
THE COMPETITION LAW REVIEW

Volume 6 Issue 2 pp 145-182**July 2010****The Impact of Regulation 1/2003 in the New Member States***KJ Cseres**

Regulation 1/2003 entered into force on 1 May 2004 introducing a fundamental change in the enforcement of Articles 101 and 102 TFEU. 1 May 2004 also marked a fundamental change in the history of the EU: ten new Member States joined the European Union. The modernization of EC competition law enforcement has in fact taken place against the background of enlargement. Enlargement and the modernization of law enforcement had been closely connected to one and other not only in the field of competition law. This paper discusses the impact of Regulation 1/2003 in the ten new Member States situated in Central and Eastern Europe that joined the EU in 2004 and 2007. What makes these Central and Eastern European countries (CEECs) special is transition from command and control economy and totalitarian rule to market economy and to compliance with the rule of law. What makes implementation of EU rules in CEECs' legislation special is the conditionality and the fact that Europeanization of these countries' laws have been interacting with market, constitutional and institutional reforms. The paper discusses both the direct and indirect impact of Regulation 1/2003 in the legislation, enforcement models and institutional designs in these countries. The experience of the CEECs indicate that EU leverage has been the most noticeable and direct on the statutory enactments of substantive competition law, however, it has in an indirect way also influenced enforcement methods and institutional choices. The exceptional influence of the EU on the CEECs' competition rules can be demonstrated by the fact that these countries often aligned their national laws even further than they were obliged to. However, in the less visible parts of the law such as procedural rules divergence can be substantial with important consequences for overall enforcement outcomes. Moreover, in the CEECs there is a significant difference between the black letter of the law and its active enforcement.

1. INTRODUCTION

Regulation 1/2003 entered into force on 1 May 2004 introducing a fundamental change in the enforcement of Articles 101 and 102 TFEU. 1 May 2004 also marked a fundamental change in the history of the EU: ten new Member States joined the European Union. The modernization of EC competition law enforcement has in fact taken place against the background of enlargement. Enlargement and the modernization of law enforcement have been closely connected to one another. This paper will discuss the impact of Regulation 1/2003 in the ten new Member States situated in Central and Eastern Europe that joined the EU in 2004 and 2007. What makes these Central and Eastern European countries (CEECs) special is their transition from command and control economy and totalitarian rule to market economy and to compliance with the rule of law. What makes the implementation of EU rules in CEECs' legislation special is conditionality and the fact that the Europeanization of

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these countries' laws has been interacting with market, constitutional and institutional reforms. Moreover, from studying the case of the CEECs general lessons can be drawn for Europeanization strategies, for other areas of law and for the balance between public and private governance.

The paper will discuss both the direct and indirect impact of Regulation 1/2003 in the legislation, enforcement models and institutional designs in these countries. The impact of Regulation 1/2003 can be clearly followed in the substantive competition rules, however the Regulation and the Commission's policy was less outspoken with regard to the development of procedural rules, enforcement methods and the institutional framework to be chosen by the Member States. The experience of the CEECs indicate that EU leverage has been the most noticeable and direct on the statutory enactments of substantive competition law, however, it has in an indirect way also influenced enforcement methods and institutional choices. The exceptional influence of the EU on the CEECs' competition rules can be demonstrated by the fact that these countries often aligned their national laws even further than they were obliged to. However, in the less visible parts of the law, such as procedural rules, divergence can be substantial with important consequences for overall enforcement outcomes. Moreover, in the CEECs there is a significant difference between the black letter of the law and its active enforcement. Therefore, it is key to investigate why and how the CEECs reconcile their legal obligations with specific market failures of the transition economies and with the need to develop enforcement methods and institutional structure suitable for their local socio-economic circumstances. The true character of the investigated legal systems is believed to be untangled once active enforcement is studied.

Accordingly, the paper will provide a comprehensive overview of the modes implementation of EC rules as laid down in Regulation 1/2003 and other soft-law legislation adopted within the framework of modernization. The first part of the paper discusses the role of Regulation 1/2003 in the CEECs and the characteristics of the Europeanization of national laws. The second part studies the legislative implementation of EC rules both with regard to substantive and procedural rules as well as the judicial implementation by national courts. The third part is about the active enforcement of these rules by the NCAs and by the national courts including both judicial review procedure and private enforcement. The fourth part elaborates on the institutions in the enforcement framework and the paper is closed by concluding remarks and discusses the reasons for available enforcement methods and the types of sanctions.

2. THE DOUBLE ROLE OF REGULATION 1/2003 IN THE NEW MEMBER STATES

2.1. Accession and modernization of EU competition law

The role of Regulation 1/2003 in the new Member States needs to be examined in the double perspective of enlargement and the modernization of European competition law enforcement. The process of enlargement and the reform of EC competition law

were closely interrelated and mutually impacting on each other. On the one hand, enlargement has opened the discourse on enforcement and it made the relevance of enforcement for the effective working of Community rules manifest. While previously issues of enforcement and institutional structures were regarded to rest in the exclusive competence of the Member States, according to the Community principles of procedural autonomy and institutional neutrality, enlargement has pushed crucial questions of enforcement and institutional choice to the forefront of the EU agenda. This change was visible in the modernization of EC competition law, which was launched by the 1999 White Paper.¹ 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.² A number of initiatives have been taken in order to achieve this objective. The adoption of Regulation 1/2003 decentralized the enforcement of EC competition law establishing the European Competition Network, DG Competition reorganized its cartel busting work, the 1996 and then later the 2002 leniency programs have been revised,³ a discussion on how to facilitate private damages cases was launched⁴ and the method of setting fines have been revised.⁵ In fact, Regulation 1/2003 not only introduced a new procedural framework for the application of Articles 101 and 102 and thus directly intervened in domestic enforcement of competition law, but it has formed inherent part of the broader EU development discussing enforcement methods.

Regulation 1/2003 formed part of the legal requirements of the candidate countries' accession to the EU.⁶ The legal obligations of accession acted as considerable political

¹ White Paper on modernization of the Rules implementing Articles 81 and 82 of the EC Treaty, Commission programme No 99/027, 28.04.1999.

² White Paper, 1999, paras 8,41,42, 75

³ Commission notice on immunity from fines and reduction of fines in cartel cases, OJ 2002, C45/03.

⁴ Green Paper Damages actions for breach of the EC anti-trust rules, COM (2005) 672 final, White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165, 2.4.2008, Case C-453/99 *Courage v Crehan* [2001] ECR I-6297, para 26.

⁵ The Commission has since then introduced new and amended measures mainly to further improve enforcement of Articles 101 and 102. Commission notice on immunity from fines and reduction of fines in cartel case, OJ C 298/17, 8.12.2006, White Paper on Damages Actions for Breach of the EC antitrust rules COM(2008) 165, 2.4.2008, Discussion paper on the on the application of Article 82 to exclusionary abuses, 2005, Guidance on its enforcement priorities in applying Article 82 to abusive exclusionary conduct by dominant undertakings, OJ 2009, C45/7; Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, OJ 2008, L171/3, pp 3–5, Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ 2008, C167/1.

⁶ The legal, economic and political conditions have been first laid down in the so-called Copenhagen criteria of the 1993 Copenhagen European Council and later in more detail in the 1995 White Paper, which was drafted in order to assist the candidate countries in their preparations to meet the requirements of the internal market. 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 program adopted by the Commission on 15 July 1997.

and economic pressure and exercised the most significant influence on the way competition laws have been shaped in the CEECs. An in-depth analysis of this extraordinary law transfer and the way EC law still influences the competition laws in these countries is missing. The available research covers the legal academic discussion, which has mainly focused on the constitutional law and public administration aspects of EU enlargement. Economic law and specifically competition law has so far received limited attention. The discussion on the impact of European competition law on national competition law concentrated on the question how far the NMS managed to align their legislation with that of the EU and how effectively and accurately the new Member States implemented the *acquis communautaire*.⁷ This top down approach was concerned about the ability of these countries to meet the requirements of accession and later membership. This approach was based on controlling compliance with conditions set by the EU. Such an approach is merely appropriate to identify whether adequate rule transfer has taken place and to spot legislative gaps in this top down perspective, 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. Moreover, and even more importantly, this approach does not take account of the broader domestic developments such as the interaction with market, constitutional and institutional reforms and the fact that the rapid adoption of the economic regulation in the post-communist CEECs has coincided with the revival of private law and the revision of the civil law codifications. Such codifications were also vastly important for the establishment of the appropriate legal framework to facilitate private transactions on the market. The relationship between the two processes from an institutional perspective has largely been underinvestigated. The revival of classical private law and the role of private law courts in this process, however, deserves special attention also when investigating the impact of the EU competition law regulation on the law on the books and the law in action in CEECs, and, in particular, the role of the institutions involved in adopting and enforcing the EU regulation in these countries.

2.2. Europeanization of competition laws in the New Member States

In the CEECs the adoption of an identifiable body of competition law and the continuous alignment of these laws with legislative and policy developments in EC competition law has been a clear example of Europeanization. Moreover, this process of Europeanization has been strengthened by Regulation 1/2003 as the decentralization of EC competition law enforcement established a system of close cooperation between the European Commission and the national authorities and delegated an active role for local/national actors. The new enforcement system inherently involved a process of increased Europeanization of competition law in all Member States. It has, also, opened

⁷ Ojala, M, *The competition law of Central and Eastern Europe* (Sweet & Maxwell, 1999); D Geradin, D Henry, 'Competition Law in the New Member States - Where Do We Come From? Where Do We Go?', in: D Geradin, D Henry (eds.) *Modernisation and enlargement: two major challenges for EC Competition law* (Intersentia, 2005); J Fingleton, M Fritsch, H Hansen, (eds.), *Rules of competition and East-West integration* (Boston: Kluwer Academic Publishers, 1997).

the way for private enforcement of competition law and encouraged private actors to enforce competition rules before their own domestic courts.

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’.⁸ The concept of Europeanization also has a dynamic dimension. It is a ‘gradual process that begins before, and continues after, the admission of new members to the organization’. Moreover, it demands ‘horizontal institutionalization’, that is widening of the group of actors whose actions and relations are normatively structured.⁹ Europeanization is a concept referring to five phenomena within vertical, horizontal and diagonal Europeanization: (1) transposition of the *acquis communautaire*; (2) influence on national institutional frameworks (institutional design); (3) compliance with transposed *acquis communautaire*; (4) spillover effects and emulation of EC law; and (5) horizontal Europeanization: borrowing Member States’ law (legal transplants).¹⁰ These aspects will be discussed below following a different categorization built on the various modes of implementation.

The degree of Europeanization can be determined by studying two dimensions. First, whether there is continuity or discontinuity of pre-existing competition laws and, second, 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.

Competition was actually non-existent in the socialist area of the investigated countries. Administratively planned market activities and the central allocation of resources took the place of free competition and trade. The CEECs had to build competition laws from scratch and more importantly create a competition culture. In the process of transition competition law played a significant role. Competition law and policy were of

⁸ I Bache and A Jordan, ‘Europeanization and Domestic Change’ in I Bache and A Jordan (eds) *The Europeanization of British Politics* (Palgrave Macmillan, Basingstoke 2006), 30. H Wallace, ‘Europeanization and Globalization: Complementary or Contradictory Trends?’ (2000) 5 *New Political Economy* 369, J Caporaso, T Risse, M Green Cowles and T Risse-Kappen (eds), *Transforming Europe: Europeanization and Domestic Change* (Cornell University Press, Ithaca 2001), K Featherstone and C Radaelli (eds) *The Politics of Europeanization* (Oxford University Press, Oxford 2003), M Vink, ‘What is Europeanization?’ (2003) 3 *European Political Science* 63, S Bulmer and C Radaelli, ‘The Europeanisation of National Policy’ in S Bulmer and C Lesquesne (eds) *The Member States of the European Union* (Oxford University Press, Oxford 2005); S Bulmer ‘Theorizing Europeanization’ in P Graziano and M Vink (eds) *Europeanization: New Research Agendas* (Palgrave Macmillan, Basingstoke 2007).

⁹ F Schimmelfennig and U Sedelmeier, ‘Theorizing EU enlargement: research focus, hypotheses, and the state of research’ (2002) 9 *Journal of European Public Policy* 500, 503. According to them ‘[i]nstitutionalization means the process by which the actions and interactions of social actors come to be normatively patterned [whereas] [h]orizontal institutionalization takes place when institutions spread beyond the incumbent actors, that is, when the group of actors whose actions and relations are governed by the organization’s norms becomes larger.’

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

great importance in creating a functioning market economy in the former socialist countries. It supported and stimulated the economic changes and it had a demonstrative role as well. The introduction of competition law proclaimed these countries commitment to market economy and competition advocacy as well as proclaimed the principles of correct economic activity and fair market practices. 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 to the EU rules.

The adoption of an identifiable body of competition law has been a clear example of Europeanization in the NMS: clear and comprehensive set of rules developed in the shadow of accession. The true character of the Europeanization process can be better understood and evaluated through a closer examination of the various dimensions of implementing EU law in the CEECs. The next section will analyze three complementary layers of transferring European law into the CEECs. The next section examines legislative implementation, then the third section elaborates on the enforcement of the implemented rules and then the institutions enforcing the implemented rules will be discussed.

3. MODES OF IMPLEMENTATION OF EUROPEAN LAW

Implementation of EU law had been stamp marked by external governance and EU conditionality. This unusual process of rule transfer exhibited an exceptional influence of the EU on the competition rules of the NMS demonstrated by the fact that these countries often aligned their national laws even further than they were obliged to do. The principles that governed the transfer and the design of economic law are largely underinvestigated. In the CEECs there seems to be a significant difference between the black letter of the law and its active enforcement. Therefore, the modes of implementation need to be studied by taking account of factors influencing the actual invocation of rules such as the interaction with market, constitutional and institutional reforms. The examination of the formal and informal constraints on law enforcement is key to capture the true impact of EU law on law enforcement and institution building. Such research can better answer questions why and how the CEECs reconcile their legal obligations with the need to address specific market failures of their transition economies and with the need to develop enforcement methods and institutional structure suitable for their local socio-economic circumstances. First, the implementation and harmonization of substantive and procedural competition rules will be reviewed. Then judicial implementation of the European case-law will be briefly discussed.

3.1. Legislative implementation

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 in conformity with EU law. The candidate countries were never presented 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 a considerable latitude for deciding what kind of substantive and institutional regime they would opt for.

This freedom is, however, not unlimited. Article 4(3) TEU requires the Member States to take all appropriate measures to ensure fulfillment of the 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.¹¹

3.1.1.2. 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 fulfill 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 and the Commission has a central role in the network in order to ensure to 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 in conjunction with Article 5, the obligation to empower national competition authorities. Article 3 of Regulation 1/2003

¹¹ This doctrine 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.

has directly influence 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 fulfill 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.¹² Article 3(3) further excludes from the principle of convergence national merger laws and laws having a different objective than the protection of competition.¹³

Still, leeways for national law exist even under Article 3(2) such as inherent restrictions, national group exemptions and national statutory *de minimis* rules. The block exemptions in the CEECs largely follow the European Commission's BERs; however, some CEECs have specific exemptions from the competition rules for agricultural products such as in Estonia and Czech Republic and special provisions for dominant position in the retail trade like in the Latvian competition law. One remarkable exception from the convergence rule is the application of stricter 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 1/2003¹⁴ and a recent survey of the International Competition Network¹⁵ discussed the controversial topic of abuse of superior bargaining power (ASBP).¹⁶

Some jurisdictions, for example Germany, employ specific provision in their competition law prohibiting abuse of superior buying power, others employ them in

¹² Recital 8 of Regulation 1/2003.

¹³ Recital 9 of Regulation 1/2003.

¹⁴ Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003 SEC(2009) 574 final, 29.4.2009, paras 160-169, 180-181.

¹⁵ ICN Report on Abuse of Superior Bargaining Position Prepared by the Task Force for Abuse of Superior Bargaining Position. http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/ASBP_1.pdf; see also F Jenny, 'The "Coming Out" of Abuse of Superior Bargaining Power in the Antitrust World', http://www.unctad.org/sections/ditc_ccpb/docs/ditc_ccpb0008_en.pdf

¹⁶ 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 on Abuse of Superior Bargaining Position Prepared by the Task Force for Abuse of Superior Bargaining Position, p 3.

other specific contexts such as tort liability under commercial code like France, again in other jurisdictions a private civil remedy exists (Italy) or separate administrative regulation of retail chains. A separate administrative act is often the legislative model opted for by the CEECs, like in Hungary¹⁷, Slovak Republic¹⁸ and a draft law in the Czech Republic.¹⁹ However, in Latvia the provision is part of the competition law.²⁰ 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; 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 fulfillment and enforcement.

Table I provides an overview of the legislative implementation of Articles 10 and 102 TFEU into national competition laws.

¹⁷ Act on Trade of 2005 lists abuses of ‘significant market power’, created basically for supermarket practices against retailers. 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.

¹⁸ Act on Unfair Conditions in Business Relationships (AUC) on April 11 2008.

¹⁹ 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. D Bicková, A Braun, *The European Antitrust Review 2010 Section 4: Country Chapters, Czech Republic*. ICN Report on Abuse of Superior Bargaining Position Prepared by the Task Force for Abuse of Superior Bargaining Position, p 6; Commission Staff Working Paper, paras 160-169.

²⁰ Section 13(2) of the Competition Law 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. Act

TABLE I. Legislative implementation

Equivalent to Article 101 TFEU			Equivalent to Article 102 TFEU	
Notification procedure		Block Exemptions		Abuse of superior bargaining power
YES	NO			
Slovakia (informal guidance) Latvia	Bulgaria, Poland, Hungary, 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 Slovenia	Slovakia (Act on retail chains in force from January 2009 that focuses on the problem of supermarkets and their suppliers), Czech Republic, Hungary (buyer power), Latvia (retail trade)

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 prohibited horizontal agreements and resale price maintenance.²¹ The attempt to avoid introducing the prohibition of vertical agreements in 1996 was not successful due to EU pressure. In 1996 a general prohibition of vertical agreements was introduced in Hungary complemented by group exemptions for exclusive distribution, exclusive and franchise agreements.²² In 2002 a new group exemption was implemented, similar to Regulation 2790/1999, which contained a safe harbour regulation for all vertical agreements with less than 30 % market share.²³ These changes revived the previous Hungarian approach that was more open to economic analysis and less formalistic and completely in harmony with the 1999 EC rules.²⁴

²¹ The Hungarian legislation at that time seemed to precede the later EC reform of vertical agreements. An often cited argument to this reform was formulated by the then head of the Hungarian competition authority, Ferenc Vissi : ‘does it make sense to condemn all vertical restraints and then (block) exempt 90% *à la* Brussels, or to accept 90% and condemn only 10% (*à la* Budapest)?’. Cited in B E Hawk, ‘System failure: vertical restraints and EC competition law’, (1995) 32(4) CMLR, 973-990, 980.

²² 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.

²³ Government Regulation 55/2002 (III.26.) on the exemption from the prohibition of the restriction of competition for certain groups of vertical agreements.

²⁴ OECD, Background report on the role of competition policy in the regulatory reform, Hungary, (2000) 10-11, <http://www.oecd.org/dataoecd/27/16/34768045.pdf> accessed 14 October 2007.

Similarly, in Lithuania the Competition Act of 1992 did not prohibit vertical agreements unless one of the parties was a dominant undertaking.²⁵

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, in fact it is 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 5.²⁶ 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 been to some extent addressed in Articles 11 and 12 of Regulation 1/2003 with regard to the cooperation within the ECN. Despite this fact, 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, in relation to the total number of the Member States the CEECs more often diverge or partially diverge from the provisions of Regulation 1/2003.²⁷ 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.²⁸ 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 additional rules to or replaces the administrative rules on how investigations are initiated, investigation powers and rights of defence are legislated, what kind of information can be used or transmitted in the ECN, and has relevant limitations with regard to both national and as EU leniency applications. These issues of actual enforcement will be discussed further below in section 4.1.1.

²⁵ Questionnaire on the challenges facing young competition authorities, Contribution from Lithuania, DAF/COMP/GF/WD(2008)57, p 5.

²⁶ Staff Commission Working Paper accompanying the Report on Regulation 1/2003, para 200.

²⁷ 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), http://ec.europa.eu/competition/ecn/ecn_convergencequest_April2008.pdf

²⁸ Staff Commission Working Paper accompanying the Report on Regulation 1/2003 para 202.

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, Slovakia	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, Poland, Latvia, Lithuania, Romania, Bulgaria, Estonia ²⁹		Slovenia ³⁰

²⁹ 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 (at the application of the Prosecutor's Office) to terminate the criminal

Table II 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 Staff commission 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.

Table III shows on the one hand the existence of complaints in the national competition laws, and on the other, which procedural rights complainants have during the NCAs' investigation.

TABLE III. Powers of NCAs: handling complaints

Convergence of national competition laws with Regulation 1/2003 and other enforcement tools	YES	NO	Partial implementation
Complaints	Romania, Lithuania, Latvia, Bulgaria, Hungary, Romania	Czech Republic, ³¹ Slovakia, ³² Poland, ³³ Slovenia ³⁴	Estonia ³⁵

proceedings initiated against the suspect. Global legal group, Leiger, K. K. Kiudsoo, Enforcement of Competition Law 2009, Chapter 12, Estonia, p 62.

³⁰ 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. Global Legal Group, Z. Zoric, N. Pipan Nahtigal, Cartels & Leniency 2009, Chapter 37, Slovenia, p 219.

³¹ Article 21 of the Competition Act declares that competition law proceedings shall be initiated *ex officio*.

³² According to Article 25 of Slovak Competition Act proceedings in the case of an agreement restricting competition shall always commence on the Authority's own initiative. The Authority may initiate the proceedings on its own initiative and on the basis of a written petition by an individual or a legal entity that is not an undertaking pursuant to this Act. On the basis of a request submitted by an individual or a legal entity filing a written petition, the Authority shall inform them in writing of further procedure regarding the matter within two months following the date of receipt of the request. Anti-cartel Template, Slovakia, ICN Cartels Working group, Subgroup: Enforcement techniques, p.5A, 2009.

³³ The Act of 16 February 2007 abolished the institution of proceedings launched on request. The antimonopoly proceedings in the cases of competition restricting practices are now initiated on *ex officio* basis. Motions lodged do not bind the OCCP President and constitute only a source of information. Anti-cartel Template, Poland, ICN Cartels Working group, Subgroup: Enforcement techniques, p 5A, 2009.

³⁴ The Office initiates procedure *ex officio* but the basis for the initiation of the procedure is information which the Office gathers from complaints and leniency. Anti-cartel Template, Slovenia, ICN Cartels Working group, Subgroup: Enforcement techniques, p 5A, 2009.

³⁵ The rights of complainants depend on the type of proceedings. In administrative proceedings complainants can provide their opinion and objections in writing or orally and they have access to non-confidential documents during the whole proceedings. In misdemeanour proceedings the law sets no specific rights for

Legitimate interest of complainants	Bulgaria, Latvia,	Lithuania, ³⁶ Hungary, Romania	
Access to non-confidential version of statement of objections	Bulgaria, Lithuania, Latvia, Hungary		Romania ³⁷
Express its opinion during investigation,	Bulgaria, Lithuania, Latvia,	Hungary	Romania
Reasoned rejection of complaint	Bulgaria, Lithuania, Latvia, Hungary, Romania		
Appeal decision of NCA	Latvia, Bulgaria, Hungary	Lithuania	

With regard to procedural rules on complaints and the rights of complainants during investigation the CEECs largely diverge from one and other. While some countries provide extensive rights for complainants more or less on similar conditions as the European Commission³⁸ in a number of countries the NCAs initiate proceedings exclusively on their own initiative and use complaints merely as a source of information. Differences, however, still exist among those countries that grant certain procedural rights to complainants. Lithuania grants similar rights to complainants as the undertakings investigated except for the possibility to appeal illegal actions of investigators. Moreover, the right to request the start of investigation by the NCA is limited to undertakings whose interests have been violated due to restrictive practices, entities of public administration and associations or unions representing the interests of undertakings and consumers. In addition, complainants also have a right to request the

complainants, however they have the right to a reasoned decision should their complaint not be followed by investigation. The same rules apply in criminal proceedings. Global legal Group, Leiger, K. K. Kiudsoo, Enforcement of Competition Law 2009, Chapter 12, Estonia, pp 56-57.

³⁶ On the basis of Article 24 of the Lithuanian Competition Act the right to request the start of investigation by the NCA is limited to undertakings whose interests have been violated due to restrictive practices; entities of public administration and associations or unions representing the interests of undertakings and consumers.

³⁷ Access to the file, participation in hearings and the right to be heard depends on the discretion of the Romanian NCA.

³⁸ The legal framework for handling of complaints has been laid down by Regulation 1/2003, Regulation 773/2004 and the Notice on handling of complaints in 2004. In short, Article 7 of Regulation 1/2003 has taken over from Regulation 17 the possibility for persons who are able to show a legitimate interest to be (formal) complainants that enjoy certain procedural rights. The procedural rights are set out in Article 6 of Regulation 773/2004 which notably foresees that the complainant shall be provided with a copy of the non-confidential version of the statement of objections and they have the opportunity of can expressing their views at the oral hearing of the parties to which a statement of objections has been addressed. Moreover, the Commission has to provide reasoned opinion if it does not pursue a complaint and this decision of the Commission is subject to appeal to the Courts.

protection of their commercial secrets at any stage of the proceedings.³⁹ In Latvia persons whose rights and lawful interests have been or may have been infringed due to the violation can file a complaint. They have access to the non-confidential version of the file and statement of objections and they also have the right to submit evidence and express opinion during the entire investigation.⁴⁰ In Bulgaria the new competition law envisages stronger guarantees for protecting the rights of interested third parties in the proceedings. The application can be lodged by the persons, whose interests have been affected or threatened by an infringement of the Competition Act, which means that for a formal application a legitimate interest is necessary to be shown. An interested party, affected by the claimed violation has the right to receive statements of objections, to submit a response as well as supporting evidence in the course of the proceedings. The complainant has the right to appeal the various acts of the NCA.⁴¹

Since 2005 the Hungarian Competition Act distinguishes between informal and formal complaints. The NCA (GVH) argued that because the proceedings of the GVH are started *ex officio*, the complainant and the person making an informal complaint do not become parties, not even when the GVH initiates its proceeding based on the document which they submitted. Formal complaints are made by way of using a complaint form and supplying a statement of relevant facts of the alleged competition law infringements and the main details of the complainant and the undertaking concerned. If a submission does not include all this information, the GVH will treat it as an informal complaint and the rights of the complainant are much reduced. In particular, an informal complainant has no right of access to the file, and no right to appeal if the complaint is rejected.⁴²

Poland, Slovakia, Slovenia and the Czech Republic handle complaints as mere sources of information without granting procedural rights to the complainants. These differences in the various ways of handling complaints have relevant implications for the enforcement of both national and EU rules. First, complaints are not only significant sources of market information for NCAs, but complainants' participation in the competition law proceedings forms relevant procedural safeguards of good administration. On the one hand, while the rights of complainants are not 'as far reaching as the right to a fair hearing of the companies which are the object of the Commission's investigation' and their limits 'are reached where they begin to interfere with those companies' right to a fair hearing',⁴³ both too broadly and too narrowly defined rights of complainants can lead to problems of administrative accountability *vis-*

³⁹ Global Legal Group, Gumbis, J K.Kačerauskas, Enforcement of Competition Law 2009, Chapter 16, Lithuania, p 102.

⁴⁰ Global Legal Group, Gumbis, J K.Kačerauskas, Enforcement of Competition Law 2009, Chapter 15, Latvia, p 94.

⁴¹ Bulgaria, Annual Report CPC, 2008, p.12; Global Legal Group, P. Petrov, Enforcement of Competition Law 2009, Chapter 7, Bulgaria, p 41.

⁴² See Hungarian Competition Act Article 43 G-I.

⁴³ *Joined Cases 142 and 156/84, BAT and Reynolds v Commission [1987]*, para. 20

à-vis the undertakings concerned. On the other, granting certain procedural rights for those persons and organizations, in particular end-consumers whose economic rights have been adversely and directly affected by anti-competitive practices,⁴⁴ also serves the purpose of sufficiently accounting for the representation of these interests in the procedure of the NCAs. NCAs are administrative authorities that must act in the public interest, not a judicial authority the function of which is to safeguard individual rights. Moreover, denying participation rights to complainants and structuring the procedure exclusively around the rights of the defence of the undertakings targeted is inconsistent with the overall aim of the procedure: effective enforcement/application of competition rules. It is also incongruous with the ultimate aim of these rules: ensuring consumer welfare. These arguments are also relevant in the light of the decentralized enforcement of Articles 101 and 102 by the NCAs as the varying degrees of participation rights in the national procedures can jeopardize the uniform application of Community law.

The interplay between handling of complaints, participation rights and private enforcement of competition law as alternative ways of enforcement should be addressed. At Community level the present legislative framework is based on a two fundamental enforcement principles established by the CFI in its judgment in *Automec II*.⁴⁵ First, the CFI said that the Commission is entitled to apply different degrees of priority in dealing with complaints submitted to it and justify it on the basis of the Community interest.⁴⁶ In this connection the CFI stated that unlike the civil courts, whose task is to safeguard the individual rights of private persons in their relations *inter se*, an administrative authority must act in the public interest. Accordingly, the Commission is entitled to refer to the Community interest in order to determine the degree of priority to be applied in the various cases brought to its notice. Second, the Court stated that reasons pertaining to procedural economy and the sound administration of justice militate in favour of the case being considered by the courts to which related questions had already been referred.⁴⁷ Thus, in fact the Commission has a wide discretion on setting its enforcement priorities in order to discipline complaints and providing complainants with a credible alternative avenue is conceptually a correlate, or even a precondition for NCAs' discretion for priority setting and case selection. The Commission considers that there is not normally a sufficient Community interest in examining a case when the plaintiff is able to secure adequate protection of

⁴⁴ The CFI in *BEMIM* ruled that an association of undertakings could claim a legitimate interest in making an application within the meaning of Article 3 of Regulation 17 even if it was not directly concerned, as an undertaking operating in the relevant market, by the conduct complained of, provided, however, that among other things the conduct complained of is liable adversely to affect the interests of its members. Joined cases T-213/01 and T-214/01 *Österreichische Postsparkasse v Commission* para 112; T-114/92 *BEMIM v Commission* [1995] ECR II-147, paragraph 28.

⁴⁵ Case T-24/90 *Automec Srl* [1992] ECR II-02223.

⁴⁶ Case T-24/90 *Automec Srl* [1992] paras 83-84.

⁴⁷ Case T-24/90 *Automec Srl* [1992] para 87.

his rights before the national courts.⁴⁸ In view of that, the substitution between participation rights for complainants in NCAs' administrative procedures and private enforcement of competition law as credible alternative of law enforcement merits further consideration.⁴⁹

3.1.3. Interim conclusions on legislative implementation

In sum, two conclusions can be formed about the legislative implementation of Regulation 1/2003 in the CEECs. The rules of Regulation 1/2003 were mostly targeted at uniformity and consistency in the decentralized enforcement system of EU competition law. These rules effected 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 to adopt competition rules different from the EU Treaty (except no stricter rules in the case of Article 101 TFEU), it has definitely formed a further incentive for these countries to converge or even copy the EC rules in their own competition legislation. It has clearly been the idea that implementing similar or identical rules on national level will ease the parallel application of national and EU competition law and help to achieve a uniform and consistent enforcement system. However, there is a part of national competition rules which are visible and mostly converge with EU rules such as the powers of NCA summarized in Table II and 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 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

⁴⁸ Case T-24/90 *Automec v Commission* (Automec II)[1992] ECR II-2223 paras 91-94, Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, OJ 1993, C39/6.

⁴⁹ Since the CFI's judgment in *Automec II* the Commission has maintained a policy on handling of complaints grounded on the potential complainants' access to private law actions before national courts as an alternative or even more efficient avenue of law enforcement, thus justifying the Commission' leeway to reject complaints. The question, however, arises whether national courts can indeed adequately secure potential complainants' rights and more specifically whether consumers have the legal and economic infrastructure to file private actions before national courts. The efficiency of the current model where consumers' participation rights in competition law proceedings are restricted, among other reasons, by relying on the argument that they can effectively enforce their rights before the national courts can be criticized by on the basis of the various limitations on consumers' capacity and motivation to file private law action but also because of the limited competence and in certain jurisdictions the limited readiness of civil courts to rule on business behaviour. There is an overall unresolved problem of available low cost collective actions for consumers to claim damages for competition law violations in Europe. In fact, there are two principal reasons why the efficiency of the present EU model can be questioned. On the one hand, it does not seem to correspond to the ultimately declared goal of EU competition law, i.e. consumer welfare. On the other, it does not seem to correspond to the ultimate actual goal of EU competition law, i.e. effective and efficient application of Articles 101 and 102 TFEU.

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 law⁵⁰ 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 of 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.⁵¹

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 to the focus of attention at EU level. Through the ECN there is regular discussion and 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.⁵² Even though the ECN was in the first place created in order to guard uniform and consistent enforcement of Articles 81 and 82 EC, it has proved to be a notable forum for discussing enforcement methods, for mutual learning and even informally converging enforcement policies as the examples of 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 and other informal cooperation networks such as the ICN and the OECD evaluation and control put increasing pressure on the agencies to quantify their enforcement and advocacy work.⁵³ This process is further generated by reputation

⁵⁰ The competition legislation that existed in the CEECs before World War II was set aside and became invalid after 1945.

⁵¹ F Schimmelfennig and U Sedelmeier 'Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe' (2004) *Journal of European Public Policy* 661-679

⁵² http://ec.europa.eu/comm/competition/ecn/annual_reports.html accessed on 8th October 2007.

⁵³ However, it has to be admitted that quantification of the enforcement work of national competition authorities lacks clearly defined and commonly agreed benchmarks. I Maher, *The Rule of Law and Agency: The Case of Competition Policy*, IEP WORKING PAPER 06/01 (March 2006) 4, see also W E Kovacic,

mechanisms such as the OECD country reports, the International Competition Network or even the Global Competition Review rankings.⁵⁴ These mechanisms make actual enforcement modalities more visible and may even induce competition among the agencies. Even though enforcement methods legislated in soft law instruments on EU level does not oblige Member States to follow those guidelines, there is certainly some pressure both from the Commission as well as within the ECN to adopt similar instruments in national legislations. A prime example is the leniency 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.

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 a proxy about the level of judicial implementation⁵⁵ Table IV represents an overview of the judicial implementation of EU competition law by national courts in the CEECs.

TABLE IV. 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 Lithuania (successful case)

There are several difficulties with studying judicial implementation in the CEECs. While in some countries it was considered that the reference by the NCA to European competition

Using evaluation to improve the performance of competition policy authorities, background Note, OECD, Evaluation of the actions and resources of competition authorities, DAF/COMP(2005)30.

⁵⁴ I Maher, 'The Rule of Law and Agency: The Case of Competition Policy', IEP Working Paper 06/01 (March 2006) 4.

⁵⁵ Cseres, K.J. J. Langer, Judicial review in Hungarian competition law –*Tetra Laval* à la Hongroise in: Lavrijssen, S. A. Ottow, *Judicial review in competition law and economic regulation*, Europa Law Publishing, 2008 forthcoming

law jurisprudence improved and supported effective law enforcement,⁵⁶ 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.⁵⁷ Moreover, national courts do not properly notify the Commission about cases where Articles 101 and 102 are applied and this is striking in the case of the CEECs. On the Commission website, where national judgments are registered there are two single cases from the CEECs, one from Lithuania on public procurement for the assignment of concessions in the sector of waste collection and the other case from Hungary.⁵⁸ The role of national courts in implementing European law cannot be underestimated in the effective enforcement of competition law. The role national courts play in the effective enforcement of competition law will be further discussed in the next section on judicial 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: ACTIVE INVOCATION OF THE IMPLEMENTED RULES

The actual impact of EU law in the investigated legal systems is believed to be confirmed once active enforcement is studied. The new enforcement models of the European Commission have a strong influence in all the Member States, however, actual application of the models is where the CEECs show a different picture. In the CEECs there are significant socio-economic factors both formal and informal constraints that have a decisive impact on whether and how the implemented rules are actively invoked. These socio-economic factors are related to the transition of the economy, to the lack of previously existing market mechanisms and experience with free markets and market regulation interaction with market, constitutional and institutional changes, and the revival of private law and private law courts in all the investigated countries.

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 analyzing law and enforcement in the CEECs. Institutions consist of formal and informal rules that determine the behavior of individuals and organizations. Formal rules such as laws and regulations and informal rules such as constraints on behavior derived from culture, tradition, custom and attitudes. Formal rules and informal constraints are interdependent and in constant interaction. Similar measures will lead to different outcomes because of diverging informal rules and informal constraints in different economies. Institutional

⁵⁶ OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Latvia, DAF/COMP/GF/WD(2009)2, p 5, ICC, EC Regulation 1/2003: views on its functioning, prepared by the Commission on Competition, Document no.225/653, 2008, p 17.

⁵⁷ Staff Commission Working Paper accompanying the Report on Regulation 1/2003, para 270.

⁵⁸ Hungary: Gazdasági Versenyhivatal / Magyar Államvasutak ZRT 7 K 34364/2006/16; Lithuania: Tew Baltija / Kauno m. savivaldybės administracijos direktorius (Director of administration of the municipality of the city of Kaunas) Vivil case 2- 1068- 52/ 05.

change is a process that is subject to path dependency. Institutional path dependency is the downstream institutional choices inherent in any institutional framework and which makes it difficult to alter the direction of economy once it is in a certain institutional path. Formal rules can be changed overnight, but informal constraints change slowly.⁵⁹ These insights from institutional economics⁶⁰ 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.⁶¹

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.⁶² 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 in 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.⁶³ 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.

4.1. Administrative enforcement by the NCAs

The obligation for the NCAs to apply Articles 101 and 102 parallel to national competition law is laid down in Article 3(1) of Regulation 1/2003. The enforcement

⁵⁹ D C North (1997), 'The Contribution of the New Institutional Economics to an Understanding of the Transition Problem', *WIDER Annual Lectures*, Helsinki, March 1997, 13.

⁶⁰ The relevance of institutions has been already emphasized by Stiglitz, who argued that stages of development indicates how far an economy has advanced to generate institutions necessary for well-functioning market economy and the capability of economy's institutional apparatus to generate wealth for its citizens. J Stiglitz, 'Participation and Development: Perspectives from the Comprehensive Development Paradigm', in: *Review of Development Economics*, (Vol. 6, 2, June, 2002), Special Issue on Democracy, Participation and Development, 163-182, 164.

⁶¹ OECD, OECD Global Forum on Competition, Small economies and competition policy: background paper, CCNM/GF/COMP(2003)4, 9-10.

⁶² The negotiations on transitional arrangements were conducted on the basis of the principle that they must be strictly limited in scope and duration. J Känkänen, 'Accession negotiations brought to successful conclusion', *Competition Policy Newsletter* (2003/1) 26.

⁶³ The interaction between the European Commission and the national competition authorities is required by Article 11 of Regulation 1/2003.

rate of the NCAs has been discussed in the Staff Commission Paper accompanying the Report on Regulation 1/2003. The only remark the Staff Working Paper makes to the enforcement record of the CEECs is that the rate of application of Articles 101 and 102 is influenced by the period of applicability of these rules.⁶⁴ Between 2004 and 2009 the number of decisions that the NCAs of the CEECs took by applying Articles 101 and 102 varies between 3 (Estonia, Latvia, Bulgaria 4, Lithuania 5, Czech Republic 6) and 9 (Slovak Republic, Poland, Slovenia 8). Hungary has brought 17 cases to the stage of a decision and Romania has initiated 6 cases but reached in no cases a decision.⁶⁵ It is on several points highly debatable how and to what degree the number of cases brought by NCAs indicates the effectiveness of their enforcement. It can however, be observed that these numbers do not significantly deviate from the average of the number of decisions in the other Member States, where a few countries like Italy (40), Spain (27), France (56), Germany (45), the Netherlands (31) and Denmark (27) has decided a large number of cases but the other Member States demonstrate a similar average as the CEECs.

Looking further into national practice of competition law enforcement some post-transition characteristics are still present, however, the competition agencies seem to operate with fairly similar output as their colleagues in the old Member States. Most of the CEECs had difficulties with enforcing the substantive competition rules in their initial startup as an agency. Enforcement powers were often insufficient to conduct investigations, reach decisions and impose persuasive fines.⁶⁶ Being charged with several market regulatory tasks, many NCAs devoted much time and resources to these wider activities such as unfair competition or consumer protection. Moreover, they often lacked priority setting or strategic planning and were obliged to follow on all complaints.⁶⁷ For example, Poland had no possibility to dismiss meritless complaints by private parties or the Czech Republic required firms that had a dominant position according to a legislative presumption of a fixed market share (30%) had to notify and register with the NCA.⁶⁸ This seems to be the case still in Bulgaria. This phenomenon could be well understood by looking at the inherent nature of the transition economies,

⁶⁴ Staff Commission Working Paper accompanying the Report on Regulation 1/2003 paras 148-149.

⁶⁵ <http://ec.europa.eu/competition/ecn/statistics.html>, 2.

⁶⁶ OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Latvia, DAF/COMP/GF/WD(2009)2, p 3; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Poland, DAF/COMP/GF/WD(2009)76, p 4; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Bulgaria, DAF/COMP/GF/WD(2009)56, p 4; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Czech Republic, DAF/COMP/GF/WD(2009)6, p 6; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Slovak Republic, DAF/COMP/GF/WD(2009)62, p 3.

⁶⁷ OECD, Global Forum on Competition, Challenges faced by young competition authorities, Note by the Secretariat, DAF/COMP/GF (2009)3/REV1, pp 4-5, 13-14.

⁶⁸ OECD, Global Forum on Competition, Challenges faced by young competition authorities, Note by the Secretariat, DAF/COMP/GF (2009)3/REV1, p 18.

namely the fact that they first had to build markets and just after an initial period could begin with market surveillance in the classical sense. The creation of a level playing field required fair trading rules. 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. There was neither a firm legislative nor an institutional basis for it. Although protection of consumers was not the main goal of either competition legislation or competition authorities, some of the CEECs adopted competition acts including rules on unfair trade practices. This integrated approach was also reflected in the competences of the agencies enforcing these laws. Moreover, market failures in the field of specific sectors, like telecommunications or electricity had been addressed by competition law tools in the absence of sector specific regulation. Thus besides the 'classical' competition rules the CEECs have often adopted competition legislation covering other relevant fields of market law such as unfair competition, advertising, unfair trade practices or even sector regulatory issues.

When the privatization process had been completed and sector regulatory agencies were formed the NCAs could turn to more traditional competition law enforcement, however, many of them still have wider regulatory tasks assigned to them. These inefficiencies have also been dealt with, for example, by following the enforcement tools as the Commission in the course of the modernization. However, even the strengthened enforcement tools have not always delivered the expected results in actual enforcement. One example is leniency programmes 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 Slovenia. However, even this jurisdiction applies some other provisions that make termination of proceedings or fine reduction possible. Despite the fact that the majority of the CEECs have a leniency program, their application has been limited so far. The first adopted programmes proved to be unproductive due to insufficient transparency or uncertainty about eligibility. Many programmes have therefore been revised and slowly the programmes began 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 in a cartel agreement in 2006 but majorly revised its 2004 leniency programme in 2009 due to several shortcomings in the previous model.⁶⁹ In the Czech Republic, Hungary and in Slovakia a marker system exists as well.⁷⁰ However, in the Czech Republic the decision to grant a 'marker' lies fully at the

⁶⁹ 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,

⁷⁰ Global Legal Group, Zahradnik, M. H. Madárová., *Cartels & Leniency 2009*, Chapter 36, Slovakia, p 214; Global Legal Group, Braun, A. Bicková D., *Cartels & Leniency 2009*, Chapter 10, Czech Republic, p 54; Global Legal Group, Bacher, G. J. Budai *Cartels & Leniency 2009*, Chapter 18, Hungary, p 102.

discretion of the Antimonopoly Office.⁷¹ 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 2007.⁷² However, Hungary has had a leniency programme for provisions on the prohibition of unfair and restrictive market practices since 2009.⁷³ In the next section the implications criminal law enforcement of competition law may have for the administrative enforcement will be discussed.

4.1.1. 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 2002,⁷⁴ Hungary⁷⁵ have introduced criminal sanctions in 2005 and many other countries followed the trend the last four years, recent examples being the Czech Republic, Latvia and Slovakia. Actual invocation of criminal sanctions and procedures has only taken place in Estonia.

TABLE VII. Administrative and criminal sanctions in the competition law enforcement

Administrative law sanctions	Estonia, Bulgaria, Latvia, Poland, Hungary, Czech Republic, Romania, Lithuania, Slovakia,	Slovenia	
Criminal law sanctions	Czech Republic, Estonia, Romania, Slovenia, Slovakia, Latvia Active invocation: Estonia	Bulgaria	Hungary (bid-rigging), Poland (bid-rigging),

⁷¹ Global Legal Group, Braun, A. Bicková D., *Cartels & Leniency 2009*, Chapter 10, Czech Republic, p 54.

⁷² 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.

⁷³ Leniency policy related provisions of Act No LVII of 1996 on the prohibition of unfair and restrictive market practices (2009).

⁷⁴ Penal Code was amended to allow for legal persons to be held criminally liable for competition offences (Art 399 - 402) with a penalty payment of up to 250 million EEK (16 million EUR). Physical persons can be punished by means of a fine (up to 25 000 EEK, or 1600 EUR, calculated by minimum income) or up to three years imprisonment. The ECB investigates criminal cases together with public prosecutors. Liability is imposed by way of court judgment. A Proos, *Competition Policy in Estonia* in K J Cseres, M P Schinkel, F O W Vogelaar, *Criminalization of Competition Law Enforcement, Economic and Legal Implications for the EU Member States*, (Edward Elgar, Cheltenham 2006).

⁷⁵ Section 14 of the Act XCI of 2005 amending the Hungarian Criminal Code, Act IV of 1978 and other acts

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 formation. 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.⁷⁶ The Estonian procedural rules related to competition law enforcement are rather complicated as three types (administrative, misdemeanor and criminal) of proceedings are possible. This has caused problems in practice and in number of occasions the ECA's decisions made rendered in misdemeanor 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.⁷⁷ The effectiveness of criminal sanctions and the consequences of this type of enforcement methods will have to be checked in the future development of those countries' practices.

The Estonian practice illustrates some of the major problems with regard to introducing criminal law enforcement besides administrative law enforcement. 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 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 be prevented from 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, hinders the efficient collection of information from individual employees for which an undertaking must rely on in order to file a successful

⁷⁶ Annual Report, 2004, Estonian Competition Board, p.3

⁷⁷ Global Legal Group, Tamm. E., K.Paas., Enforcement of competition law 2009, Chapter 9, Estonia p.214

leniency application.⁷⁸ An NCA's promise of 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.⁷⁹ One way to overcome this problem is represented by the Estonian legislation which extends the effects of a leniency grant to criminal prosecution.⁸⁰

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.⁸¹ Those Member States that impose criminal sanctions for the 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.⁸²

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, representing a potential conflict between two enforcement tools with the same goal.

⁷⁸ D.Schroeder, S.Heinz, Requests for leniency in the EU: experience and legal puzzles in: K J Cseres, M P Schinkel, F O W Vogelaar, *Criminalization of Competition Law Enforcement, Economic and Legal Implications for the EU Member States*, (Edward Elgar, Cheltenham 2006) pp 161-163.

⁷⁹ Wagner-von Papp, Florian, 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?' (April 5, 2010). Criminalising Cartels: Critical studies of an interdisciplinary regulatory movement, C. Beaton-Wells, A. Ezrachi, eds., Hart Publishing, Forthcoming . Available at SSRN: <http://ssrn.com/abstract=1584887>

⁸⁰ 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 (at the application of the Prosecutor's Office) to terminate the criminal proceedings initiated against the suspect. Global legal group, Leiger, K. K. Kiudsoo, Enforcement of Competition Law 2009, Chapter 12, Estonia, p 62

⁸¹ See also Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101/43, point 28 c,

⁸² A Dawes, O Lynksy, 'The ever-longer arm of EC law: the extension of Community competence into the field of criminal law', (2008) 45 CMLR 131.

4.1.2. 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 the Member States were left a considerable leeway to adapt the *acquis* to their own institutional preferences and legal system. Despite this freedom the NMS are ambitiously adopting the latest developments in the Commission's competition law enforcement practice. The CEECs have tried to improve detection methods by strengthening investigation powers, establishing special cartel units, increasing corporate fines, introducing criminal sanctions, and professional disqualification and leniency programmes. Direct settlement exists in the Czech Republic since 2008 in the form of so called alternative solution of certain competition cases and was first applied in the summer of 2008.⁸³ A chief economist has been appointed in Hungary in 2006 and in the Czech Republic in 2009.⁸⁴

There is a need to systemize the available enforcement methods in the national competition rules, but also to investigate what the formal or informal constraints are to actively invoking these enforcement schemes in specific country settings. The discrepancy between law on the books and active invocation and effective enforcement is still striking in these countries. Ambitious and formal transposition of rules often lacks active enforcement. 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. The relevance of private enforcement of competition rules for the development of European private law is fundamental, and will be further discussed in section 4.2.3. The enforcement of competition rules by the national courts is an essential though rather limitedly examined area of the enforcement of competition law. The next section will address both judicial review procedures and private enforcement.

4.2. Judicial enforcement by national courts

4.2.1. Judicial appeal

The Staff Commission Working Paper 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.'⁸⁵

⁸³ 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, http://www.compet.cz/fileadmin/user_upload/Sekce_HS/Direct_Settlement.pdf

⁸⁴ Gergely Csorba, (*Chief Economist*, Hungary, GVH); Milan Brouček, Chief Economist of the Czech competition authority.

⁸⁵ Point 40 of the Staff Commission working Paper

However, the Working Paper also admits that there is overall scarcity of judgments.⁸⁶ While application of EU competition law by national courts is weak there is also a problem of 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: whether this review should be intense or restrained especially 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 also 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 review is indispensable with its complementary function of judicial accountability. Accordingly, 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 had defined a moderate standard of judicial review of competition decisions taken by the European Commission⁹¹ 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, the reasons for the decision taken are properly stated, the facts are accurately stated and whether there has been no manifest error of assessment or a misuse of powers.

⁸⁶ 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, point 291.

⁸⁸ O Essens, A Gerbrandy, S Lavrijssen (eds.), *National Courts and the Standard of Review in Competition Law and Economic Regulation*, Europa Law Publishing 2009; Cseres, K.J. J. Langer, *Tetra Laval á la Hongroise* in: *National Courts and the Standard of Review in Competition Law and Economic Regulation*, O Essens, A Gerbrandy, S Lavrijssen (eds.) Europa Law Publishing 2009, pp 127-144.

⁸⁹ S.A.C.M. Lavrijssen & M. de Visser, *Independent Administrative Authorities and the Standard of Judicial Review*, *Utrecht Law Review* 2006, no. 1, pp 111-135.

⁹⁰ ECJ, 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.

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 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 of upholding or overturning NCA decisions and no access to the content of the cases. There is even less known about the way 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 skepticism with regard to the expertise of national judges to assess competition law issues. Moreover, the standard of judicial review may differ per country and the way courts apply this standard requires case specific in-depth research.

Certain agencies 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 process may take too long and thus frustrates 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.

TABLE VIII. 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

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

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

Standard of judicial review Restrained <i>à la</i> Tetra Laval	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 generalist court enforcement until 2003 and 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.

4.2.2. Illustrative examples of judicial review

As to the impediments judicial review raises in competition law enforcement some country specific experience is illustrative. Slovakia reported serious shortcomings of its judicial review system.⁹⁴ First, until 2008, the appeal to the decision of Regional Court in Bratislava was only possible for the unsuccessful petitioner when the court dismissed his action and for the NCA in cases where the decision was changed, for example the imposed fine was decreased. However, in the proceedings which ended in annulment of the decision of the Council of the Competition Office and in the most of the cases also of first instance decision, the Office had power to appeal only under certain conditions stipulated in the Civil Code of Procedure which was almost never the case in reality. Therefore, the Office felt sometimes paralyzed, as it was not able to intervene effectively in the market for the benefits of consumer and competition. Since 15 October 2008, the legislative amendment to the Civil Code of Procedure gave the Office the right to appeal against any decision of the Regional Court in Bratislava which annuls the decision of the Council of the Office. In important cases the national court annuls the decisions of the Council of the Office, whilst most of the decisions lack a concrete identification of the failures of the Office during the proceedings and a particular legal opinion of the court. The other negative fact is unfounded and disproportionate decrease of the imposed sanctions. Slovakia argued that the lack of experience of judges in competition law, and hence the following outputs, disable the effective enforcement of competition rules.⁹⁵

A 2007 case in the Czech Republic is illustrative where, a Czech review court overruled the national competition authority's decisions in two cases on the ground that the

⁹⁴ DAF/COMP/GF/WD(2009)62, pp 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, pp 10-11

⁹⁵ DAF/COMP/GF/WD(2009)62, pp 5-6; OECD, Global Forum on Competition, Questionnaire on the challenges facing young competition authorities, Contribution from Slovak Republic, DAF/COMP/GF/WD(2009)62, p 6

application of EC and national competition law regarding the same infringement in the same decision would violate the principle of *ne bis in idem*. The Czech Supreme Administrative Court later overturned the lower court's judgment and held that that court had misinterpreted the principle.⁹⁶

As to the standard of judicial review an available study of the Hungarian practice can be mentioned. While the Hungarian legislation provides wide competence for the Hungarian courts to review decisions of administrative authorities, the case-law of the courts shows that the courts are cautious in the extent they review the assessment of the Hungarian NCA (GVH) and well-aware of the borderlines of their powers.⁹⁷ Even though the courts are allowed to change the decision of the administrative agency and replace it by their own decision, they do not engage in reestablishing the facts of the case or intervene with the appraisal of the GVH.

The Hungarian courts seem to have been able to find a reserved position in the floating zone between restrained and intense judicial review when it comes to the review of the (economic) appraisal of national authorities. The identification of the exact borderline between marginal and intense judicial review of the administrative authorities' decisions could be further discussed perhaps by a cross-country comparison.

Still, the question remains why the Hungarian courts do not make reference and rely on European law more often. There is presently a high degree of convergence between national and thus Hungarian substantive competition rules and the European competition law provisions. Accordingly, it could be reasonably expected that the enforcement of these closely aligned national rules follow the guidelines provided by the European Courts. This is, however, not the case. An extensive answer to what the underlying reasons for this discrepancy might be is beyond the scope of this contribution. Still, one possible explanation could be that unlike the national competition authorities who actively participate in the European Competition Network, national courts are still more embedded in their national legal system and focus more on national legal rules and jurisprudence.

With regard to judicial review standards and actual enforcement there is a striking lack of research and data, especially in the CEECs but to some extent also in the old Member States. However, as stated above the role of judicial review in the overall

⁹⁶ Case No. 62 Ca 8/2007-171, RWE Transgas, Decision of the Regional Court Brno, 22 October 2007; Case No. 62 Ca 4/2007-115, Tupperware, Decision of the Regional Court Brno, 1 November 2007. Case 5 Afs 8/2008 – 328, RWE Transgas, Decision of the Supreme Administrative Court, 31 October 2008; Case 7 Afs 7/2008-200, Tupperware, Decision of the Supreme Administrative Court, 3 December 2008.

⁹⁷ The general statutory standard of review can be found in Section 339/B Act III of 1952 on the Code of Civil Procedures consists of four elements: accurate establishment of the facts, compliance with relevant procedural rules, the assessment of the facts is clear and the characterization of the evidence in law is reasonable. When this standard is compared with the *Tetra Laval* standard as laid down in paragraph 39 of the judgment and further elaborated on by the Court of First Instance in *Microsoft*, *Alrosa* and *Impala*, the Hungarian legislator seems to follow the Community standard. See also Vj-27/2005, MOL excessive pricing case GVH, Annual Report GVH (2006); Kf. II. 39. 048/2002/13. Legfelsőbb Bíróság. (Supreme Court); *Népszabadság Rt. by B.V. Tabora*. Legf. Bír. 7.K.33364/2003/10. (Supreme Court)

competition law enforcement is fundamental: it is to provide a rigorous control of the administrative decisions and assessment of NCAs where often administrative accountability is absent. The fact that there seems to be a reluctance of courts to engage in such complex and perhaps unfamiliar legal exercises and the fact there is an overall lack of data what the national courts are doing and how is a problem beyond effective competition law enforcement. It is a problem of accountability and transparency both at EU and at national level.

4.2.3. Private enforcement of competition rules before national courts

Private enforcement of competition law in the CEECs merits separate attention in the research on the CEECs' competition laws. First, private enforcement of competition law is a prime example of Europeanization of national law and influencing national competition and private law rules. Second, while the obstacles to introduce private damages claims are numerous and involve complex legal and economic issues in all Member States⁹⁸ the CEECs face particular challenges. Third, it offers a distinctive case study to investigate 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 and the interplay between them in the enforcement of competition rules.

While some of the CEECs have implemented private enforcement of national competition rules, none of them except Lithuania has practical experience with private enforcement. There have been no final cases of private enforcement and therefore merely theoretical assumptions can be made about their future 'success'. While some of the challenges are equally valid for the old Member States, the CEECs face some particular problems. Both private individuals and national authorities face the problems of assessing complex legal and economic issues of competition law. While most of the NCAs have built up sufficient legal and economic expertise with regard to competition law issues the same cannot be said about the national courts. National courts face a double barrier: on the one hand, they lack a basic knowledge of European law and on the other, they are unfamiliar with competition law issues. 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 spill over much beyond their narrow competition mandate,⁹⁹ how national courts as well as private undertakings will assess the application of the legal exception under Article 101(3).¹⁰⁰

⁹⁸ The Green Paper has identified a number of general obstacles to introduce this enforcement method such as access to evidence, passing on defense, standing for indirect purchasers and quantification of damages. Green Paper Damages actions for breach of the EC anti-trust rules, COM (2005) 672 final

⁹⁹ The NCAs' limited resources and procedural limitations might result in dealing with a limited number of cases.

¹⁰⁰ The application of Article 101(3) to non-economic objectives can prove to be an especially dangerous exercise when national courts apply that provision, unlikely fit to assess whether the restriction of competition within the internal market can be justified by non-economic objectives of other Community

National judges need trainings and assistance in order to be able to manage expert witnesses and economic evidence that will be inherent and frequent parts of competition cases.

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

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 part autonomy and the often lacking recognition of involving private actors in law making and enforcement. Besides the lack of confidence in the judiciary the significant time, costs and complexity litigation means. These last three issues are especially a problem for consumers. The legal position of consumers and consumer organizations is often more restricted in these countries than in the old Member States. Access to justice of consumers and consumer organizations within and outside of the court system is often problematic or despite of existing legal rules practical difficulties hinder them to make effective use of those substantive rights. Collective consumer actions are rare either because of the lack of legal basis or other practical financial problems.¹⁰¹ These inefficiencies for consumers' access to justice has to be considered also in light of the Community argument that selecting priorities for NCAs and wide discretion on assessing complaints has its relevant justification in the fact 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 necessitates a more proactive approach. Such tailor made solutions aim at, for example, making use of the advantages earned during public enforcement. Such a useful element of the public enforcement is the expertise of the NCAs, who can assist the national courts as *amicus curiae* in adjudicating damages claims in competition cases.¹⁰² Another recent example is a legal presumption of 10% overcharge when calculating damages for hard-core cartels in Hungary.¹⁰³ In Bulgaria a more flexible procedural rules has been

policies. National authorities might justify anti-competitive practices on the basis of national policies. Therefore, as the Commission argues, a pure economic approach is more appropriate in the decentralized enforcement. NCAs will have to invest both in financial and humans resources in order to increase their capacity for economic analysis.

¹⁰¹ See the National reports of Czech Republic, 20, Lithuania 17, Latvia 17 Estonia, 21-22, Slovenia, 21-22, Hungary, 16 in Ashurst, Study on the conditions of claims for damages in case of infringement of EC competition rules, (2004).

¹⁰² Article 15 Regulation 1/2003.

¹⁰³ 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.

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 the results of the infringement were passed on to them by the intermediate commercial operators.¹⁰⁴

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

The last section will address further characteristics of the institutional framework set up in the CEECs for enforcing competition rules.

5. INSTITUTIONS ENFORCING COMPETITION RULES

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 formed the most serious challenge in the post-communist transformation of the legal and economic system and even after 2004. Crucial questions of enforcement and institutional choice were left unanswered except for some very general rules in Regulation 1/2003.

Under Article 35 Regulation 1/2003 each Member State had a clear obligation to draw up national competition law and designate a competition authority responsible for the application of Articles 101 and 102 before 1 May 2004,¹⁰⁵ however, the details have been 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.¹⁰⁶ The accession process merely required an adequate administrative capacity through well-functioning competition authorities and thus the new Member States had a great level of freedom in designing the institutional framework of competition law enforcement. Beyond Article 35 of Regulation 1/2003 neither further requirements nor formal rules have been formulated on the powers and

¹⁰⁴ *International Comparative Legal Guide, Enforcement of competition laws*, Petrov P. Bulgaria, 2009, p 44

¹⁰⁵ 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’.

¹⁰⁶ 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 ECR I-7879, paras 46-55.

procedures of these competition authorities.¹⁰⁷ 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 1/2003¹⁰⁸ has 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 took place in Estonia. The Estonian NCA became an integrated authority, which merged with previously separate communications, the energy market and railway regulators at the beginning of 2008. Further to the merger, the ECA consists of three divisions - competition division, railway and energy regulatory division and communications regulatory. Hence, the different divisions of the ECA regulate also specific sectors.

5.1. Variations for institutional design

There is presently a wide diversity of institutional design 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 resorted 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, notably in unfair trade practices. They seem to take up (quasi-)regulatory roles as well. Competition authorities are in comparison with other public agencies, for example consumer authorities are 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 'spillovers' in other fields of market regulation such as consumer protection and regulating network industries.¹⁰⁹ Table IX provides an overview of the NCAs' competences.

¹⁰⁷ Although national procedural rules had to provide for admission of the Commission as *amicus curiae* in national procedures, NCAs will have to be empowered to conduct examinations in accordance with the Regulation, and Member States will have to fulfil obligations to report to the Commission. The Commission retains broad supervisory powers that allows him to intervene in proceedings before the national authorities and to of the Commission discretionary powers 'primus inter pares'. See Article 11(6).

¹⁰⁸ Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003 (SEC(2009) 574 final, 29.4.2009 points 190 and 200)

¹⁰⁹ 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.

TABLE IX. Competences of the NCAs

Scope of competition law includes unfair competition or consumer protection	Competence of competition agency includes other than 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 Commission Paper.¹¹⁰ Moreover, there is an overall lack of reported case-law on the Commission website for national judgments applying Articles 101 and 102.¹¹¹ 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.

The interplay between competition authorities and national courts became more visible and national legislations show that in the CEECs cooperation between these two enforcement institutions is intensive and sometimes in the form of a legislative obligation. Such an element of the public enforcement is the expertise of the NCAs, who can assist the national courts as *amicus curiae* in adjudicating damages claims in competition cases. 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 behavior, 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.¹¹²

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.

¹¹⁰Communication from the Commission to the European Parliament and the Council, Report on the functioning of Regulation 1/2003 (COM(2009) 206 final, 29.4.2009; Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003 (SEC(2009) 574 final, 29.4.2009).

¹¹¹Out of the ten new Member States two countries (Hungary, Lithuania) have each one judgment published on this website. <http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/>

¹¹²See 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. EC Regulation 1/2003: views on its functioning, Prepared by the Commission on Competition, ICC, 2008, p 5.

The Competition Office may submit observations or set forth its standpoint orally before the closing of the hearings. Upon a request of the court, the Competition Office shall inform the court about its legal standpoint concerning the application of the competition law rules in the given case. Thus, the Competition Office acts as an ‘amicus curiae’ to the courts. Furthermore, if the Competition Office decides to initiate proceedings in a matter that is pending before the court, then the court shall stay its own proceeding until the Competition Office issues its final and legally binding decision, and the court is also bound by the final and legally binding decision of the Office concerning the finding of breach of the competition law rules or the lack thereof.

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 unraveling and adjudicating cases on the ‘borderlines’ of competition law, such as the above mentioned abuse of a superior bargaining power¹¹³ or unfair trade 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 of effective enforcement frameworks and to design workable remedies.

6. CONCLUSIONS

This paper assessed the impact of Regulation 1/2003 in the CEECs that joined the EU in 2004 and 2007. The assessment has been conducted by looking at 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 to depart from traditional top-down approaches to study the effect of EU law in national legislations and to try to address 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 paper demonstrated that even though there is a high convergence of substantive competition rules relevant differences exist for example with relation to unilateral conduct. The emergence of these rules does pose regulatory and enforcement questions and have implications not only for the NCAs but also for the national courts who need to differentiate among competition law and non-competition law issues and decide, for example, whether contract or competition law

¹¹³Behind 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. De Smijter E. and Kjoelbye, L. ‘The Enforcement system under Regulation 1/2003’, in Faull & Nikpay: The EC law of competition, part 2.59. Staff Commission Working Paper accompanying the Report on Regulation 1/2003 paras 180-181

should deal with the given situation. Similarly to the old Member States, the CEECs voluntarily converge with the Commission in respect of procedural rules, however, considerable differences remain in the less visible parts of procedural law. For example, the differences how these countries regulate the rights of complainants are imperative both for public enforcement and for the safeguarding of sound administration as well as for private enforcement. Diverging procedural rules demonstrate that national procedural autonomy is still a powerful influencing device on the ultimate outcome of enforcement of EU rules. The role of the ECN in this process as a transmitting mechanism among the NCAs and the European Commission as a learning laboratory is noteworthy.

With regard to the active enforcement of competition rules the CEECs still exhibit legacies of their past. The discrepancy between law on the books and active invocation and effective enforcement is still striking in these countries. Ambitious and formal transposition of rules 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 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. 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 and where the institutions and the institutional interplay and balance between them as well as their relationship with civil society merits further analysis. This paper showed that NCAs have passed the initial stage of young competition authorities and became mature law enforcers of competition law, even though they face certain drawbacks of 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 and their private law cross-roads as well as their private law consequences need to receive more attention in the future academic as well as public policy work.

While there is a high convergence of substantive competition laws among Member States, the divergences of procedural laws but even more importantly the different institutional variations that eventually influence and determine how the rules are enforced is a factor that cannot be overlooked. Moreover, they need to be looked at 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.