹³ Moreover, a ‘common thread’ across all areas of the current MiFID review is the minimising of the remaining Member State discretion with a view to establishing a ‘single rulebook for EU financial markets’.¹⁴ The current policy reflected in the MiFID and the MiFID review is based on the assumption that investors in the EU deserve the same level of protection all over the EU and that the EU 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, up until now, the export of the Western type of EU securities regulation to NMS and other CEECs has not been studied in the context of the economic, social and local needs of these countries.

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

¹³ 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.

¹⁴ Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (Recast), COM(2011) 656 final, at 2.

flow of information from CEECs back to EU level is urgently needed in order to establish the connection between the EU securities regulation and the particular circumstances of CEECs. Without having such connection it is difficult to learn about the impact of the EU securities regulation in these countries and hence to ensure its effectiveness in practice. In-depth research into the process of the Europeanization of securities laws in CEECs may produce important 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 service providers and ensuring their effective enforcement.

As will be demonstrated in the next sections, investigating the impact of the EU securities regulation within the particular context of the conduct of business rules for investment firms and credit institutions may provide particularly useful insights into the process of the Europeanization of securities law in CEECs.

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 EU law was sought. The continuity/discontinuity paradigm may affect not only the implementation of substantive EU law, but also the institutional choices which are made in the course of this implementation and the way various actors involved in the Europeanization process operate in practice.

When it comes to the adoption of the EU securities regulation in post-communist CEECs, one should take into account that capital markets, and hence specific laws regulating such markets, were virtually non-existent in the centrally planned economies. In Poland, for example, as a result of the regime transformation after World War II, securities laws were largely abolished. Only the Bills of Exchange Act and the Cheques Act remained in force, as they turned out to be useful, to a certain extent, within the system of command and control economy.

Moreover, it is notable that the conduct of business rules, which now form part of the EU regulatory framework for investment services, originated largely from within the national private laws, in particular the contract laws, of the old EU Member States. These rules have subsequently been cast as the EU supervision standards and strengthened by public law enforcement mechanisms in the EU securities regulation, primarily due to the need to strengthen investors' confidence in the financial markets.¹⁵ 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 1993.¹⁶ 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.¹⁷ 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

¹⁵ On this in more detail, see Olha 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* (Sellier, Munchen, 2007), chs. 7 and 8.

¹⁶ BGH 6 July 1993, *BGHZ* 123, 126 = *NJW* 1993, 2433 (*Bond*).

¹⁷ See, for example, *Rust v. Abbey Life Insurance Co Ltd* (1978) *Lloyd's Rep* 386.

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 did not develop 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, laws governing securities trading in the primary and secondary markets were adopted and 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 CEECs, in particular in Poland. At present, it is not entirely clear what role has been played in this development by the 1993 ISD and the 2004 MiFID beyond the legal obligations of CEECs to adopt the EU securities regulation, nor 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 NCs, 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 EU 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 the enforcement of consumer standards, and the institutional setting for the enforcement of the current EU 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 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 completely new for CEECs. It may also affect the institutional setting for the public enforcement of the EU securities regulation and the way administrative agencies operate in this field.

Using previous experience, however, involves dangers for the adequate implementation and enforcement of the EU 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.¹⁸ In addition, strong reliance on public enforcement may be problematic from the point of view of the protection of individual investors. Legacies of the communist past, such as the underdeveloped system of civil

¹⁸ On this see, for example, Antonina Bakardjieva Engelbrekt, “The impact of EU Enlargement on Private Law Governance in Central and Eastern Europe: The Case of Consumer Protection”, in Fabrizio Cafaggi and Horatia Muir-Watt (eds.), *Making European Private Law: Governance Design* (Edward Elgar, Cheltenham, 2008), 98-137; Katalin J. Cseres, “Governance Design for European Private Law: Lesson from the Europeanization of Competition Law in Central and Eastern Europe”, in Fabrizio Cafaggi and Horatia Muir-Watt (eds.), *Making European Private Law: Governance Design* (Edward Elgar, Cheltenham, 2008), 138-193; Norbert Reich, “Transformation of Contract Law and Civil Justice in the New EU Member Countries: The Example of the Baltic States, Hungary and Poland”, in Fabrizio Cafaggi (ed.), *The Institutional Framework of European Private Law* (Oxford: Oxford University Press, 2006), 271-302.

justice and civil society,¹⁹ 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 EU 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 EU 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 the private enforcement of the EU conduct of business rules by aggrieved investors. It is here that in some CEECs the continuity between the old private law system existing prior to the adoption of the EU 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 written neither for, nor from the perspective of, the *private law* relationship between the investment firm or credit institution and the client.²⁰ In contrast, for example, to the Directive on Consumer Rights²¹ which explicitly confers *rights* on consumers against businesses and, albeit to a limited extent, provides consumers with remedies,²² the MiFID is not drafted in such terms. The MiFID does not explicitly grant rights to investors as regards conduct of business rules, nor does it contain remedies empowering the investors to take action in those cases where an investment firm or a credit institution has not complied with the conduct of business rules.²³ In this respect, the MiFID also differs from the Distance Marketing of Consumer Financial Services Directive²⁴ applicable *inter alia* to distance selling of consumer *investment* services, and more recent sector-specific directives related to the provision of other (consumer) financial services, such as the Payment Services Directive²⁵ and

¹⁹ *Ibid.*

²⁰ Compare Hans-W. Micklitz, “Anlegerschutz – Analyse des EG-Rechts”, in Jürgen Keßler and Hans-W. Micklitz (eds.), *Anlegerschutz in Deutschland, Schweiz, Großbritannien, USA und der Europäischen Gemeinschaft* (Nomos, Baden-Baden, 2004), 267-325, at 324.

²¹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304/64.

²² See, for example, the consumer’s right of withdrawal for distance and off-premises contracts (ch. III) and consumer rights specific to sales contracts (ch. IV).

²³ The only provisions of the MiFID which deal with private enforcement – Articles 52 (2 b) and 53 – are discussed in more detail below.

²⁴ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 271/16.

²⁵ Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, OJ L 319/1.

the Consumer Credit Directive.²⁶ Unlike the MiFID, the contract-related rules in these three measures are drafted from the perspective of the private law relationship between a consumer and a service provider and do include *inter alia* consumer rights;²⁷ moreover, the Payment Services Directive, for example, also extensively deals with service provider liabilities to consumers.²⁸

As a matter of fact, both the ISD and the MiFID are drafted predominantly from the perspective of public enforcement of the investor protection provisions contained therein via supervisory authorities.²⁹ The extensive conduct of business regime established by the MiFID is directed at ensuring effective supervision of the investment service providers' compliance with the new standards. The provider who does not comply with the conduct of business rules must be subject to administrative sanctions which must be effective, proportionate and dissuasive (art. 51 of the MiFID). To ensure the effective administrative enforcement of the MiFID, Member States should establish public authorities (art. 48(2) of the MiFID). Imposing supervision standards upon investment service providers and ensuring their public enforcement are currently seen by the EU legislator as the primary means of achieving its regulatory objectives in the field of investment services and activities, including a high level of investor protection. This trend has also been confirmed during the MiFID review. While the initial consultation document concerning the MiFID review contained a proposal from the Commission to include the 'principle of civil liability' in the MiFID II, the proposal for the MiFID II is silent upon this issue.³⁰

Furthermore, of particular importance in the present context is the fact that the current EU regulatory regime for investment services is based on the four-level approach to the legislative process, the so-called Lamfalussy architecture.³¹ At level 1, the European Parliament and the Council of Ministers adopted the MiFID which established the core principles of the regulatory regime. The law then progressed to level 2, where these core principles were further elaborated with detailed technical implementing measures. These technical measures were 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 was also played by the Committee of European Securities Regulators (CESR) – an advisory committee which contributed technical advice on the implementation measures. The legal measures taken at this level included the above-mentioned Directive implementing the MiFID as regards organisational

²⁶ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133/66.

²⁷ E.g., the consumer's right of withdrawal (art. 6 of the Distance Marketing of Consumer Financial Services Directive; art. 14 of the Consumer Credit Directive); the consumer's right to early repayment (art. 16 of the Consumer Credit Directive); the payer's right to a refund for payment transactions initiated by or through a payee (art. 62 of the Payment Services Directive).

²⁸ E.g., the payment service provider's liability to the payer for unauthorised payment transactions (art. 60 of the Payment Services Directive); the payment services provider's liability to the payer for non-execution or defective execution of the payment transaction (art. 75 of the Payment Services Directive).

²⁹ Compare Micklitz, *op.cit.* note 20, at 324; Christel M. Grundmann-van de Krol, *Het effectenrecht tussen publiek- en privaatrecht* (Boom Juridische uitgevers, Den Haag, 2002), 4.

³⁰ See European Commission, Directorate General Internal Market and Services, 8 December 2010, Public Consultation, Review of the Markets in Financial Instruments Directive (MiFD), available at <http://ec.europa.eu/internal_market/consultations/docs/2010/mifid/consultation_paper_en.pdf>, at 63, para. 7.2.6 – Liability of firms providing services) and European Commission, 20 October 2011, COM(11)656 final, *Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (Recast)*, respectively.

³¹ 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, Guido Ferrarini, "Contract Standards and the Markets in Financial Instruments Directive (MiFID): an Assessment of the Lamfalussy Regulatory Architecture", 1(1) *European Review of Contracts Law* (2005), 19-43, at 23.

requirements and operating conditions for investment firms, and the Regulation implementing the MiFID as regards the standard of recordkeeping obligations for investment firms, transaction reporting, market transparency and the admission of financial instruments to trading.³² The next levels, level 3 and level 4, of the Lamfalussy structure mainly concerned the implementation and enforcement of the EU legislation adopted at level 1 and level 2 in the national legal orders of the EU Member States. Level 3 was based on cooperation and networking amongst national regulators through the CESR to ensure the consistent and equivalent transposition of Levels 1 and 2 measures. Level 4 concerned the strengthening of the enforcement of the EU regulation. The Lamfalussy architecture was 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 transposed 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 in the Act on Trading in Financial Instruments 2005 has been played by the Ministry of Finance.³³ In Romania, the transposition of these rules took place mainly through the regulations of the National Securities Commission – the Romanian supervisory authority in the securities field.³⁴ Similarly, the supervisory authority – the Securities Commission – played an important role in the adoption of the EU conduct of business rules in Lithuania by specifying more general provisions concerning the conduct of business rules in the Markets in Financial Instruments Act 2001.³⁵

This mode of implementation, prompted by the EU securities regulation, has resulted in a leading role for the executive, in particular national supervisory authorities, in the Europeanization of securities law in CEECs. The first issue which needs to be investigated in this context is to what extent the adoption of these rules has been affected by the national political and socio-economic background of a particular CEEC. In particular, does a particular legal system tend to make use of the copy-and-paste technique or, as far as possible, exercise discretion in implementing the standards prescribed by the EU measures and/or add additional rules in areas related to, but not directly regulated by, the EU 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, the supervisory authorities)?

³² Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive (2006) OJ L 241/1.

³³ See, in particular, the Decree of the Minister of Finance on procedures and rules of conduct of investment firms, of banks referred to in Article 70(2) of the Act on Trading in Financial Instruments and of custodian banks of 20 November 2009. On the implementation of the MiFID in Poland, see Andrzej W. Kawecki, "Poland", in Danny Busch and Deborah DeMott (eds.), *Liability of Asset Managers* (Oxford University Press, Oxford, 2012), 251-271.

³⁴ Regulation of the National Securities Commission no. 12/2004.

³⁵ 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.

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 additional requirements on investment service providers beyond those found in the MiFID concerning the conduct of business regulated under it? 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 market³⁶ and/or to resolve disputes between the aggrieved individual investors or their groups and investment firms?

Providing answers to these questions is important considering that the post-financial crisis changes in the Lamfalussy landscape further strengthen the role of the executive, in particular supervisory authorities, in the rule-making process in the securities field and further intensify European centralisation with respect to securities law. Of particular importance in the present context is the establishment, on the 1st of January 2012, of the European System of Financial Supervisors (ESFS). Within the new system, the national supervisory authorities work together with the new European Supervisory Authorities (ESAs) to safeguard financial soundness at the level of individual financial institutions and to protect consumers of financial services. The CESR, which was an unstable network of national supervisors, is replaced by the European Securities and Markets Authority (ESMA) which has been granted broad powers to shape regulatory and supervisory convergence throughout the EU.³⁷ The ESMA is authorised *inter alia* to devise and propose technical standards (a ‘single rule book’) which are put to the European Commission for endorsement, issue guidelines for interpretation and conduct peer reviews (‘best practices’) with which the national supervisory authorities will make every effort to comply in their decision-making, and, last but not least, even temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of the financial markets.³⁸ The ESMA’s potential to drive further centralisation in the investor protection field is therefore considerable.³⁹ However, as Moloney rightly observes, ‘the related risks of limiting Member States’ ability to experiment with emerging challenges must be countered by ESMA’s ability to dilute these risks’.⁴⁰ This is particularly true as far as the emerging financial markets in CEECs are concerned. The effectiveness of the ESMA’s measures in the field of investor protection accordingly depends, to a significant extent, upon the ESMA’s knowledge of the specificities of the CEECs and its ability to take them into account when exercising its quasi-rule-making powers.

³⁶ Such a power is given, for example, to the Polish Financial Supervisory Authority. See Rafal T. Stroinski and Lukasz Gorywoda, “Country Status Report from Poland”, 3(6) *European Company law* (2006), 288-291, at 290.

³⁷ Regulation (EU) No. 1095/2010, OJ 2010 L 331/84.

³⁸ See, in particular, arts 8-9 of the Regulation (EU) No. 1095/2010, OJ 2010 L 331/84.

³⁹ See, for example, Niamh Moloney, “The European Securities and Marktes Authority and Institutional Design for the EU Financial Market – A Tale of Two Competencies: Part (1) Rule-Making”, 12(1) *European Business Organization Law Review* (2011), 41 – 86, at 70 and Niamh Moloney, “The European Securities and Marktes Authority and Institutional Design for the EU Financial Market – A Tale of Two Competencies: Part (2) Rules in Action”, 12(2) *European Business Organization Law Review* (2011), 177-225, at 177.

⁴⁰ *Ibid.*, p. 70.

3.2 *Implementation through Judiciary and Alternative Dispute Resolution Boards*

The implementation of the EU conduct of business rules in the *supervision* legislation in CEECs also gives rise to questions concerning the relationship between supervision standards and national private law and, in particular, the role of private law courts and alternative dispute resolution (ADR) boards, if such are in place, in the adoption of the conduct of business rules in these countries.⁴¹

Although the EU 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 contract-related standards of behaviour which aim to protect investors. In fact, as has already been mentioned above, the conduct of business rules originated from the private law of some old EU Member States and have subsequently been coined as the EU supervision standards and further elaborated as such standards. As contract-related 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 EU securities regulation has been implemented in CEECs, does not provide an exhaustive answer to the question concerning the relationship between the conduct of business rules and national private laws.

Thus, for example, the Polish Act on Trading in Financial Instruments 2005 envisages 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 Polish Act does not clearly grant investors a right of action in case of a breach of the conduct of business rules, so an investor may not directly invoke these rules. 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.⁴² Invoking the tort of breach of an explicit statutory duty therefore clearly circumvents the need to establish that a duty of care should be recognized at common law.

Uncertainty concerning the effect of the conduct of business rules as between an investment service provider and an investor also exists in other CEECs. It is notable that the Lithuanian Markets in Financial Instruments Act, for example, imposes an obligation on the persons who acted in violation of the Act to *inter alia* carry out the instructions of the Securities Commission in order 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 or credit institution and its client. Furthermore, it has transpired that many other CEECs do not provide any clue at all as to the relationship between the conduct of business rules and their national private laws.

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 private law, the issue has largely been left to domestic private law courts and ADR boards, if such are in place, to decide.

⁴¹ On this issue in more detail, see Cherednychenko, *op cit.* note 8, at 925.

⁴² FSA PS 45, para. 3.47.

The case law of the private law courts in many old Member States provides evidence that the conduct of business rules have already been exercising a *radiating* effect (*Ausstrahlungswirkung*) on the content of the private law concepts.⁴³ In German law, for example, the conduct of business rules contained in the Securities Trading Act (*Wertpapierhandelsgesetz (WpHG)*) 1994 specify the meaning of more general private law concepts, such as good faith (*Treu und Glauben*) contained in § 242 of the Civil Code, the commission agent's duty of loyalty (*Pflicht zur Interessenwahrung*) laid down in § 348 of the Commercial Code or precontractual duties which can be based on § 311 (2) of the Civil Code.⁴⁴ In Dutch law, the private law concepts, such as the service provider's general duty of care (*zorgplicht van een goed opdrachtnemer*) embodied in article 7:401 of the Civil Code, serve as an umbrella under which the conduct of business rules laid down in, or pursuant to, the Financial Supervision Act (*Wet financieel toezicht (Wft)*) 2006 enter into private law.⁴⁵ In English law the conduct of business rules, which are now contained in the Conduct of Business Sourcebook (COB) enacted by the Financial Services Authority (FSA),⁴⁶ have also become highly influential in shaping the common law standards of care, in particular the scope of the duty of care in the tort of negligence.⁴⁷

Is a similar development, however, also taking place in NMS and/or other CEECs, in particular PCC, NC and Partners? At present, we know very little about this. It is noteworthy in this respect that in Albania, for example, the courts generally prefer to apply the provisions of the Civil Code ignoring the existence of specific legislation in the field of consumer protection.⁴⁸ It would be interesting to investigate to what extent this tendency is also true for other CEECs as far as the investor protection is concerned.

It is also notable in the present context that, according to Article 53 of the MiFID, 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'.⁴⁹ Moreover, in the MiFID II Proposal the word 'encourage' has been deleted and the Member States have been placed under the obligation to set up efficient and effective extra-judicial mechanisms for investors' complaints.⁵⁰ Next to the judiciary therefore, the ADR boards, set up by public or private

⁴³ On this in more detail, see Cherednychenko (2007), *op cit.* note 15, chs. 7 and 8.

⁴⁴ See, for example, BGH 11 November 2003, *Wertpapier-Mitteilungen* (2004), at 24, 26; BGH 8 May 2001, 22 *Zeitschrift für Wirtschaftsrecht (ZIP)* (2001), 1580, 1581; BGH 5 October 1999, *BGHZ* 142, 345, 346. See also Andreas Fuchs, *Wertpapierhandelsgesetz (WpHG): Kommentar* (Beck, München, 2009), at 1196, with further references.

⁴⁵ See, in particular, the case law of the ADR boards in the field of financial services – the Dutch Securities Institute Complaints Board (*Klachtencommissie DSI (KCD)*) and the Appeal Commission of the Dutch Securities Institute (*Commissie van Beroep (KHCB)*), as well as their successor – the Financial Services Disputes Board (*Geschillencommissie financiële dienstverlening*) of the Financial Services Complaints Institute. E.g. KHCB 30 July 2002, JOR 2002/165; KCD 30 July 2003, no. 107; KCD 16 December 2005, 05-282.

⁴⁶ The FSA has extensive statutory powers to make rules under the Financial Services and Markets Act (FSMA) 2000 (ss. 138-148).

⁴⁷ See, for example, *Lloyd Cheyham & Co. Ltd v. Eversheds* [1985] 2 Lloyd's Rep. P.N. 154; *Bankers Trust International PLC v. PT Dharmala Sakti Sejahtera* [1996] CLC 518; *Gorham & Others v. British Telecommunications plc, Trustees of the BT Pension Scheme, & Standard Life Assurance Company* [2000] 1 WLR 2129; *Brandeis (Brokers) Ltd v. Black and others* [2001] 2 All ER (Comm) 980; *Loosemore v. Financial Concepts (a firm)* [2001] Lloyd's Rep. P.N. 235; *Seymour v. Caroline Ockwell & Co* [2005] 39 P.N.L.R. 758.

⁴⁸ *Civil Law Forum for South East Europe: Collection of studies and analysis, First Regional Conference, Cavtat, 2010*, Volume III, (GTZ (Gesellschaft für technische Zusammenarbeit), Belgrade, 2010), at 416.

⁴⁹ In some CEECs, the supervision legislation has 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, 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.

⁵⁰ Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (Recast), COM(2011) 656 final, art. 80.

organisations, such as professional associations in the financial services sector and/or consumer associations, may also become important vehicles of the Europeanization 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 to what extent, private law courts and/or ADR boards give effect to the conduct of business rules of EU 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 ADR 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 claims in the existing private law norms (such as defects of consent, non-performance of a general duty of care or tort for breach of such a duty)?⁵¹ Do courts and/or ADR 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 EU 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. Any firm which does not comply with these rules is to be subject to *administrative* sanctions which must be effective, proportionate and dissuasive.⁵² 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.⁵³ Moreover, strengthening public enforcement and harmonising administrative sanctions has also been one of the important aspects of the MiFID review.⁵⁴ An important role in this field will be played by the ESMA which, as has already been explained above, has broad powers to shape regulatory and supervisory convergence throughout the EU.

Against this background, the first issue which needs 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. Have there been administrative reforms in the CEECs in question in order to accommodate the creation of the new public supervisory authorities which would effectively act in the public interest? If so, to what extent have such authorities been playing an active role in enforcing the conduct of business rules? In which cases, if any, have administrative sanctions been imposed and which administrative sanctions have been chosen (e.g. administrative fines, cancellation of the authorisation or 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 ESMA on a regular basis, and if so, in which areas?

Answering these questions should allow one to tackle the more general issue of whether supervisory authorities in all Member States, CCs and PCCs face more or less the same challenges in public

⁵¹ It is also possible that the legal system leaves both options open for the aggrieved investor(s).

⁵² See Article 27 of the ISD and Article 51 of the MiFID.

⁵³ See in particular, Articles 22-28 of the ISD and Articles 48-51 of the MiFID.

⁵⁴ Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (Recast), COM(2011) 656 final, arts 73-78.

enforcement of the EU 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 Member States, the proposed research could provide recommendations concerning steps that can be taken at EU level to improve the effectiveness of the public enforcement mechanisms in these countries and the role which could be played by the ESMA in this respect. These recommendations may also be useful as far as NCs and Partners are concerned.

4.2 Private Enforcement

While both the ISD and MiFID aim to protect investors and contain the conduct of business rules for this very purpose, 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 EU 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.

The fact that the EU legislator places strong emphasis on *public* enforcement in the investment services field is disturbing because *private* enforcement by individual investors or their groups is also important for the ability of the EU securities regulation to attain its policy goals.⁵⁵ As Moloney puts it:

'Market mechanisms which promote good behaviour by investment firms depend, in part, on the active policing by investors of firm failures, particularly with respect to investment advice. The development of an effective retail investor constituency includes, therefore, the development of a cohort of investors empowered, and sufficiently informed, to monitor investment firms (...) and to exercise liability rights, whether contractual or otherwise.'⁵⁶

Besides, it remains to be seen whether and, if so, to what extent, supervisory authorities, which are primarily concerned with protecting the general interest of the community in the adequate functioning of the financial markets, will play a role in protecting the individual investor interests. A combination of public and private enforcement is necessary to ensure the effectiveness of legal standards in practice.⁵⁷ At the moment, however, private enforcement of the EU securities regulation remains heavily dependent on national laws. In the absence of any guidelines concerning private enforcement of the harmonised investor protection rules by the aggrieved investors or their groups in the EU securities regulation, CEECs have a wide discretion as to how to deal with it. It is not entirely clear, therefore, to what extent aggrieved investors will really benefit from the extensive conduct of business

⁵⁵ On the importance of an effective investor enforcement in Europe see, for example, Bernard Black, "The Legal and Institutional Preconditions for Strong Securities Markets", 48 *UCLA Law Review* (2001), 781-855; John C. Coffee, "Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms", in Guido Ferrarini, *et al.* (eds.), *Reforming Company and Takeover Law in Europe* (Oxford University Press, Oxford, 2004), 455-506; Niamh Moloney, "Effective Policy Design for the Retail Investment Services Market: Challenges and Choices Post FSAP", in Guido Ferrarini and Eddy Wymeersch (eds), *Investor Protection in Europe: Corporate Law Making, the MiFID and Beyond* (Oxford University Press, Oxford, 2006), 381-441.

⁵⁶ Niamh Moloney, *ibid.*, at 425.

⁵⁷ For well-articulated arguments in favour of such an approach in the law and economic literature, see, for example, Steven Shavell, "A Model of the Optimal Use of Liability and Safety Regulation", 15(2) *Rand J. of Economics* (1984), 271-280, at 271 et seq.; Steven Shavell, *Foundations of Economic Analysis of Law*, (Belknap, Harvard, 2004), 589; Charles D. Kolstad, Thomas S. Ulen and Gary V. Johnson, "Ex Post Liability for Harm vs. Ex Ante Safety Regulation: Substitutes or Complements?", 80(4) *American Economic Review* (1990), 888-901, at 888 et seq. Compare Susan Rose-Ackerman, "Tort Law in the Regulatory State", in Peter H. Schuck (ed.), *Tort Law and the Public Interest - Competition, Innovation, and Consumer Welfare* (W.W. Norton, New York, 1991), 80-104, at 80 et seq.

rules introduced by the EU securities regulation and, thus, to what extent the latter will be able to ensure a high level of investor protection.⁵⁸

Yet, as will be explained below, the double role of the conduct of business rules as supervision standards, on the one hand, and contract-related standards highly relevant to the relationship between the investment service provider and its client, on the other, does give rise to a number of interesting questions concerning the private enforcement of these rules by individual investors or their groups in practice.

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 by 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). However, even if a particular supervision standard has direct or indirect effect in private law, this does not automatically imply that the aggrieved investor has a real chance to obtain relief. Whether the investor can reasonably expect to successfully sue an investment firm or a credit institution over its failure to observe a supervision standard will largely depend on the accessibility of private litigation against such parties in terms of time and costs, both domestically and on a cross-border basis, and on how easy it is to obtain relief through the applicable contract or tort law.

As far as retail investors' access to justice is concerned, collective actions and ADR mechanisms have a particular role to play here. It is notable, however, that at present the possibilities to bring collective actions largely exist only in the old Member States.⁵⁹ With the exception of Bulgaria, NMS currently do not provide for any collective redress tools to deal with mass investor claims.⁶⁰ The modalities of the ADR mechanisms, such as ombudsmen, mediators or complaint boards, also vary considerably across the EU. Some old Member States have rather well-developed informal dispute resolution bodies, operating as an alternative to private law courts, for disputes related to all financial services sectors, including investment services. The Financial Ombudsman Service in the UK and the Financial Services Complaints Institute (*Klachteninstituut Financiële Dienstverlening (Kifid)*) in the Netherlands are the examples of such ADR bodies.⁶¹ In the NMS, however, the ADR schemes in the area of investment services sector are still either non-existent or relatively underdeveloped. Moreover, little is known about the situation in other CEECs, in particular NC and Partners.

The need to improve access to justice for consumers, both through the development of collective redress and ADR mechanisms, has been acknowledged at EU level. For several years, work has been undertaken within the European Commission to develop EU standards of compensatory collective redress in the field of consumer law. In the 2008 Green Paper on Consumer Collective Redress, the Commission initiated an assessment of the current state of redress mechanisms with a view to closing

⁵⁸ For a critical analysis of the potential of the MiFID to improve investor protection in the context of the current overhaul of the EU investor protection measures proposed by the European Commission with a view to rebuilding retail investor confidence in packaged retail investment products (PRIIP), see Olha O. Cherednychenko, "The Regulation of Retail Investment Services in the EU: Towards the Improvement of Investor Rights?", 33(4) *Journal of Consumer Policy* (2010), 403-424. See also Communication from the Commission to the European Parliament and the Council on Packaged Retail Investment Products, COM(2009) 204 final.

⁵⁹ Collective redress mechanisms have been introduced in Austria, Bulgaria, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain, Sweden, and the UK. See European Commission-DG SANCO, Study on the Evaluation of the Effectiveness and the Efficiency of Collective Redress Mechanisms in the European Union, 26 August 2008, at 4, available at <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm#Studies>.

⁶⁰ *Ibid.*

⁶¹ See European Commission Consultation Document on Alternative Dispute Resolution in the Area of Financial Services, Brussels, referred to below as Commission Consultation Document ADR Financial Services, 11 December 2008, available at <http://ec.europa.eu/internal_market/consultations/docs/adr/adr_consultation_en.pdf>. See also DG SANCO, Study on the Use of Alternative Dispute Resolution in the European Union, 16 October 2009, available at <http://ec.europa.eu/consumers/redress_cons/adr_study.pdf>.

any identified gaps to effective redress.⁶² In its 2009 follow-up consultation paper, the Commission contends that ‘the lack of an effective legal framework enabling consumers to ensure adequate compensation in mass claim cases is detrimental to the market and creates a justice gap.’⁶³ The available policy options described by the Commission range from taking no action in this area to establishing a detailed harmonised EU-wide judicial collective redress mechanism including collective ADR. Following the responses to this consultation, in 2011 the Commission launched a new horizontal public consultation ‘Towards a more coherent European approach to collective redress’⁶⁴ with a view to identifying common legal principles on collective redress and examining how such common principles could fit into the EU legal system and into the legal orders of the EU Member States. It remains to be seen what kind of action will ultimately be taken at EU level. At present, however, the only relevant rule in the EU law on collective actions in the investment services field is article 52 (2 b) of the MiFID which provides for ‘a right of appeal’ by consumer organizations to ‘ensure that the national provisions for the implementation of this Directive are applied’. Unfortunately, this provision does not define the specific scope and objective of this right.

The improvement of the ADR mechanisms, specifically in the field of financial services, has also recently attracted the attention of the EU institutions. As has already been mentioned above, whereas under the MiFID Member States are only obliged to *encourage* the setting-up of efficient and effective extra-judicial mechanisms for investors’ complaints, under the MiFID II Proposal they are obliged to put such mechanisms in place. Moreover, in November 2011, the European Commission published the Proposal for a new Directive on ADR to ensure that EU consumers have access to ADR procedures regardless of the kind of product or service in dispute or where it was bought within the EU.⁶⁵ According to the Proposal, the new Directive should prevail over any EU legislation which contains provisions aimed at encouraging the setting up of ADR entities in a specific sector only.⁶⁶ Where sector specific legislation mandates the setting up of such entities, the new Directive should prevail only to the extent that such legislation does not ensure at least an equivalent degree of consumer protection.⁶⁷

While these efforts to improve access to justice for consumers at EU level are certainly welcome, it is not clear to what extent they take into account the legacies of the communist past which may seriously affect the effectiveness of private enforcement in NMS. It is submitted that failing to consider the specific problems which may be faced by NMS consumers in general, and retail investors in particular, will render it difficult to improve private enforcement of EU securities regulation in these countries.

As has already been mentioned above, apart from the problem of access to justice, another major issue for private investors is how easily they can obtain relief through the applicable contract or tort law. Even if a particular supervision standard has effect in private law, this alone does not mean that investors will obtain relief. In order to do so, all conditions for liability, rescission or termination of the contract, which apply under applicable national private law, should be met.

As a rule, the burden of proof with regard to all these conditions lies with the aggrieved investor. In practice, however, it may not always be easy for the investor to prove them. Particular difficulties may

⁶² Green Paper on Consumer Collective Redress, COM(2008) 794 final, 27 November 2008.

⁶³ Follow-up to the Green Paper on Consumer Collective Redress, 8 May 2009, p. 3, available at <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm#Consultation>

⁶⁴ Commission Staff Working Document, SEC(2011)173 final, 4 February 2011.

⁶⁵ Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), COM(2011) 793 final, 29 November 2011.

⁶⁶ *Ibid.*, recital 10.

⁶⁷ *Ibid.*

arise, for example, concerning the proof of the causal link between the breach of the conduct of business rules and the damage. Proof of a causal link may be difficult, for example, if the investor has suffered loss due to unclear or misleading information, an omitted warning of the risks involved in a certain investment or a recommendation to purchase an unsuitable investment product. More investor friendly private law courts in some legal systems tend, therefore, to reverse the burden of proof in certain cases in favour of investors. Thus, for example, in a recent judgment the German Supreme Court in private law matters adopted a presumption that the aggrieved individual investor would not have made an investment if the investment adviser had provided him with the correct information concerning his kick-back-payments; as a rule, this presumption applies to all cases in which the investment adviser has failed to comply with its duties to inform.⁶⁸ Accordingly, if the violation of the duty to inform by the investment adviser is established, it is up to the adviser to prove that the investor would have concluded the contract even he had been duly informed. Reich, for example, argues in favour of extending such reverse burdens of proof to (sufficiently) serious violations of the investment service providers' obligations under the MiFID.⁶⁹

While it aims to protect investors, the MiFID itself, however, does not contain any rules which would (seek to) improve the investor's procedural position by reversing the burden of proof in his favour. It is notable that, in contrast to the MiFID, such rules can be found in other directives in the area of (retail) financial services. Thus, for example, according to Article 7(3) of the Distance Marketing of Consumer Financial Services Directive, in those cases where the consumer exercises his right of withdrawal from a distance contract, the supplier may not require the consumer to pay any amount for the service actually provided by the supplier, unless he can prove that the consumer was duly informed about the amount payable. Article 15 of this Directive provides that Member States *may* also shift the burden of proof to the supplier in respect of other suppliers' obligations to inform the consumer set out in this Directive, the consumer's consent to conclusion of the contract and, where appropriate, its performance. A similar rule can be found in Article 33 of the Payment Services Directive. According to this provision, Member States *may* stipulate that the burden of proof concerning the compliance with the information requirements laid down in this Directive shall lie with the payment service provider. Moreover, Article 6(9) of the Directive on Consumer Rights does not allow any discretion for the Member States in such matters and places the burden of proof as regards compliance with the information requirements for distance and off-premises contract on the trader.

As the MiFID, however, does not contain any such rules, it wholly depends on the national private laws of CEECs whether a claim arising from the violation of a supervision standard will attract the reverse burden of proof. As of yet, hardly any comparative studies have been conducted in this area so we know very little about the procedural obstacles faced by aggrieved investors in NMS, CC, PCC, NC and Partners when enforcing the conduct of business rules.

Against this background, the second issue in the context of enforcement which requires a thorough examination is the effectiveness of the *private* enforcement of the conduct of business rules in CEECs, taking into account the internal socio-economic and cultural circumstances of these countries. The focus of this investigation is 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 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

⁶⁸ BGH, 12 May 2009, WM 2009, 1274.

⁶⁹ Norbert Reich, "The Interrelation between Rights and Duties in EU law: Reflections on the State of Liability Law in the Multilevel Governance System of the Union: Is there a Need for a More Coherent Approach in European Private Law?", in Piet Eeckhout and Takis Tridimas (eds.), 29(1) *Yearbook of European Law* (2010), 112-163.

developed within their own private law systems? To what extent are private law courts in CEECs trained in giving effect to the conduct of business rules? In particular, do they use any innovative techniques when applying these rules? Do investors actively invoke the conduct of business rules in private law courts?

Are there ADR mechanisms available to investors? If so, how do ADR boards deal with the violations of the conduct of business rules by investment service providers towards their clients? How actively are they used by (retail) investors? Do investors prefer ADR boards to courts?

If individual investors do not actively resort to private law courts and/or ADR 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 EU level as far as (certain groups of) CEECs are concerned. If this turns out to be the case, the proposed research could provide recommendations concerning steps that can be taken to improve the EU private enforcement strategy.

5. Institutions

Building upon the investigation into the modes of implementation of the EU conduct of business rules and their enforcement as outlined above, the final step in the proposed research is to take a closer look at the institutional aspects of the Europeanization of private law in CEECs through the adoption of such rules. The focus of this investigation is on the interplay between the executive, in particular supervisory authorities, judiciary and ADR 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, where much of investor protection has been developed by private law courts on the basis of general private law, the adoption of the conduct of business regime, in particular following the implementation of the ISD, led to a shift in focus from private law, in particular contract law, towards the conduct of business obligations.⁷⁰ This development has manifested itself in private parties largely invoking the conduct of business rules rather than purely private law duties of care, while courts and commentators also largely focus 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

⁷⁰ Compare Peter O. Mühlert, “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 Guido Ferrarini and Eddy Wymeersch (eds.), *Investor Protection in Europe: Corporate Law Making, the MiFID and Beyond* (Oxford University Press, Oxford, 2006), 299-320, at 300 et seq.; Stefan Grundmann and Jörg Hollering, “EC Financial Services and Contract Law – Developments 2005-2007”, 4(1) *European Review of Contract Law* (2008), 45-64, at 62.

investor protection.⁷¹ This may also entail a shift in power from private law courts to supervisory authorities. In my view, the extent of such shift is likely to differ from country to country. The crucial issue here is to what degree private law courts will maintain and develop purely private law rules, in particular, duties of care, independently from the conduct of business as interpreted and applied by the supervisory authorities.

A certain tension between private law and supervisory authorities which may arise in this context is exemplified by the recent decision of the Dutch Supreme Court in the cases *De T. v. Dexia Bank Nederland N.V.*, *Levob Bank N.V. v. B.*, and *GBD and Stichting Gedupeerden Spaarconstructie v. Aegon Nank N.V.*⁷² In these cases, the banks submitted that, at the time the contract between them and their clients was concluded, the duty to know one's client had not been included in the financial supervision legislation then in force.⁷³ Hence, the banks argued, they could expect that by complying with the public law standards, they had also been acting in conformity with the duty of care in private law. In all three cases, this line of reasoning was, however, unequivocally rejected by the Supreme Court which held that the private law duties of care can go further than the public law duties of care contained in the conduct of business rules. In doing so, the Supreme Court followed the opinion of the Advocate General in these cases who argued as follows:

‘The argument of the banks referred to above does not take into consideration the fact that although when determining the scope of the bank's special duty of care, which follows from the requirements of good faith, the content of the public law legislation may be taken into account, it is untenable to claim that this private law duty of care may not go further than the conduct of business rules contained in the public law legislation. Adopting such an approach would ignore the fact that the Netherlands has a system of *double* duties of care – the *public law* duties of care and the *private law* duties of care (primarily developed by the Supreme Court). The public law supervision legislation aims to safeguard a diligent, professional and honest conduct of business by an investment firm (and/or a credit institution) and, to this end, it contains further rules on the basis of which a supervisory authority can promote these goals. The requirements of good faith as well as that which can be imposed upon a good service provider are tailored to an *individual* case and may entail that a financial service provider is under a further-reaching duty of care than that following from the public law legislation in force at that time; this is so because the public law duty of care *influences* the private law duty of care but does not *determine* it.’⁷⁴

By following this opinion of the Advocate General, the Dutch Supreme Court accordingly emphasized the autonomy of private law and private law adjudication from supervision standards and decisions of supervisory authorities.⁷⁵

⁷¹ Mülbart, *ibid.*, at 320.

⁷² HR 5 June 2009, RvdW 2009, 683, 684 and 685.

⁷³ The Securities Transactions Supervision Decree (*Besluit toezicht effectenverkeer*) 1995 and the Further Regulations on Market Conduct Supervision of the Securities Trade (*Nadere Regeling gedragstoezicht effectenverkeer*) 1995 and 1999.

⁷⁴ The Opinion of the Advocate General of 13 February 2009 in *Levob Bank N.V. v. B.*, and *GBD, De T. v. Dexia Bank Nederland N.V.*, and *Stichting Gedupeerden Spaarconstructie v. Aegon Bank N.V.*, RvdW 2009, 684, para. 3.21 (translation and emphasis added).

⁷⁵ When assessing the implications of this pronouncement in practice, one should take into account that it was not given in relation to the conduct of business rules implementing the *maximum* harmonisation regime of the MiFID, but in relation to the conduct of business rules implementing the *minimum* harmonisation regime of the ISD. Yet, the autonomy of private law and private law adjudication from supervision standards and decisions of supervisory authorities can also be defended by similar arguments under the MiFID regime. On this in more detail, see Cherednychenko, *op cit.* note 8, p. 940 et seq. On the analysis of the potential of the MiFID to bring about a maximum harmonisation of conduct of business rules more generally, see Olha O. Cherednychenko, “Full Harmonisation of Retail Financial Services Contract Law in Europe: A Success or a Failure?”, in Stefan Grundmann and Yesim M. Atamer, *Financial Services, Financial Crisis and General European Contract Law: Failure and Challenges of Contracting* (Kluwer Law International, The Hague, 2011), 221-258.

The major issue, which arises in this context, is how the ISD and the MiFID have affected the institutional balance in post-communist CEECs where public governance has traditionally been much more developed than private governance. In relation to Poland, for example, Kawecki, points to the lack of case law on liability for asset management and provides the following explanation for it:

‘Litigation involving asset management contracts is still infrequent in Poland and there is a dearth of high-profile cases. This is mostly due to the fact that the Polish capital market watchdog, the FCS (like its predecessor, the Polish Securities and Exchange Commission) has been extremely sensitive to the issue of public trust in capital markets in the nascent state of their formation. Over the years the FSC has pursued an extremely vigorous enforcement policy, bordering on occasion on overregulation, in an effort to prevent any abuse by brokerage houses in relations with their clients. Most such cases are dealt with swiftly by the FSC within its supervisory capacity, including the use of administrative tools at its disposal, however subtly, to force licensed entities to satisfy their clients’ claims for the perceived damage sustained by them within the asset management relationship. Local clients of asset managers are fully aware of this regulatory zeal of the FSC and usually turn first to the regulator for assistance in an effort to satisfy their claims against portfolio managers on the account of any perceived violations by a manager of the terms of the asset management contract or the applicable professional standards. (...) Even when a client decides to pursue its claims in a court of general jurisdiction, such cases are usually quickly settled by the manager without public scrutiny, to pre-empt an enforcement action by the FSC, which may lead to significant financial sanctions or even the loss of the manager’s licence.’⁷⁶

While the situation described above points to the effectiveness of the public enforcement mechanism in the investor protection field in Poland, it also raises concern about the development of private enforcement there. The heavy reliance on administrative agencies in CEECs may prevent these countries from fostering the development of civil justice and civil society which did not have much chance to develop during the communist times. Further research on the institutional implications of the EU harmonisation of the conduct of business rules in different groups of CEECs is needed in order to be able to address potential adverse effects of the Europeanization of securities law on the overall institutional framework in these countries. The following questions need to be answered in this context. Does one observe (the tendency towards) a complementarity or tension between the public and private governance and/or between different types of private governance (in particular, through private law courts and ADR 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 ADR boards? Has the implementation of the ISD and/or MiFID led to a decrease in the power of private law courts in private enforcement and the increase in the power of ADR boards? 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 ADR 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, ADR 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 an impact on the development of general private law concepts in CEECs? Do private law courts and/or ADR boards largely ‘follow’ the conduct of business rules when interpreting and

⁷⁶ Kawecki, in Busch and DeMott, *op cit.* note 33, at 266.

applying general private law concepts, in particular general duties of care of investment 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 ADR boards, if such are in place, when resolving similar cases, and *vice versa*?

The proposed analysis of the institutional aspects of the Europeanization process in the securities field in CEECs would enable one to provide recommendations not only concerning the improvement of the present EU policy-making in the field of investment and other financial services, but also on the future EU enlargement policy in general.

6. Conclusion

The preliminary study in the field of securities law addressed the modes of adoption of the EU conduct of business rules for investment service providers in CEECs, the public and private enforcement of such rules and the way in which a relevant institutional framework in these countries has been designed. Such a three-dimensional approach to the analysis of the impact of EU law in national legal systems allows one to view the Europeanization of securities law in CEECs not only from the traditional perspective of the adoption of the law on the books, but also to put it in a broader context of the law in action and to identify a number of pressing issues which merit further in-depth research considering the legacies of the communist past.

As far as the adoption of the conduct of business rules of investment service providers in the CEECs' national legal orders is concerned, it transpired that these rules were transposed within the supervision legislation as supervision standards whose compliance must be checked by supervisory authorities. This mode of implementation, prompted by the EU securities regulation itself, has resulted in a leading role for the executive, in particular national supervisory authorities, in the Europeanization of securities law in CEECs. There remains a dearth of knowledge, however, on a number of important issues arising therefrom. Thus, it should be investigated to what extent the adoption of the EU conduct of business rules has been affected by the national political and socio-economic backgrounds in NMS, the countries which apply for EU membership and those which seek merely closer cooperation with the EU outside of a formal membership in the Union. Furthermore, the implementation of the conduct of business rules in the *supervision* legislation also gives rise to the question concerning the relationship between the supervision standards and the newly revived general private laws. The preliminary research has shown that the supervision legislation, through which the EU securities regulation has been implemented in CEECs, does not provide an exhaustive answer to this question. Yet, national private law courts and ADR boards in these countries may nevertheless play an important role in the adoption of the EU conduct of business rules. Another issue which merits further research, therefore, is the role of these institutions in different groups of CEECs in giving effect to the conduct of business rules in the private law relationship between an investment service provider and an investor, considering *inter alia* that, in contrast to many old Member States, the conduct of business rules in CEECs do not originate from their own private law systems.

Further research is also needed with regard to the enforcement of the EU conduct of business rules in CEECs in order to find out whether the rules on the books actually work in practice. While both the ISD and the MiFID presuppose the existence of an effective system of supervision over investment services industry, no comprehensive investigation has yet been made into the effectiveness of public enforcement in NMS, let alone in other groups of CEECs. Such research is urgently needed, as the 'command and control' administrative culture, which developed in these countries during the communist times, may pose serious challenges to the adequate functioning of the supervisory system in the investment services field today. Moreover, even less is known about the private enforcement of the conduct of business rules by individual investors or their groups in practice. However, legacies of the communist past, such as the underdeveloped system of civil justice and civil society, may preclude

investors who have suffered losses as a result of a breach of the conduct of business rules by investment service providers from obtaining compensation. Comprehensive research is therefore needed on the issue of how actively, and before which institutions, investors invoke the conduct of business rules in practice, and which procedural and/or institutional difficulties exist on the way towards ensuring the effective private enforcement of the conduct of business rules.

Building upon the investigation into the modes of implementation of the EU conduct of business rules and their enforcement, the final step in the proposed research is to analyse the institutional aspects of the Europeanization of private law in CEECs through the adoption of the EU conduct of business regime in CEECs. A thorough investigation is needed into the interplay between the executive, in particular supervisory authorities, the judiciary and ADR boards in adopting and enforcing the conduct of business rules in CEECs, and the implications of this interplay for the institutional balance between public and private governance in these countries.

While the EU securities regulation has undoubtedly become an important source of transformation and modernization of the legal systems of post-communist CEECs, it is submitted that the Europeanization of Central and Eastern European securities law can no longer be regarded as a one way process in which Western standards are transferred to the East without a thorough analysis of the starting conditions and special needs of these countries. The Europeanization of private law in general, and that of securities law in particular, in CEECs should become a more *interactive* process in which the legacies of the communist past affecting law adoption, enforcement and institutional design in CEECs are taken more seriously at EU level than has so far been the case. Accordingly, the ultimate aim of the proposed further research into the Europeanization of private law in CEECs through the adoption of the EU conduct of business rules for investment service providers 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 policy, on the other.

VI. THE EUROPEANIZATION OF PRIVATE LAW IN CEECS: PRELIMINARY CONCLUSIONS AND A FUTURE RESEARCH AGENDA

Olha O. Cherednychenko and Hans-W. Micklitz

The preceding analysis of the Europeanization of private law in Central and Eastern Europe has highlighted an amazing lack of knowledge on, and an even more amazing lack of intellectual concern for, the transformation process of the national private legal orders in the NMS, CC, PCC, NC and Partners through the EU harmonisation measures. It has been demonstrated that the European Commission starts from a one-size-fits-all approach which was developed during the various rounds of enlargements and which was transposed with little modification by CEECs without taking into account the particularities of their national legal orders. It has been argued that such an approach raises serious concerns about the effectiveness of the EU legislation in CEECs and that a different, more comprehensive, approach to the Europeanization of private law in these countries is urgently needed.

In order to develop such an approach, the Europeanization should be understood as a process and not as a product. This requires, first and foremost, a deeper understanding of the national private legal orders as they stood prior to communist times, as they developed during communism and as they have evolved in the aftermath of the liberation from the communist ideology. Such a look back at the history is necessary for understanding the implications of the 'forced' EU harmonisation of private laws in CEECs which could enhance continuity or promote discontinuity in particular fields of law affected by the harmonisation. The focus on the continuity/discontinuity paradigm allows one to examine to what extent the legal tradition in CEECs has interplayed with the political dimension of communism and what impact this interplay has had on the implementation of EU law in these countries, the institutional choices made in the course of its implementation and the operation of various actors involved in the Europeanization process. The results of such analysis would make it possible to develop a systematic set of recommendations for a design of a differentiated Europeanization strategy which would take into account the specificities of CEECs.

Analysing the Europeanization in CEECs as a dynamic process along the lines of the continuity/discontinuity paradigm makes it not only necessary to look at the implementation of substantive black-letter rules of EU origin in CEECs, but also requires a study of the extent to which the adoption of such rules has been affected by the legal tradition as well as political, socio-economic and cultural circumstances of these countries, the way in which the rules of EU origin have been enforced and the way in which a relevant institutional framework has been designed. Such a comprehensive approach to the analysis of the impact of EU law in the national legal orders of CEECs allows one to view the Europeanization of private law in these countries not only from the traditional perspective of the adoption of the law on the books, but also to put it into a broader context of the law in action and to identify a number of pressing issues which merit further in-depth research considering the legacies of the communist past.

Building upon this analytical framework, the analysis of the three fields of private law where the influence of the EU harmonisation policy is most obvious, i.e. consumer law, competition law and securities law, draws a more sophisticated picture of how the proposed research should be conducted and what can be expected from it. The preliminary studies in these three fields have addressed the modes of adoption of EU rules in CEECs, the public and private enforcement of such rules and the way in which the relevant institutional framework in these countries has been designed.

As far as the adoption of EU law is concerned, it has been demonstrated that the focus on the transposition of black-letter EU rules in national legislative acts does not provide a complete picture of the modes of adoption of EU law in CEECs nor of the extent of the homogeneity of national laws in

the harmonised areas. This is true, to a larger or lesser degree, for all the three fields in question. Thus, for example, even though there is a high degree of convergence in the area of substantive competition laws implemented by the legislator, national courts in general seem to be reluctant to apply EU competition law when reviewing administrative decisions of national competition authorities. In the field of consumer law, a deeper understanding of the impact of EU consumer protection legislation in CEECs requires further research into the interplay between consumer law and national private legal orders and the way this interaction affects the adoption of EU consumer law. Similarly, the implementation of the EU conduct of business rules for investment service providers in the supervision legislation gives rise to questions concerning the relationship between the supervision standards and the newly revived general private laws in CEECs. While national private law courts and ADR boards in these countries may play an important role in the adoption of the EU conduct of business rules, at present little is known about whether and, if so, how these institutions give effect to such rules.

Perhaps an even bigger issue which needs further research is to what extent public and private enforcement mechanisms in CEECs produce visible and effective results. The role of enforcement is key for the actual impact of EU law on the national legal orders. The preliminary research has shown, however, that CEECs, to a greater or lesser extent, suffer from enforcement problems. Diverging procedural rules in the field of competition law, for example, may have a serious impact on the effectiveness of the public enforcement of competition rules. In the field of consumer law, serious concerns have been raised about the ability of the so-called market inspectorates, which were in charge of controlling the quality of products in the communist times, to perform genuine market surveillance tasks. Similar concerns should be raised concerning the effectiveness of public enforcement in the securities field, considering that the 'command and control' administrative culture, which developed in CEECs during the communist times, may pose serious challenges to the adequate functioning of the system of financial supervision in these countries.

The situation seems to be even worse with regard to private enforcement. Ambitious rules of EU origin in the field of competition and consumer law simply lack active enforcement in CEECs. Very little is known about the private enforcement of the conduct of business rules by individual investors or their groups in these countries. Procedural difficulties and legacies of the communist past, such as the underdeveloped system of civil justice and civil society, appear to pose major obstacles for the active invocation of the rules of EU origin in practice.

Last but not least, a workable structure for enforcement in all three fields presupposes the existence of competent and independent institutions such as administrative agencies, private law courts, ADR and non-governmental organisations. A thorough investigation is needed into the interplay between these actors in adopting and enforcing EU law in CEECs, and the implications of this interplay for the institutional balance between public and private governance in these countries. One of the interesting questions for further research is to what extent the strong emphasis placed by the EU law on public enforcement through administrative agencies, particularly in the field of consumer and investor protection, has precluded the development of effective private enforcement mechanisms in CEECs. Another important issue to be considered is the operation of ADR mechanisms and the institutional balance between such new mechanisms and old private law courts.

Without further empirical research into the issues outlined above, no valuable answers concerning the impact of European private law on the national legal systems in CEECs can be given. The problems faced by CEECs in the areas of enforcement and institutional design, however, raise serious questions about the ability of EU policy-makers to produce the intended results. Important factors which have also contributed to this situation include the EU's strong focus on the law on the books as a yardstick for membership and its weak formal competencies as far as enforcement and institutions in national legal systems are concerned. If anything, the EU measures provide for remote and scattered procedural and institutional requirements depending on the area concerned. Seen from an EU perspective, there is little that can be used to impose enforcement mechanisms on the NMS, CC and PCC. What remains

are the broadly formulated political requirements laid down in the Copenhagen Declaration and the various enlargement agreements. They are much more difficult to implement, not only because of their vagueness but also because they touch upon national and cultural sensitivities. Accordingly, the results of the proposed research could be used to develop soft law-based strategies at EU level to address the enforcement and institutional aspects of the Europeanization of private law in CEECs.

All in all, the Europeanization of private law in Central and Eastern Europe 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. What is needed is an approach which turns the perspective upside down and looks at the EU enlargement policy through the eyes of countries which are already members of the EU, those which want to become EU members or those which seek merely a closer cooperation with the EU. Only such a two-way perspective can pave the way for research in which both the export of EU law to CEECs and the import of the experiences with EU law from CEECs are explored at length.

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