LUISS

Department
of Political Science

Chair Comparative Public Law

The effect of the Acquis Communautaire on CEECs: did competition law compliance benefit from multi-jurisdiction enforcement?

Prof. Cristina Fasone (LUISS)
and Prof. Marianne Dony (ULB)
SUPERVISOR

Prof. Luciano Monti
CO-SUPERVISOR

Agnese Tittoni Matr. 637412
CANDIDATE

Academic Year 2019/2020

To my parents,

Thank you for always supporting me.

I owe the best part of myself to you.

ACKNOWLEDGMENTS

First of all, I have to thank LUISS and ULB for the opportunity to live this beautiful experience. Even in such troubled times, the occasion that you gave me was a motivation, to do more and better, to reach my best and to prepare myself to achieve bigger accomplishments. Further thanks to my LUISS supervisor, Professor Cristina Fasone that accompanied me in all the process, guiding me with necessary and amazing attention. Thanks also to my ULB supervisor Professor, Marianne Dony, who has always been available to me. A last thanks to Professor Luciano Monti, that has been ready and kind to give me suggestions.

The idea for this research was born during my internship at the ENEL Brussels Office, therefore, I would like to thank my supervisor, Simonetta Naletto, that has been a wonderful mentor, not only for work issues. Thank you for teaching me, with care, attention and kindness, I was very lucky to find you at my side.

I would like to thank all the fantastic people that work at the ENEL office, I passed six amazing months, and each of you have been able to make my experience the best. But most of all, I should reserve a special thought for my "Enel girls", Ivana, Martina and Ana: you were the great surprise of my 2020, and not even in my best dreams, I could have imagined to meet such special people like you.

Of course, I must give a huge and infinite thanks to the ones that most have supported me, not only for academic issues, but also for a lot of other things: Cristiano and Augusto. The same that introduced me to the magical world of "traversone". A special tank to Silvia, that I discovered a friend, confidante, and a shoulder on which laugh and cry. A big appreciation to other two great companions of adventure: Tommaso and Thomas.

Then I would like to thank all the people that have been with me during this last experience, that enrich my life, that make me think that I manage to be surrounded by beautiful minds, people and souls. Thanks to Valerio, Alessio, Laura, Roberta, Elena, Chiara, Laura, Alessia, Michelle, Giulia, Mira, Gianluca, Annagiulia, most of them supporting me since many years.

Lastly, I would like to thank my parents and my family, that have been able to give me the strength and the means to pursue my objectives. I can only say that all I have done, and all I could do in the future is because of you.

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SUMMARY

This research will define the functioning of the nowadays system of application of competition law in the EU, looking at the differences with the previous one. With special attention for the final results, much space will be devoted to the novelties introduced by Regulation 1/2003 which established a decentralized and multi-jurisdictional system of application of competition law across Member States. The Commission ceded part of its oversight power to National Competition Authorities (NCAs), whose objective is to supervise on the good functioning of the market, in order to maintain viable competition levels across the European internal market. Together with NCAs, National Courts (NCs) were responsible to adjudicate in competition related cases, and therefore to apply EU competition rules directly in their territorial jurisdiction. Part of the reason that brought the EU to implement this mechanism is the accession of 10 new Member States, 8 of which have been under a socialist regime with state-coordinated economies. All the Member States were left free to decide on the administrative form of their NCAs, and also on the decision to establish specialized courts in their judicial system. Because most of the competition review would have been run at national level by national institutions, the EU introduced a new body, the European Competition Network (ECN), where all the NCAs and the Commission, could meet and exchange information and best practices in an highly juridified manner, in order to maintain a uniform and effective application of the competition rules across the EU territory. During years, the ECN have demonstrated that the network method of coordination, in formal and informal ways, have produced high level experts across all the NCAs in all Member States, even in those states, that presented weak economies when entering in the EU. Indeed, the analysis of this research showed that the NCAs of the 8 states entered in 2004 (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia) display results in competition review not so different from EU core Member States (France, Italy, Germany). On the contrary, the research highlighted a sharp difference in the activity and specialization of NCs, mainly due to a previous and progressive lack in independence and efficiency, that influence the perception of the success of recurs that individual and economic actors can do before courts. This research wants to demonstrate that the difference in the activity and effectiveness of national actors can be explained in part by the presence of a network mechanism for NCAs, and the absence of a similar system for NCs. In the fourth chapter, the document presents the main advantages of a network mechanism of governance, while the fifth chapter presents alternatives based on this hypothesis for the recent rule of law backlash in Central and Eastern European Countries.

1. INTRODUCTION

1.1 The EU Competition Framework: A Concise Overview of the Instruments

With the Treaty of Lisbon, the newly born European Union has recognized to competition law a vital importance in the legal framework of the Union. In Article 3(1)b TFEU, it has been written that competition policy highly contributes to the Union goal of the internal market. Already in the text of the Constitutional Treaty of 2003, rejected via national referenda, competition law was recognized, with even more importance, as an objective of the Union. Indeed, since the Treaty of Rome, the EC has always given a primary role to competition law and policy in order to attain its goals.

The legislative and regulatory framework operating in this field have been extended and reformed, and now it touched three main macro areas:

- Antitrust (Articles 101-102 TFEU);
- Mergers (Merger Regulations No 4064/89 and 139/2004 and its Implementation Regulation 1268/2013;
- State aid (Articles 107-109 TFEU and secondary legislation).

More precisely, antitrust provisions cover the prohibition for undertakings to make agreements that restrict competition. Taking from settled EU case law, an agreement is "a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given conduct on the market" (Bayer AG vs Commission, 2000). Thus, Article 101 TFEU covers both horizontal (agreements between companies operating at the same level in the market) and vertical agreements (agreement between companies operating at different levels of the market, such as producer and distributor). The rule provides for exemptions only in cases when those agreements can improve the production or distribution of goods, contribute to technical or economic progress or allow consumers a fair share of any benefit. In this sense, many horizontal agreements may be accepted if they permit to undertakings to share costs and risks, to improve knowledge and innovation and to raise investments. For what concerns vertical agreements are meant to distort competition less than horizontal ones, but they can cause restrictions between two different undertakings, with a following concentration of powers in the hands of one of the two (Fox and Gerard, 2017).

On the other side, Article 102 TFEU covers the prohibition for undertakings to abuse of a dominant market position. In this sense, an abuse of dominant position is when a company has the power and the ability to influence prices on the market, to make discriminations among distributors, licensees and consumers. The main evidence of a dominant position is the market share that a company has, and the gap between this market share and the position of competitors in the market in question (Fox and Gerard, 2017).

For what concerns mergers, competition rules do not always define this type of action as anti-competitive, but EC Regulation on Mergers highlights the possibility that mergers can distort and weaken competition by segmenting the market or giving significance power to only some dominant actors. Therefore, the regulation aims at differentiating between those concentrations that are pro-competitive, and those who can affect the integrity of the internal market, mainly those that create or strengthen dominant position of actors inside the market. The analysis of a merger effect must take into account both legal and economic factors, and, furthermore, it must calculate the net effect, so differentiating between the negative consequences of the concentration and the positive externalities that could follow (Fox and Gerard, 2017).

Lastly, the third main area of law in the field of competition is about State aid. Provisions prohibiting State aid are necessary to create the right competitive environment for the development and sustainability of the internal market. A State aid is the granting of public resources by a Member State or a public authority to an undertaking, providing it with an economic selective advantage, producing distortions of competition and affecting trade between Member States. The main provisions are located in articles from 107 to 109 TFEU, that affirm that some types of State aid can be acceptable, given a compatibility assessment that assure the position of the aid as a solution to evident market failure or for the development of certain economic activities. Anyway, in mostly of the cases, Member States have to notify state aids to the Commission, that has to assess their viability for the internal market (Fox and Gerard, 2017).

In this light it is necessary to traits the main role of the Commission, which is the central actor for competition matters. Article 3(1)b TFEU also states that competition policy is an exclusive competence of the Union, and the Commission is the main ruler on those matters. However, during the years, the Commission powers have been restructured; initially, after the Treaty of Rome, the competition control was centralized in this organ of the European Community, however, the huge workload, and the ever-growing importance of competition matters brought the EC to undergo a process of decentralization of competition control, down to the National Competition Authorities of the Member States and the National Courts, in a spirit of proportionality and subsidiarity.

Such changes have great importance especially because they acquired momentum during the eastern enlargement of the European Community, a period in which the Community opened to ex socialist countries. In this sense, it is evident how, passing from 15 to 27 states required structural changes, also in the light of the fact that those countries come from a centralized economic system, without any prior competence on competition matters (Szczepański, 2018).

1.2 Relevance of the research

Having outlined the main traits of the competition rules under the Treaty, and after the historical changes that both the rules and the enactor of those rules have passed, it should seem evident the relevance of the research question, which aims at understanding the effect of the implementation of decentralized multi-jurisdiction enforcement of competition law, in an environment which was not used to competition matters.

The Central and Eastern European Countries comprehend countries with different traditions and cultural background, while sharing one same trait: a socialist past. The eastern enlargement was the first of its kind, contributing to what will become one of the main policy instruments of the EU, that is conditionality. Poland, Hungary, Czech Republic, Slovakia, Latvia, Lithuania, Estonia, and Slovenia had to undergo a tough and difficult period of legislative, institutional and structural changes in order to be part of the Union.

The EU's eastern enlargement was bigger, more invasive and more innovative than its earlier enlargements of the 1990s. It also had a more comprehensive influence on domestic legal systems because the Europeanization process of the candidate countries' legal orders was engaging with market, constitutional and institutional reforms. Thus, the implementation of EU law by the countries that joined the EU in 2004 was really exceptional, due to a top-down model of rule transposition, and based on strong EU conditionality (Cseres, 2014).

Unlike past enlargement practice, the pre-accession process was characterized by unprecedented length and complexity, using a sophisticated set of pre-accession instruments, strategies and policies. However, according to some scholars, this complicated process of constitutional transformation of these countries was too fast and did not build the right guarantees for future issues. Indeed, this extraordinary journey of CEECs from recovering sovereignty to delegating part of it to the EU, lasted a little more than a decade. While the constitutional lawyers in the old Member States have had time to adapt incrementally to integration, the accession of the CEECs represented a major constitutional leap, with as a central element, the revision of the CEECs' constitutions, where conditionality requirements required the integration of a complex set of guarantees for sovereignty and independence. This proved a rather challenging and controversial exercise, resulting in most countries in minimal amendments prior to the accession referendums (Albi, 2005).

This bigger picture, in which decentralization of competition law is inserted, can be considered as an additional aspect to take into account when analyzing the actors that must enforce competition law in these countries, such as the NCAs and the NCs. Did this constitutional transformation process permit stable foundations for the independent and effective enforcement of these actors? Looking at the process of institutional set up of the actors involved and the

differences among them it is possible to define a possible interpretation of this larger phenomenon.

The modernization process of Competition law is often recognized in the adoption of Council Regulation 1/2003, entered into force on 1st May 2004. This regulation decentralized the enforcement of EU competition law and increased the enforcement and monitoring powers of National Competition Authorities (hereafter NCAs) and National Courts (hereafter NCs). Besides the technical changes operated by this document, what is interesting is the fact that, in CEECs, this brought a complete new institutional set of bodies that were completing missing before. The CEECs had no past experience, nor expertise, in how to build efficient and effective institutions like NCAs; in the same sense, the judicial brunch had no knowledge at all of the competition law enforcement.

Given these problems, in the first years after enlargement, enforcement level was very low in CEECs. Nonetheless, just after the accession of the new Members, considering those shortcomings, the Commission tried to find solutions. In the Regulation 1/2003, it was envisaged the creation of a communication network among the Commission and the NCAs that would have served as cooperation and canal of exchange of information. The creation and the effective work of this channel proved to be in a way beneficial to the decentralized enforcement. CEECs NCAs gained experience and expertise thanks to the cooperation and exchange of details among the other NCAs of the other Member States, and the Commission itself, that retains a hierarchical role in the ECN, giving advices on the operation of the NCAs. The same structure does not appear for National Courts, and indeed, the research confirms that National Courts and private enforcement before them still ranks very low in respect of other Member States.

1.3 Methodology

In this sense, the aim of this research is to understand if multi-jurisdiction enforcement has in some way benefited CEECs compliance in the field of competition law. In particular, if the implementation of soft law canals, like the ECN, has heavily facilitated the enforcement by the NCAs. As last objective is to prove if this method has potentialities, therefore, possible to implement in other field of EU law, in order to obtain a better protection of EU rules. The research will focus on the analysis of how the compliance to the EU competition law in CEECs (dependent variable) has been affected by the multi-jurisdiction enforcement (independent variable).

More specifically, the aim of this research will be studied through the analysis of three main hypotheses, framed in the light of the findings of the literature analyzed.

Hypothesis 1: CEECs' NCAs institutional design proved to be as effective as in other MSs

In this case, the analysis will look at the institutional construction undergone by NCAs in CEECs, and if they have managed to reach effectiveness and efficiency in accomplishing their objectives. The dependent variable would be the institutional design chosen by each country, related to the one of a sample of other MSs, in order to see their advantages or drawbacks.

Hypothesis 2: CEECs' National Courts effectively enforces and protects competition law

The focus switches from NCAs to National Courts, another actor of the model of decentralized enforcement. In this second hypothesis, the research will look at the model of National Courts for what concerns competition law enforcement, related to the level of protection of competition rules, in order to see if this second actor reaches its objectives.

Hypothesis 3: ECN operation increased reliability and effectiveness of NCAs in CEECs

Lastly, once defined the level of enforcement of both actors, the research will concentrate on the characteristics that differentiate the two, that is the soft law canal of communication, in order to see if this has make any difference in the effectiveness of the NCAs and National Courts.

The decision to analyze the dependent variable in the context of CEECs countries (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia) has been based on the particular characteristics that these countries had when applied to be European, and the amount of changes they had to undergo in order to enter in the EU. The dependent variable will be analyzed in the period of time that goes from the accession in 2004, to recent times 2018 (date of the last Report on Competition Enforcement by the European Commission).

In consideration of the large sample and the large period of time to consider, the unit of analysis will rely on both quantitative and qualitative data, taken by databases and reports from both the European Commission and National authorities. More precisely, for what concerns the analysis of the first hypothesis, the research will be based on the definition of the institutional model of CEECs countries, according to the different institutional designs given by the relevant literature on the topic. Then the data will be drawn by National Annual Reports and the Commission Annual Report on Competition, focusing mainly on the capacity of the NCAs to carry out their functions (i.e. the number of decisions they take per year related to competition cases; the level of independence from governmental branches, the resources given to each body). For what concerns the second hypothesis, the indicators chosen will be the organization envisaged by National Courts for what concerns the protection of competition rules, and the data will be defined following Commission Annual Report on Competition, looking at efficiency of national

courts (i.e. the presence of a special court, the number of the appeal procedures, the number of procedures brought by NCAs where possible, the number of procedures brought by individuals), and also at the level of training needs of judges operating in competition field through the Final Report made by the Commission in 2016. For both the first and second hypotheses, quantitative data will be derived from the Bertelsmann Stiftung's Transformation Index (BTI) reports that are made for each country every two years; specifically, for the efficiency of National Courts the research will rely also on the annual EU Justice Scoreboards survey. Finally, regarding the third hypothesis, the principal indicator will be the activeness of the ECN in delivering instructions and directions to NCAs, and the degree of responsiveness of the NCAs. In order to understand it, the data will be taken by the 2013 Commission Report on ECN after 10 years from its application, coordinated with annual reports by NCAs, in order to see the level of intertwining of the national bodies with the ECN.

2. THE EU'S COMPETITION LAW REGIME

2.1 EU Competition Law and the Treaty of Rome

2.1.1 Philosophical strands of thought

Competition law has been present in the European integration process since the beginning. However, it is possible to look for the origins of the policy field in documents and practices that pre-date the Treaty of Rome and the birth of the European Community. Indeed, multiple sources have influenced the discourse that were present during the drafting of the Treaty, in which competition law has such an important role for the objectives of the community.

As first step, it must be recognized a role to the national pre-war system of competition management, especially in those states that presented developed and internationally significant industries and markets. In this sense, it must be accorded to Germany and France a pivotal role in shaping the future discourse about the internal market and its integrity (Sauter, 2016).

Secondly, in the same path, a great influence has come from the German ordoliberal school of law and economics, that since 1930's advocated for free competition as a tool for a functioning market and society. According to ordo liberalism, the state has the task to create a functional and proper legal environment for the market through a strict control of competition, in order to avoid monopoly, oligopoly, and any kind of heavy concentrations. In this sense, ordoliberals attach to the state a much more important role that neoliberals, and this can also be seen in the application of ordoliberal thought to the implementation of a social market economy in Germany after WWII (Sauter, 2016).

In addition, a very important contribution came from Antitrust laws from USA, especially enshrined in 1890 Sherman act. This document is particularly important, given the structures it has and the main objective it displays, that have served as framework for the European drafters for the general understanding of what would be the goals of EU competition law. Quoting the US Supreme Courts words:

"The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct, which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." (*Spectrum Sports, Inc. v. McQuillan*, 1993, p. 447-458)[1]

In this sense, the act already presented the main targets of general competition policy in the EU, therefore anticompetitive agreements and attempts of monopolizations affecting fair

[1] US Supreme Court affirmed the principle for which monopolization cannot be proved by the simple showing of unfair or predatory conduct. The effective monopolization should be demonstrated factually.

competition. In the same document, the relevant authority was entrusted to issue acts prohibiting certain conducts, and private parties to go before court in order to recover damages created by anticompetitive behaviors.

Lastly, it should be reminded the groundbreaking role of the ECSC treaty of 1951, in which the founders Member States moved the first steps toward integration and the internal market.

2.1.2 The ECSC example

The ECSC Treaty, signed in 1951 and adopted in 1952, set the stage for the beginning of the European integration process. The primary aim of the Treaty was to pool together the dominant war industries in Europe, in order to avoid belligerence through a functional integration, that would have permitted a safe and secure environment in Europe. However, together with the main goal, the Treaty introduced also the instruments that were needed to obtain prosperity and peace, that is the dissolution and destruction of the combination of national industrial cartels, especially in the steel and coal sectors (Sauter, 2016).

The framework produced would be the pathway on which the Treaty of Rome would build the next competition framework. For the sake of this document, special importance is the analysis of the articles 65 and 66 of the ECSC Treaty that give an overview of the competition mechanism envisaged by the community. While the first is related to the prohibition of cartels mainly, the second one introduced the prohibition for mergers and a slightly reference to a prohibition of abuse of dominant position. Always in article 66, it is possible to foresee a mention to antidumping measures, so aimed at avoiding undertakings being capable to sell goods to a lower price that the market price in the European market environment (Sauter, 2016).

Article 65 encompassed the prohibition for agreements intended to:

"(a) to fix or determine prices;

(b) to restrict or control production, technical development or investment;

(c) to share markets, products, customers or sources of supply." (European Coal and Steel Community, 1951)

The high Authority, the predecessor of the European Commission, had the power to authorize specialization agreements or joint-buying or joint-selling agreements related to specific products, or products analogous to the ones specified in the Article, given that this authorization was conditional and limited in time.

Article 66 stipulated the obligation of a prior authorization by the High Authority for any intended concentration, whether it was about mergers, acquisition of shares or parts of the assets, loan or contracts. The High Authority had to assess the possibility to grant the authorization according to these characteristics:

"- to determine prices, to control or restrict production or distribution or to hinder effective competition in a substantial part of the market for those products; or

- to evade the rules of competition instituted under this Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets." (European Coal and Steel Community, 1951)

Also, in this case, the High Authority had again authorization powers in defining which type of concentrations and mergers could be accepted. However, in article 66, the Treaty conferred to the High Authority also the power to fine undertakings, either because they concentrate or merge distorting competition, or because after an authorization to merge or concentrate, it was found out that the concentration authorized still distorts competition. In addition, whenever a party did not follow the rules and decision set out by the Authority, the same Authority could decide to fine and suspend the activity. Any party concerned could decide to refer to the Court (Sauter, 2016).

2.1.3 The Spaak Report and the drafting process

The process of European integration continued and intensified after the creation of the ECSC. In 1955, in Messina, ministers of the six founders States met for a conference that had the aim of setting out the main objectives of the new European Economic Community (EEC). As a further step, the ministries named a new intergovernmental committee chaired by the foreign ministry of Belgium, Spaak, that together with experts, had to work for a report defining the broad outline of the political objectives set out by the ministries in Messina (Sauter, 2016).

Among the different aspects of the task, the committee was also entrusted to identify the ways in which the new community would have attained the beforementioned objectives. In doing so, the final report, issued on 21st April 1956, was composed of three parts:

- Common market;
- Euratom;
- Most urgent areas of action.

In the first chapter, title III clarified the rules about competition. It is interesting to see that the main sketched reported by the intergovernmental committee would have been the exact base for the future instruments used by the EC.

The first part is related to anti-dumping measures (then inserted in article 91 of the Treaty of Rome), and the report recognized to states the freedom of applying national legislations during the transitional period[2]. After that, if the legislation reform had not been adequately carried out, the European Commission, the body who replaced the High Authority, or any other State, could have brought the case before the Court (Spaak Report, 1956, 13-14).

In second place, the report mentioned measures against monopolies (then inserted in article 85 and 86 of the Treaty of Rome), that were limited to the ones prescribed by the Treaty, and mainly against cartels and monopolies "using discriminatory practices, dividing markets, limiting production and controlling the market for a particular product" (Spaak Report, 1956, 13-14). The States, the enterprises and the Intergovernmental Committee itself could complain against the European Commission against forms of distortion of competition. The Commission had the duty to find a compromise solution in a limited time. If this will not happen, then the case could be brought before the Court (Spaak Report, 1956, 13-14).

As third part, the report touched also national resources under the form of State aid (then inserted in articles 92-93-94 of the Treaty of Rome). The report prohibited any kind of State aid, whatever was the form, but recognized the possibility for some exceptions:

- aid for social policy to disinterested institutions and individuals;
- aid for the development of certain regions (Spaak Report, 1956, 13-14).

Furthermore, the report recognized that during transitional period other state aid could be accepted. The Commission, after having consulted the Council, had to evaluate compatibility of the different forms of State aid, and it should specify conditions and time period for the application of the State aid inside its decision (Spaak Report, 1956, 13-14).

What is interested is that rules about mergers were completely missing, and they would not be reintroduced until 1980's. On the contrary, the role of the European Commission had already been defined as essential in the effective implementation of the common market.

[2] This transitional period will last 12 years, divided into three stages of four years each; the length of each stage may be altered in accordance with the provisions set out in the Treaty of Rome 1957.

2.2 Centralized Enforcement of Competition Rules under Regulation 17/62

2.2.1 Article 87 of the Treaty of Rome

As explained in the previous paragraph, the aim of the Treaty of Rome was in part different from that of the ECSC, since it did not aim at pooling together specific resources, but it aimed at creating a common market, thus abolishing barriers, and the main instruments that permit the maintenance of the new economic environment were competition rules. So, in this sense, competition rules were the tools for a greater objective. The main rules defined in the Spaak Report were then transformed in articles inserted in the final text of the Treaty of Rome, as outlined above. Always in the Treaty, Article 87 stated that:

> *"Within three years of the entry into force of this Treaty the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly [European Parliament], adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86. If such provisions have not been adopted within the period mentioned, they shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the Assembly [European Parliament]"* (Treaty of Rome, 1957).

The Treaty itself provided for the creation of a system of implementation and application of competition rules, that would have been addressed through the issuing of Regulation 17/62.

As the article said, the regulation had to do with the implementation of article 85 and 86, related to prohibition of cartels and monopolies. However, the complex structures that the Treaty gave to the prohibitions written in it did not match the poor competence of national authorities in dealing with such complicated matters. More specifically, the articles set out:

- the unlawfulness of anticompetitive agreements;
- the invalidity of those agreements;
- at the same time, the four conditions permitting to those agreements to be acceptable, given their efficient effect on general market.

Regulation 17/62 tried to solve this puzzle introducing a centralized enforcement of the rules prescribed in the Treaty, whose power was conferred in the hand of just one institution: the European Commission.

2.2.2 The notification and authorization system

In Regulation 17/62, a centralized notification system was implemented, which obliged undertakings to notify any measure to the Commission, in order to have authorization to apply

agreements under the conditions set out in the Treaty. Thus, under article 9(1) of the Regulation 17/62, the Commission was the only able to grant exemption through the application of article 81(3) of the Treaty, and although NCAs and NCs could potentially apply article 81(1), they were *de facto* restrained by the obligation to stay, if a firm notifies the agreement to the Commission. In the same sense, NCAs and NCs could not apply stricter national laws to prohibit agreements that were exempted by the Commission under article 81(3) (Monti, 2007).

The Commission had the unique power to declare the compatibility or incompatibility of an agreement before the communitarian law. The reasoning behind the choice to concentrate decisional and revisional power in the European Commission was the uniformity desire in the application of communitarian law. Especially during the first years of the EC, uniform application of the law, and strict compliance were required to build the basis of the internal market, the main objective of the EC. As then restated by the Court of Justice, some years after the adoption of the Treaty of Rome, in the case *Consten v Grundig case* of 1966:

> *"an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objections of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between States, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers. Article 85(1) [now Article 101(1) TFEU] is designed to pursue this aim, even in the case of agreements between undertakings placed at different levels in the economic process*" (*Établissements Consten S.à.R.L. and Grundig Verkaufs- GmbH v Commission*, 1966, 340).

The importance attached to the uniform application, makes light on the decision to devise a centralized enforcement of competition law. However, this system was far from being efficient, given the fact that national authorities were not enough expert to deal with competition matters without the help of the Commission, and at the same time, undertakings were obliged to notify any measure they want in order to make them authorizable, since the Commission is the only body able to rule on the compatibility of measures with the internal market (Monti, 2007).

The central position of the Commission was given not only for antitrust rules, thus implementing article 81 and 82 EC , but, also State aid compatibility assessment was put under the lenses of the Commission scrutiny, and in 1989, merger control was added to the long list of exclusive competences of the body (Sauter, 2016).

During the years, the Commission started to drown under thousands of notifications, often of innocuous agreements, that take time from the important investigation procedures for what concerns high concentrations, horizontal agreements and abuse of dominant positions. This had two main consequences: first, competition enforcement was not efficient; second, the already mentioned priorities in the Commission agenda were set aside by regular and innocuous administrative burden. For this reason, the Commission started to introduce new ways of reducing its workload (Monti, 2007).

2.2.3 De minimis, Confort letters, Block exemptions

In 1969, during the *Völk v Vervaecke* case, the Court of Justice introduced *de minimis* principle, stating that an agreement falls out of the scope of the competition rules set out in the Treaty, when it does not significantly affect the competition in the common market. In order to understand the distortion of competition, the Court stated that the authority must rely on objective and factual criteria, such as the market share of the undertakings under analysis (Monti, 2007).

Indeed, the case was about an exclusive distribution agreement between the owner of a washing machines production activity, and a Belgian distributor of household electrical appliances. The market share of both the distributor and the owner were considered not enough significant to create a dangerous distortion of competition. According to the Court, the level of 5% of market share was the threshold for being considered under the *de minimis* principle, together with a turnover threshold of 20 million accounting units. Following this Court interpretation of the Treaty, the Commission issued a Notice in order to clearly establish which are the agreements falling under de minimis principle (Jones and Sufrin, 2008).

However, the number of individual cases brought to the Commission did not diminish, and it was not possible to deal with each of them through a formal individual decision, as the notification and the authorization system ruled. Indeed, the Commission started to use individual informal clearances, called comfort letters, which are non-binding documents that authorized the agreement under the communitarian competition rules. Notwithstanding, the efficiency of the method put in place, the informal documents had no legal nature, and they could not be challenged before the Court, furthermore, they did not have the obligation of publication on the official journal. In this way, the commission, on one hand, it partly solved the overload of work, but on the other hand, gave up on important procedural guarantees (Monti, 2007). In any case, during “Perfume cases” of 1980s, the Court confirmed the practice, underlining the fact that comfort letters might be only element of facts before a Court, and not

legal binding documents (Procureur de la République vs Bruno Giry and Guerlain S.A. and others, 1980).

As third step to alleviate the deadlock in the Commission, the Council issued Regulation 19/65, and then Regulation 1534/91, introducing a new category of measures that could be automatically validate, under the Block Exemptions regulations. Based on article 87 EEC, the Council, considering the proposal of the Commission, issued rules for exemption for standard types of agreements:

- Vertical agreements: in the field of exclusive distribution or purchasing;
- Sectoral agreements: in the field of motor vehicle distribution and insurance;
- Horizontal agreements: in the field of specialization and research and development agreements (Sauter, 2016).

The measures, then renamed by an early critic of this method, Valentine Korah, the "straitjacket effect", had particular and strict application rules, for which undertakings willing to adopts agreements under the Block Exemptions had to stick to one model and follow it strictly, they could not apply two of the models proposed by the regulations, given the fact that the three options are mutually exclusive. It was so highly specific and restrictive, that the commission in its 1999 White paper (discussed below) would use the definition of "straitjacket effect" used years before (Sauter, 2016).

2.3 The Eastern Enlargement and Pre-Accession Compliance

2.3.1 The impact of Enlargement on EU Competition Law

After the fall of the Berlin wall, states that had previously been under socialist control expressed the will to join the EC. The Community was ready to accept this request, also in the light of enhancing its influence on the continent and following the democratization principle inside its funding values. However, accession for ex socialist states was not a simple process, since the beginning. Indeed, their legacies coming from the past still retained much weigh in defining a proper strategy to enter in the EC. Specifically, the authoritarian form of government, together with the a controlled economy made difficult to hypothesize a smooth accession, indeed, those states had to completely change their constitutional, institutional and economic basis (Cseres, 2010).

The request for accession by these states had special significance if correlated to the modernization of communitarian competition law that was envisaged in the previous years by the Commission and the other communitarian institutions. Especially, in the light of the future

accession of these controlled economies, Commission had to rethink its strategy in dealing with competition matters. The simple transposition of rules to establish a formal market economy was not enough, if not matched by a stable enforcement system at national level. If in the past, the Commission could rely also on past national instruments to permit a basic level for the respect of competition rules in the Member states, in this case, it was not possible (Cseres, 2010).

Therefore, it was evident how the eastern enlargement functioned as a prompt to the last steps of the modernization process of communitarian competition rules. In the same way, on the other hand, the modernization process of competition policy had a great effect on the national systems of these states, that passed from a state controlled economy, where prices were fixed and market signals are either ignored or repressed, to a market economy where strict rules had to be applied, and institutions had to be created in order to maintain the integrity of the market (Cseres, 2010).

In this sense, it is possible to affirm that there was a mutual effect of both the phenomena, the eastern enlargement gave the occasion to finalize changes that were already in the plans of the Commission, and the modernization process provide the indications to the accessing states to match the requirements of the EC.

For this reason, it is interesting to analyze the entire path of the accession period, in order to understand the points of linkage between the two process, and furthermore, to understand how much the accession and transposition period had managed to create a stable basis for the implementation of the new decentralized enforcement method experimented by the Commission.

2.3.2 Europe Agreements

As already mentioned, in the aftermath of the fall of the communist regimes in Europe, the ex-socialist states asked to enter in the EC, however, it was necessary to define a good strategy for the accession, in order to tackle the main differences among the already Member States, and the ones aspiring to become members.

In light of this necessity, the 1993 Copenhagen European Council laid out the famous "Copenhagen criteria", a set of principles that would have regulated the entrance of future members, but that will also remain as a version of the principles on which the Union will be founded. More specifically, they were organized in four criteria:

- Geographic criterion – countries applying for accession should be European countries;

- Political criteria – democracy, rule of law, human rights, respect and protection of minorities;
- Economic criterion – functioning market economy, capable to cope with pressure and competitiveness in the internal market;
- Legislative criterion – incorporation of the acquis Communautaire and alignment of national legislation to relevant EU legislative documents (Cseres, 2014).

The Copenhagen European Council gave also the main lines of action to develop the process of accession, that was mainly brought forwards through bilateral agreements between the EC and the accessing States, and whose documents, Europe Agreements, set out the legal requirements asked to the several applicant States (Gerardin and Henry, 2004).

State	**Date of Entry into force of Europe Agreement**
Czech Republic	February 1995
Estonia	February 1998
Hungary	February 1994
Latvia	February 1998
Lithuania	February 1998
Poland	February 1994
Slovakia	February 1995
Romania	February 1995
Bulgaria	February 1995

Table 1: Source DG Enlargement Website

The Europe Agreements were more specific documents that portrayed legal and institutional basis aligning national competition legislation with the communitarian requests. They were especially important for the analysis of competition policy field, since they focused precisely on the transposition of the competition laws into national legal systems. In addition, these bilateral agreements called also for the effective enforcement of those rules on competition, and to achieve this goal, they required to accessing state to build an efficient administrative capacity through well-functioning competition authorities (Gerardin and Henry, 2004).

In other words, Europe Agreements contained a more specific requests in respect to the criteria set out in the Copenhagen European Council. And in order to comply with those criteria, the agreements inserted also a reproduction of the relevant provisions of the Treaty regarding competition law, especially regarding restrictive agreements, abuse of dominant position and state aid. Indeed, following the words of the Explanatory Memorandum to the Europe

Agreements competition provisions are "one of the basic points of the Europe Agreements between the European Communities [and the other parties]" given the fact that they are a "prerequisite for the smooth development of trade relations between the two parties" (European Commission, 1994 and 1995).

Inserting Treaty provisions was functional to another of the objective of the Europe Agreements, that is the convergence of national laws towards EC legislation. However, critics had been divided on the interpretation of the word "convergence" and its scope. Indeed, some of them consider convergence as bringing into harmony the national law with the EC legislation; however, others have a maximalist conception of convergence that consider it as sticking to the pure transposition of the legal acts of the Community. In this sense, the Commission has preferred the second interpretation, also in the light of the upcoming modernization of competition policy field, and its decentralized enforcement method, in which a strict adherence to the EC legislation is needed to ensure uniformity and coherence (Gerardin and Henry, 2004).

2.3.3 The 1995 Commission White Paper

In the same spirit of the maximalist conception of convergence, the Commission enhanced its efforts to help candidate states to align to competition rules and it issued a White Paper in 1995. The main goal of the document was to provide assistance to accessing states in order to demonstrate more easily that they had laid down competition laws mirroring the acquis Communautaire, and in addition, that they had been set up competent competition authorities capable of ensuring a credible enforcement record.

Therefore, also in the 1995 White Paper, the guidance was mainly focused on legislation essential for the functioning of the internal market and the acquis Communautaire. It also covered a description of administrative and organizational structures for the implementation and enforcement of the EC legislation.

"[I]t is important though to stress that the exercise is not confined to the sole adoption of laws and regulations or structure building. There must be a continued effort to ensure enforcement of the policy and to make the policy widely known and accepted by all economic agents involved i.e. by governments, companies and by the workforce. The law must not only exist, but it must also be applied and -above all- be expected to be applied. Economic agents must take their decisions under the assumption that the policy will be applied" (European Commission, 1995).

Although the recommendations issued by the document were only political, the choice not to follow them by the candidate States could have strong repercussions, since the Commission had stated clearly that the content of the White Paper was necessary and conditional for the finalization of the accession treaties. Indeed, from 1997, the Commission annually published regular reports to evaluate the progress in the convergence of candidate states toward accession in the European Union. In the 2003 Report the Commission affirmed that the candidate countries had quite successfully adapted their national laws to the EC legislation in the field of competition law, but the Commission also underlined the fact that for effective enforcement there was still need for guidance. In light of these comments, the Commission considered ready to accede only some countries of the CEECs group in 2004, precisely Poland, Hungary, Czech Republic, Slovakia, Estonia, Lithuania and Latvia, while Romania and Bulgaria should wait until 2007, to become EU Member States (Gerardin and Henry, 2004).

2.4 Regulation 1/2003 and the Decentralization of Enforcement

2.4.1 Earliest traits of Modernization

As anticipated in the previous paragraphs, due to the complex structure conceived by the Treaty of Rome, and the incapacity of national competition authorities to deal with competition matters, the Commission has taken exclusive power to prohibit or permit agreements, mergers or State aids, under a centralized notification and authorization system implemented by Regulation 17/62.

However, since the beginning several criticisms can be highlighted for what concern this method of enforcement. First of all, as already explained, the centralization of authorization mechanism made the Commission blocked by a tremendous number of notifications, that did not permit an efficient dealing with more important cases. A second point, related to the first, is the fact that given the mechanism put in place by the Regulation, the Commission, and especially the Directorate General for Competition acted as a reactionary body that in order to operate has to be provided with a notification by any individual case. Given this reactionary nature of the mechanism, the Commission did not act as its counterpart in the US, where they had the possibility even to revise antitrust doctrines in 1980s and 1990s (European Parliament Directorate General for Internal Policies, 2016).

These reasons brought the Commission to search for solutions, and it was evident that making the NCAs and NCs able to investigate by themselves was a good starting point. Therefore, the Commission took the occasion of the 1973 case *BRT v. Sabam* (*Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior*, 1974), and also on the following case in 1992 *Automec II* (*Automec Srl v. Commission*, 1992), where

the Court of Justice affirmed the direct applicability of article 81 and 82 EC (now 101 and 102 TFEU), in order to review its interpretation of the article 87 EC where was assigned to the Commission itself the exclusive competence for prohibiting or authorizing agreements. In two notices issued in 1993 (European Commission, 6-12) and 1997 (European Commission, 3-11), the commission encouraged the enforcement of competition rules by NCAs and NCs. However, the experiment did not give the right results, due to the fact that Regulation 17/62, still in force, relieved NCAs and NCs by any investigation right, when a proceeding was open before the Commission. Therefore, this decentralization attempt was not successful, except for some specific cases with the German and French authorities (European Parliament Directorate General for Internal Policies, 2016).

2.4.2 The 1999 European Commission White Paper

After the first moves to a new enforcement system, a more radical step was set out by the Commission in 1999, issuing a White paper. The aims of the document were to explain the reasons for the reform of the competition policy field and to propose the main alternative enforcement systems that could be implemented. Among these aims, the Commission underlined the necessity to strengthen the uniformity and the consistency of the competition rules, also in the light of the then forthcoming eastern enlargement (Sauter, 2016).

In this sense, it is useful to remind, that, as explained before, since the 1990s ex-socialist states started their applications to become new members of the EU, and given their past legacies and their cultural characteristics, the Commission was justly controlling that those new members could not endanger the integrity of the common market. An effective enforcement system would have been a right instrument also to shape the economies and the institutions of those states, in a way that they would be able to cope with the competitive pressure inside the EC, without putting too much burden on possible *ex post* controls or proceedings by the Commission.

Going further into details, the 1999 White Paper sketched four alternatives to a reform of the competition policy:

1. Interpretation of article 81(1) EEC (now 101(1) TFEU) as a rule of reason, meaning that in case of agreements with net benefit, they will be automatically considered compatible without further need of evaluation by the Commission;
2. Decentralization of the evaluation and authorization system also to national competition authorities, through a system based on the gravity of the measure concerned;
3. Widening of the exemption from notification for cases under article 4(2) of the Regulation 17/62;

4. Simplification of administrative procedures, such as the translation of documents or the communication obligations to the Advisory Committee[3] (Sauter, 2016).

However, none of these alternatives was considered in the following reform of the competition policy field of the EC, since the Commission especially highlight the danger of non-uniformity in the application of competition law, this risk was considered much greater than the risk of the incoherent treatment of complaints, as DG Competition Director General Claus Dieter Ehlermann stated in the comments to the White Paper (Ehlermann, 2000). The objective of the commission was:

> *"The Commission considers that, in seeking such a balance and in order to accomplish its institutional mission, it must have a procedural framework that enables it, in the first place, to refocus its activities on combating the most serious restrictions of competition and, secondly, to allow decentralized application of the Community competition rules while at the same time maintaining consistency in competition policy throughout the Community. Lastly, the Commission considers that the procedural framework should ease the administrative constraints on undertakings while at the same time providing them with sufficient legal certainty"* (European Commission, 1999).

In this light, the White Paper decided to give up the previous alternatives for another one based on the principle of a legal exception system. This proposal put forward to introduce a reading of article 81(3) EC (now 101(3) TFEU) that provide for a direct applicable legal exception, also relying on the interpretation given by the Commission and the Court cases given since the 1960s. In advancing this change, the Commission highlighted three main aspects:

- Ending the notification and authorization system;
- Introducing a decentralized enforcement system of competition rules;
- Intensifying ex post control (Monti, 2007).

Analyzing the different points, the direct applicability of article 81(3) EC was necessary to enhance the role of NCAs and NCs in the enforcement of competition law, and at the same time increasing the possibility of the Commission to focus just on important cases. In the same sense, abolishing the notification procedure was considered the natural continuation of the Commission strategy to alleviate the backlog of cases and redistribute its resources (Monti, 2007)

[3] Advisory Committee with Representatives of Member States.

Referring to the first two points, the White Paper analyzed the possible drawbacks in terms of coherency, in order to develop an efficient alternative. In this sense, it stressed the necessity of coherence between the concurrence jurisdiction of the new decentralized enforcement system, and stressing the principle of primacy of EU law, it differentiated between the central role of the Commission and the decentralized powers of the national competition authorities and national courts, in details, the fact that national courts and national competition authorities cannot produce decisions contrasting the decision of the Commission, therefore, it maintained its central role to promote new points of law or to avoid the risk of conflicting decisions at national level. The White Paper also envisaged a possible network among national authorities guided by the Commission that retained a central role, issuing notices, guidelines and communications to indicate the main signals for the development of competition rules to the national level. In the third point, the Commission introduced the possibility of further powers, thus, the possibility to start investigations based on complaints or its own initiative (Sauter, 2016).

2.4.3 Regulation and its three aims

After the evaluation of the 1999 White Paper, having received the responses by European institutions, states, companies and lawyers, mainly positive ones, the Commission issued Regulation 1/2003, adopted in December 2002 and entered into force on 1st May 2004, the same day in which the ten states of the fifth enlargement of the EC became full members. It is worth to remind that in this enlargement involved states that were ex-socialist states (Sauter, 2016).

Regulation 1/2003 replaced the centralized enforcement of competition law given by Regulation 17/62, in the spirit of the modernization brought by the Commission. The document disposed for the direct application of article 81(3) EC about the powers previously exercised entirely by the Commission, and at the same time, it provided that agreements enforceable under article 81(3) EC are enforceable without prior decision by the Commission, in this sense, the Regulation reversed the burden of proof for the compatibility of these agreements on the undertakings, that had a new great responsibility.

This Regulation showed three aspects that should be necessary to mention and to analyze:

- Empowerment of the national level of enforcement of competition rules;
- Central role of the Commission;
- Coordination between the EU level and the national level (Sauter, 2016).

The first aspect was the innovative part of the legislation, given that the previously exclusive competence of the Commission now was shared with national public authorities. Specifically,

articles 5 and 6 stated that NCAs and NCs are empowered to apply articles 81 and 82 EC (now 101 and 102 TFEU), and consequently they had the power to investigate and declare the compatibility of agreements , and all the actions correlated, such as, requiring infringements to be ended, ordering interim measures, accepting commitments and to impose fines or period penalty payments. However, if the Regulation clearly stated these powers for NCAs, for NCs was valid the general investigation and decisional power, that entrusted these authorities with a general procedural protection of the rights defined by the articles in question, given their direct applicability (Sauter, 2016).

Furthermore, article 3(1) specified that NCAs and NCs must apply communitarian competition law together with national legislation, however, in paragraph 2 the regulation specified that national laws must not be more restrictive than communitarian law for what concerns practices under article 81 and 82 EC. In this sense, national laws that prescribed stricter standard for what concerns unilateral conduct and with a different objective from the one inside article 81 and 82 EC are allowed[4]. The reasoning behind this provision was the necessity to always assure a similar standard of assessment and to promote convergence. The third paragraph went even further, allowing national laws that prohibit "unfair trading practices" when pursuing a different objective form the ones inherent in article 81 and 82 EC. However, it is a difficult legal exercise to define which objective lies behind a measure, and if it is effectively different from general antitrust objectives (Fox and Gerard, 2017, 11).

The regulation also redefined the powers of the Commission, which still retained great powers, and in some cases, it enlarges its scope of control on NCAs and NCs. In this sense, in article 7 the document gave clear powers to find and terminate infringements. Investigation powers can be initiated by the Commission through a complaint or by its own initiative, regardless if other NCAs took or decided on the case. Linked to the power to investigate, there was also the power to impose fines, which have been increased to 1% of the undertaking annual turnover. The Commission under this article could also oblige companies to sell off part of their business because of a found infringements (divestiture power). Under article 8 the Commission was capable also to impose interim measures, and if companies infringe these interim measures the Commission could impose fines up to 5% of the company annual turnover. With article 9 it could adopt commitment decisions, a power that was related to the experienced gained under the Merger Regulation of 1989. Article 10, instead, provided the Commission with an exclusive power that was to find inapplicability, or in other terms to give a positive declaration of legality

[4] Based on German requests to maintain national tradition of stricter standards for what concerns unilateral conducts.

of a practice under scrutiny. In sum, the Commission still retained much of its autonomy, and it had the capacity to still intervene massively regardless of the actions of NCAs and NCs. In this light, it is worth mentioning the fact that decentralized enforcement was limited to antitrust measures, while State aid assessment was still an exclusive competence of the Commission and Mergers in the "EU dimension"[5] are under the scrutiny of the Commission solely (Sauter, 2016).

The third relevant section was about the necessary coordination among the EU level and the national level. The changes introduced by the Regulation needed the building of new way of coordination between the authorities, given the fact that the parallel competences could create problems of jurisdiction or uniformity among the decisions delivered by the Commission, the NCAs and NCs. In this sense, in article 11, the Regulation introduced the mutual duty to inform, so both the Commission, the NACs and the NCs have to communicate with each other. The Commission must send relevant documents to NCAs before taking any final decision, and the NCAs must inform EC of any investigation and, then send to the Commission any information about the case thirty days before taking a final decision on the case. In paragraph 3, the Regulation restated the principle already inserted in Regulation 17/62 article 9(3), for which the Commission had the priority in dealing with cases, so that NCAs and NCs have to step back when the Commission declares to take on the case. In this way the Regulation 1/2003 assured uniformity and coherence of the competition law enforcement. Furthermore, in article 16 it was stated that NCAs and NCs cannot take decisions in conflict with those of the Commission, thus intensifying the Commission control on the decisional freedom and the interpretation of competition law by the NCAs and NCs (Sauter, 2016). Always in the same light, in article 15, the Regulation states in paragraph 1 that the Commission should send information or provide opinion when NCs consider issues of EU competition law, thus providing support and help in the interpretation and application of law. In paragraph 2, it was up to the NCs to transmit to the Commission a copy of their final decision document to the Commission, attributing to the Commission a monitoring function over the NCs. Lastly, in paragraph 3, NCAs and the Commission (*amicus curiae*) can intervene in a case delivering opinions or interpretations of the law. The commission can intervene on its own motion, or under request of the parties or the NC itself, although its opinions are not binding, they may have a relevant impact on the NC

[5] The Merger Regulation provides that mergers with an EU dimension, thus under the competence of the Commission, are those measures that display certain turnover thresholds, that are jurisdictional in nature, this means that the analysis does not take into account other substantive competition issues, the nationality of the parties, the country where the transaction took place and the relevant law applicable to the transaction. There are two types of thresholds, the original one dating back the original text of the Regulation in 1989, and the alternative ones, dating back to an amendment done in the 1990s (Fox and Gerard, 2017, 235-236).

decision, given the fact that disregarding Commission opinion may create the basis for an infringement procedure (Adinolfi, 2015, 79-80).

After the brief overview on the main elements of the new Regulation, it is worth to highlight some characteristics that make this document important for the analysis of this thesis. In first place, the Regulation has general application, furthermore it is binding in its entirety and it is also directly applicable in all Member States. Therefore, form 1st May 2004, all the Members, had to apply the provisions of the Regulation, otherwise they would have incurred in proceeding for infringement under article 266 EEC, and therefore, they could have been considered liable under the Francovich doctrine (*Francovich v. Italy*, 1991).[6] From these premises, two main requirements can be underlined:

- NCAs and NCs need to be able to exercise the powers prescribed to them in the Regulation;
- NCAs and NCs must be willing to cooperate together and with the Commission (Emmert, 2004).

However, in the same day, 1st May 2004, ten new Member States entered the EC, 8 of them with a socialist past, having adopted the entire acquis Communautaire in just few years, having also built an entire institutional apparatus from scratch, given their complete unfamiliarity with all what concerns handling of competition matters. The CEECs, differently from the other Members States, are especially relevant in the analysis of the success of the Regulation 1/2003 and the decentralized enforcement system.

2.4.4 Notices on Cooperation with National Competition Authorities and National Courts

As outlined in the previous paragraph, Regulation 1/2003 gave little details on the new relationship between the Commission and the national authorities, both the NCAs and the NCS. Article 35 defined the duty for Members States to build NCAs, but it did not specify any characteristic for the institutional design, nor how they should be place in respect of the main EU institutions.

[6] Mr. Francovich, together with other employees, did not received the last salaries after the company where he worked went into liquidation. They filed for compensation under Directive 80/987, that required Member States to compensate in such cases. Given the inaction of Italy, the case went before the European Court. Although the vagueness of the Directive on the direct effect of its provisions, the Court ruled that the Member State was still obliged to act in light of Article 5 EC Treaty (now Article 10), therefore, the Court required to compensate individuals for any loss suffered due to the failure of a Member State to implement Community law. In this sense, the Court created the new notion of State liability and also the substantive rights for individuals in certain circumstances.

During the entire modernization process, the Commission had more than once tried to explain and guide the relationship between its role and the role of the national level, indeed, in 1997 issued a Notice on Cooperation between the Commission and the NCAs and the NCs, in which there were briefly sketched the position of the NCAs and the NCs in respect of the Commission.

Under the 1997 Notice, the framework envisaged by Regulation 17/62 did not permit the NCAs to investigate and decide on cases with a European effect, but just on national effects on competition, and also of cases of agreements that could not be exempted, in order to avoid the possible blocking of the Commission exemption assessment under article 81(3) EC. NCs are entrusted with the general protection of the Treaty rights, given the direct applicability of the articles on competition law. In this light, the relationship between the Commission and the NCs was framed in the general framework of the constant communication between national courts and the European Court, thanks to the preliminary rulings instrument (Emmert, 2004).

With the Regulation 1/2003 the Commission and the Council understood that given the new incumbents on the NCAs and the NCs, and the necessity to make the new decentralized system to work efficiently, also in the light of the accession of new members that did not have any expertise in dealing with these matters, they decided to create a new body specifically entrusted to bettering the communication and the cooperation between the NCAs and the Commission: the European Competition Network (hereafter ECN). Its importance was then confirmed in the 2004 Notice on Cooperation between the Commission within the network of National Competition Authorities.

The Notice introduced the new channel of communication between the Commission and the NCAs, and it also clarified its main objectives:

- To create a space for discussing and debating competition matters;
- To introduce an efficient framework for cooperation among the different bodies;
- To build and maintain uniformity and coherence in dealing with competition matters (European Commission, 2004).

Furthermore, the Notice introduced some detail on the case handling between the Commission and the NCAs, setting some criteria on which is the relevant authority in charge of the investigation and decision on specific cases:

- The authority opening a case *ex officio*;
- The authority receiving the complaint;
- The authority with a link between the infringement and the territory;

- Other criteria for the parallel action (European Commission, 2004).

In another Notice on Cooperation between the Commission and National courts, always of 2004, the Commission dealt more specifically with the relationship between national law application and the application of EU law. It recalls that NCs cannot accept agreements under national legislation, that in any case infringe article 81 EC (article 3 Regulation 1/2003). Furthermore, it highlighted the *amicus curiae* role of the Commission before NCs, both on its own initiative, and on request of the court (European Commission, 2004b).

Although not so specific and detailed, these documents gave great guidance on the national authorities, now entrusted with greater responsibilities. The same cannot be said for what concerns the guidance on the building of these institutions.

2.4.5 Rule Transposition

Given the previous analysis of the relevant legislative documents and provisions, it is worth to see how the new Member States have managed to include all these requirements in their legislations. Since the 1990s, the Europe Agreements and then the guidance of the Commission has managed the transitional period, that required the transposition of all the *acquis Communautaire*, included the provisions relevant for competition law. The process was guided by an incrementalistic approach; therefore, a multitude of changes and amendments have been followed from the first draft proposals of the CEECs during the negotiations with the EU institutions (Cseres, 2007).

However, the adoption of this new *corpus juris* was nothing but an easy thing for CEECs, given the fact that they had to completely depart from the way they thought the market and the economy, and to adapt to a new legal and political tradition. In this respect it is worth to remind that CEECs have experienced a central control of the economy, with artificially created monopolies, that falsified the consumer demand and the suppliers request, and that produced unsatisfaction of the demand and supply, without permitting the right equilibrium and the right rate of production, and therefore, also growth. Consequently, the efforts they had to do were very hard, especially in managing specific branched of competition law. Indeed, the inclusion of antitrust legislation about agreements and abuse of dominant positions was the first, but more fatigue was done to introduce merger control, and especially State aid control (Cseres, 2006).

Country	**Scope of Competition Act**
Czech Republic	Restrictive agreements, abuse of dominant position, concentration control
Estonia	Restrictive agreements, abuse of dominant

	position, concentration control, undertakings with special and exclusive rights, state aid, unfair competition
Hungary	Restrictive agreements, abuse of dominant position, concentration control, unfair competition, deception of consumers (unfair manipulation of consumer choice)
Latvia	Restrictive agreements, abuse of dominant position, concentration control, unfair competition
Lithuania	Restrictive agreements, abuse of dominant position, concentration control, unfair competition
Poland	Restrictive agreements, abuse of dominant position, concentration control, trade practices injuring collective interests of consumers (unfair contract terms, unfair misleading advertising, incomplete untruthful information)
Slovakia	Restrictive agreements, abuse of dominant position, concentration control, undertakings with special and exclusive rights
Slovenia	Restrictive agreements, abuse of dominant position, concentration control

Table 2: Source Cseres (2007)

In order to manage the transposition in the smoother way possible, and to accelerate the process of accession, the CEECs considered that a maximalist conception of harmonization was the right choice to pursue, therefore, the statutory requests were met through the strict mirroring of the communitarian competition rules inserted in the Treaty, without further adaptation. The introduction of the new provisions was made through a top-down approach, often conditioned by the fear of possible drawbacks on the process of accession, therefore, the national actors avoided any kind of stricter revision of the draft proposed to the national parliaments, believing that a faithful transposition would have been enough (Cseres, 2007).

However, it should be noted that while the competition ruled inserted in the Treaty were thought for the aim of correcting market failures, in already strong and stable market economies, the CEECs were in the process of building brand new markets in order to heal structural distortions, to improve efficiency and to promote foreign investments and growth.

Although the uncertainty and the vagueness of the parameters on the harmonization process, in all the CEECs the equivalents of article 81 and 82 EC and of the Merger Regulation existed, and their convergence with the communitarian rules was high. It must be said that CEECs relied on a stable and prepared basis for what concerns competition law, thanks also to a large body of case law and commentaries given by the European Court, this helped in reaching a good degree of convergence. Furthermore, it must be noted that the introduction of Regulation 1/2003 have pushed for further convergence, especially given the high burden of workload for their NCAs and NCS when it entered into force, in this sense, high convergence would have

permitted less controversies and higher possibility of adherence to the communitarian understanding of competition culture (Cseres, 2007).

Country	First Competition law legislation	Current Competition law
Czech Republic	1991: Act No 63/1991 Coll, on the Protection of Economic Competition, as amended by Act No 495/1992 Coll	Act No 143/2001 Coll of 4 April 2001 on the Protection of Competition and on Amendment to Certain Acts as amended by Act No 340/2004 Coll, of 4 May 2004, Act No 484/2004 Coll of 5 August 2004, Act No 127/2005 Coll of 22 February 2005 and Act No 361/2005 Coll of 19 August 2005 Act No 215/2004 Coll, amending certain relationships within the area of state aid, and altering the Act on the promotion of research and development
Estonia	1993: Competition Act of 16 June 1993	Competition Act Passed 5 June 2001 (RT1 I 2001, 56, 332), entered into force 1 October 2001, last amended 24 January 2007 entered into force 15 March 2007—RT I 2007, 13, 69
Hungary	1990: Act No LXXXVI of 1990 on the Prohibition of Unfair Market Practices	Act No LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices
Latvia	1991: Competition and Restriction of Monopolies Law	Competition Law of 4 October 2001 Law of 22 April 2004 "Amendments to the Competition Law" Law on Control of Aid for Commercial activity, adopted on 19 December 2002, in force starting from 1 January 2003
Lithuania	1992: Law on Competition	Law on competition 23 March 1999 No VIII-1099 Vilnius (as amended on 15 April 2004 No IX-2126) Law on Monitoring of State Aid to Undertakings of the Republic of Lithuania No VIII-1689
Poland	1990: Act of 24 February 1990 On Counteracting Monopolistic Practices and the Protection of Consumers' Interests	Act of 15 December 2000 on competition and consumer protection (Journal of Laws No 03.86.804) Act of 30 April 2004, on the procedural issues concerning public aid (Journal of laws 2004, No 123, item 1291)
Slovakia	1994: Act No 188/1994 Coll on the Protection of Economic Competition, as amended by Act No 240/1998 Coll and Act No 121/2000 Coll (the Czechoslovak Competition Act of 1991, Act No 63/1991 Coll on the Protection of Economic Competition, as amended by Act No 495/1992 Coll, became the first Competition Act in Slovakia after split in 1993)	Act No 136/2001 Coll on the Protection of Economic Competition and on Amendments and Supplements to Act of the Slovak National Council No 347/1990 Coll on Organization of Ministries and Other Central Bodies of State Administration of the Slovak Republic, as amended by Act No 465/2002 Coll, Act No 204/2004 Coll and Act No 68/2005 Coll State Aid Act No 231/1999 Coll, as amended by Act No 434/2001 Coll, Act No

		461/2002 Coll, Act No 203/2004 Coll, Act No 82/2005 Coll and Act No 518/2005 Coll
Slovenia	1993: Act No 65 Law on Competition Protection	Prevention of the Restriction of Competition Act, Official Gazette of the Republic of Slovenia, No 56/1999 Monitoring of State Aid Act 1999, the State Aid Control Act (OG, RS, No 1/2000)

Table 3: Source Cseres (2007)

After the exhaustive discussion on the rules transposition, and after having analyzed the correct inclusion of competition rules inside the CEECs legal systems, a natural question is whether these rules have been effectively implemented. According to the North (1997) conception of adaptive efficiency, institutions need gradual adoption of new norms for an effective and efficient implementation. On the contrary, the efforts made by CEECs in few years, and the poor guidance of the Commission on how to build the institutional set-up necessary for the application of these new rules can make the compliance doubtful for the CEECs.

3. ADMINISTRATIVE CAPACITY AFTER REGULATION 1/2003

3.1 National Competition Authorities Institutional Set-up

3.1.1 Theoretical traits of the Institutional Analysis

According to Stiglitz (2002), institutions are relevant also as indicators of the stage of development of an economy. More they are complex and interdependent, more the economy is at a later stage in the development scale. For the specific aim of this research, institutions became a relevant actor during the period of modernization of EU competition law. With the adoption of Regulation 1/2003, the enforcement by national actors became the most important aspect to watch for. The effectiveness of EU law enforcement had been defined in literature by "the degree to which both the formal transposition and the practical application of supranational measures at the national level correspond to the objectives specified in the European legislation" (Knill and Lenschow, 1998). In order to have viable level of enforcement by national institutions, the EU requested effective administrative organization especially to those states that were seeking accession. For this reason, during the Madrid European Council, it was introduced the notion of administrative capacity, later inserted also in Association Agreements, explained above. For administrative capacity was mainly devoted to the strengthening of the well-functioning of competition authorities, in order to put in place a good competition policy according to EU standards (Cseres, 2014).

Following the theories of North (1997), economic institutions have an influence on economic performances of a country, and in the same sense, the way in which an institutions is constructed and how it works can have a heavy impact on the economy of a country. For this research, the interest is on the effect the institutional set-up and the institutional performance have on what concerns compliance with EU competition law.

One of the main theoretical bases of the institutional analysis is the theory that explains the institutional change in a form of path dependency. Institutions are based on culture, values and traditions, and often, these characteristics are difficult to change overnight, therefore, institutions are deemed to follow a downstream path influenced by past choices, that makes difficult to deviate (Schimmelfennig and Sedelmeier, 2004).

As already said, CEECs came from a past of strong centralization of power. The institutional apparatus was shaped according to the needs of the past regimes, and it was in great difficulty during the change from an authoritarian society to a democratic one, that should answer to questions of independence and efficiency. Indeed, when putting in place a competition policy regime two main dimensions should be considered: the choices concerning the institutional set-

up, and the choices on how the main institutions exert their powers (implementation powers). The institutional set-up includes: (1) the position of the competition authority in relation to other public bodies; (2) the scope of the rules whose enforcement is attributed to the authority; and (3) the powers attributed to it (Buccirossi and Ciari,2018).

For this reason, this section will analyze the path of institution building, also highlighting the main characteristics that a competition authority and a national court entrusted with competition matters should have, according to theory. The aim is to discover the particular traits that differentiate CEECs path to the other members of the EU and make a comparison with EU core members like Germany, France and Italy. The main objective is to demonstrate that the guidance of EU institutions in the phase of institutional building and the presence of a forum for exchanges among NCAs made the difference.

3.1.2 Goals and Functions of the National Competition Authorities

When analyzing institutions, the first thing to put under the lenses is the goal for which the institution has been created for, useful also to understand how it has been structured. Indeed, for each goal, a peculiar structure must be thought in order to reach it effectively.

Given the recent history around NCAs, the topic of analyzing their goals has come under the light in the past near years. It was addressed for the first time in the OECD Competition committee in May 1992, and later on it appeared more frequently in the discussions regarding competition policy. In the 2003, the OECD secretariat issued a note that specified that "the basic objectives of competition authorities were to maintain and encourage the process of competition in order to promote efficient use of resources while protecting the freedom of economic action of various market participants" (OECD, 2003). However, in the note, the Secretariat also inserted other themes that are under the coverage of competition policy, such as: pluralism, de-centralisation of economic decision-making, preventing abuses of economic power, promoting small business, fairness and equity and other, socio-political values (Jenny, 2016).

In brief, it could be said that the main goal of competition policy is consumer welfare, together with other more general goals, that in most of the cases pertain to the economic sphere (e.g. promoting small business, fairness) and other that are more generally in the public interest (promotion of employment, national champions, economic stability) (Jenny, 2016). Many countries are starting to believe, that even though consumer welfare is an important aim to pursue, the goal of general economic growth should be taken into account by authorities when defining a country competition policy (International Competition Network, 2011).

When turning to the analysis of the goals of the NCAs more specifically, bearing in mind the broader conception of competition policy, most of the literature debate is about if NCAs should limit themselves to the competition enforcement, or they should widen their sphere to consumer protection.

For competition enforcement, it is meant the protection of threats to competition such as anticompetitive agreements, abusive conducts, mergers and indiscriminate state interventions (Buccirossi and Ciari 2018). While for consumer protection it is meant the risk for consumers to be cheated in situation of markets less than perfectly competitive (Hadfield et al. 1997, 368). Given the broad scope of competition enforcement, distortions of competition may easily affect several actors in the market, and especially consumers. For this reason, especially "when a market becomes more exposed to competition than it was previously (because of the removal of trade barriers or deregulation), the incentives of market participants may change in ways that raise consumer protection concerns" and that in some sectors consumers may have a difficult time coping with the complexities of competition (Fels and Ergas, 2014).

In this line, more and more NCAs unite the two functions under one single authority, in the interest of this research is to note both Italy, as a core Member of the EU, and Lithuania, as one of the new Members of the CEECs. The literature has highlighted the possible advantages for such a change in the structure of the NCAs. As first point, it should be noted that they have mutual benefits, indeed, "competition policy, by keeping markets effectively competitive, can reduce the work that needs to be done by consumer policy; consumer policy, by enhancing the ability of consumers to exercise choice, can help make markets more effectively competitive and force firms to compete on the merits, thereby supporting the ends of competition policy" (Fels and Ergas, 2014). In reason of this first point, the second follows underlining that they can be easily combined under the same portfolio of policy instruments. Furthermore, as a third advantage, it has always been pointed out the possible gains from the development of a cross-cut expertise across the two different branches, also in the light of a bigger understanding and visibility of both policies thanks to the integration process (Jenny, 2016).

3.1.3 Organization of the National Competition Authorities

The analysis of the goals and functions of NCAs is useful to the analysis of the organization of these institutions. The institutional set-up of a competition policy regime concerns many factors, among them, two are considered to have a special weight in this discourse: the scope and type of powers and the internal distribution of those powers.

First, for powers of NCAs it is meant those executive competences granted by the Regulation 1/2003 and clarified thanks to the following notices published by the Commission. More specifically, they can be divided in two big groups: the investigative powers and the adjudication powers.

Under the investigative powers, it is possible to find the ability to collect evidence of illegal conduct and data for the evaluation of the impact of that conduct on competition and the functioning of the market. Under the adjudication group, it is usually prescribed the possibility to impose remedies that restore competition and sanctions that have a deterrent effect on the conduct under analysis. These two groups are often accompanied by a third group that comprehends the ancillary powers, mostly the power to seal premises, to collect evidence stored in digital media, to impose sanctions against non-compliant firms and to take interim measures. They are usually a tool used to help in the carrying out of a function (Buccirossi and Ciari, 2018).

Here, a brief scheme of the main recognized powers to NCAs for what concerns the variables under analysis that are the CEECs.

	YES	**NO**	**Partial implementation**
Power to impose structural remedies	Czech Republic, Slovenia	Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia	
Power to order interim measures	Poland, Hungary, Czech Republic, Lithuania, Slovakia, Slovenia	Estonia	
Power to adopt commitments	Lithuania, Hungary, Slovenia, Czech Republic, Poland	Estonia, Slovakia	Latvia
Power to seal business premises, books	Lithuania, Hungary, Slovakia, Czech Republic, Poland	Slovenia	Latvia
Power to inspect private premises	Estonia, Hungary, Poland, Czech Republic, Slovakia, Slovenia		Lithuania
Calculation of max 10% of the undertaking's turnover	Czech Republic, Slovenia, Slovakia, Latvia, Lithuania, Hungary, Poland	Estonia	
Fines on association of undertakings	Hungary, Latvia, Lithuania	Estonia, Slovakia, Slovenia, Poland	Czech Republic

Informal guidance	Latvia, Poland, Slovenia	Czech Republic, Hungary, Estonia	Lithuania, Slovakia
Leniency	Czech Republic, Slovakia, Hungary, Poland, Latvia, Lithuania		Estonia, Slovenia

Table 4: 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

From the scheme, it is clear that CEECs countries have followed strictly the indications given to them by the EU, and the NCAs have a vast basket of powers at their disposal. Something peculiar in respect to the NCAs of these countries, is the fact that most of them, under the power to impose remedies and sanctions, they can also impose criminal sanctions.

	Remedies and Sanctions		**Leniency**
	Pecuniary Fines	**Criminal Sanctions**	
Czech Republic	Arts 22, 23 administrative pecuniary fines		Program concerning the application of leniency to imposition of fines pursuant to the Art 22 of the Act No 143/2001 Coll, on the Protection of Competition in the cases of prohibited agreements
Estonia	Arts 73–78	Art 79 imprisonment up to 3 years	Art 205 of the Criminal Procedure Act
Hungary	Arts 78–79	Art 14 Hungarian Criminal Code Imprisonment for bid-rigging up to	Art 78 (8) Notice No 3/ 2003, on the application of a leniency policy amended by Notice No 1/ 2006
Latvia	Arts 12, 14, 17		Regulations of the Cabinet of Ministers of 19.10.2004 No 862 'Procedure for the calculation of fines for violations referred to in Art 11 (1) and Art 13 of the Competition law', amended by Regulations

			of the Cabinet of Ministers of 25.04.2006 No 318
Lithuania	Arts 40–44		Art 43 Art 50 for infringements of Arts 81, 82 EC
Poland	Arts 106–108, 110–13 personal fines		Art 109
Slovakia	Art 38(1–10)	Art 149 Criminal Code Fines, up to two years imprisonment	Art 38(11–12)
Slovenia		Fines (corporate and individual) Arts 52–54	No leniency programme

Table 5: Source Cseres (2007)

Once powers of an NCA are defined and circumscribed, it is necessary to see how those powers are exercised, and usually two main model are identified: the prosecutorial and administrative model.

The prosecutorial model implies that the authority prosecutes the cases that it brings in an adversarial proceeding in a court room, in such model the court is the decision maker, not the authority. Instead, the administrative model provides that the competition authority is the body entrusted with the investigation and the adjudication powers, whose decisions can be appealable to either to a general or a specialized court. Inside the administrative model, there is an internal differentiation that is called the dual administrative model, in which the authority has two entities inside, one entrusted with the investigation, and the other with the adjudication, in this sense, slightly replicating the division of the prosecutorial model, but in an internal perspective (Buccirossi and Ciari, 2018).

Often, in the literature, it has been advanced the idea that the prosecutorial model is better suited to face competition matters. The advantages prescribed to it are diversified, among them it could be noted the fact that proceeding are denotated by impartiality, thanks to the separation of investigation and adjudication, in this way, avoiding the so called confirmation biased, that is defined as replicating the same opinions and behaviors because of predetermined ideas, in this case through the replication of the efforts of the investigation. Furthermore, the judicial decision process is often considered more transparent than the administrative process, and therefore, more credible. However, assuming a *per se* superiority of the prosecutorial model would mean neglecting several and important drawbacks of this model. More specifically, the main problem

of this model relies in the actors themselves, therefore the courts, that in most of the cases are not specialized unlike competition authorities, resulting in less capacity in understanding the economic issues raised by competition matters (Jenny, 2016).

Notwithstanding, this evident problem, the main positive feature of the separation between investigation and adjudication is a characteristic worth to be examined in more detail. In most of the cases, the investigation powers are pursued by an investigation service, that in case of a separation is a different team from the one that takes the decision, which could also be configurated in a single formation or a collegial one. In this sense, the separation has several benefits since it avoids mistake thanks to a double check of the matters in question. Furthermore, this double check can be even more improved in the case the decision-maker is independent of both the investigator and the defense, therefore, receiving double information. From the perspective of the quality of the decision process, an authority considered independent is respected more, and more legitimated in its decisions. Of course, it is necessary to refrain from possible drawbacks, such as the suboptimal use of resources or an excessive amount of information that would likely block or delay the decisional process (Jenny, 2016).

Following a brief overview of the decision-making process devised in CEECs NCAs.

Country	**Decision-making Process**
Czech Republic	Office: investigation, enforcement, adjudication Appeal to Chairman of the office
Estonia	Competition Board investigation Adjudication: court
Hungary	Competition Office investigation Competition Council adjudication
Lithuania	Administration of Competition Council: investigation Council: Adjudication, enforcement
Latvia	Council: investigation, enforcement, adjudication
Poland	Office: investigation, enforcement, adjudication
Slovakia	Antimonopoly Office investigation, enforcement adjudication
Slovenia	Council of the Office appellate to decisions of the Office

Table 6: Source Czeres (2007)

3.1.4 Independence and Efficiency of National Competition Authorities

During the transposition and implementation phases, as discussed in the previous chapter, and as demonstrated in the sections above, the NCAs of the countries under analysis have preferred

to replicate and borrow from other members of the Union their organizational models, especially from the German NCAs, which itself resembles the Commission structure and organization. This choice could be considered a strategy to best assure the possibility of entering in the EU, however, in some cases, this had somehow redirected the attention from addressing the realities of their jurisdiction, such as specific anticompetitive forms, the size of the markets, industrial policy interests, etc. These issues could be aggravated if noted that these countries were often economies in transition from command to market economies, with major state-owned enterprises or recently privatized, with long history of state-led development policies that harshly restricted competition, therefore, they were faced with substantial interests from the government and the private side (Trebilcock and Jacobucci, 2010).

For these reasons, to analyze the general compliance of these NCAs, particular attention should be given to their degree of independence and efficiency, in order to assure their credibility as public institutions.

The first, and the vastest, concept to consider is the notion of independence. According to the ECJ, independence in relation to a public body means "a status which ensures that the body concerned can act completely freely, without taking instructions or being put under any pressure (Commission vs Germany, 2010). Although the weight of this definition, some of the terms used are not so accurate, since the terminology "act completely freely" does not correspond to the characteristics ascribed to a public body, that should be always accountable for its actions, showing that there is a mutual relationship with the notion of accountability, as if they are two sides of the same coin (Wils, 2019). Following this reasoning, the definition given by the former chairman of the board of the Netherlands Authority of Consumers and Markets (ACM), Chris Fonteijn, is much more useful to understand the double standard inside independence of public bodies. According to him, independence is "having the freedom to reach conclusions in accordance with the task that lawmakers have bestowed upon us, without having to face inappropriate pressure" (Fonteijn, 2011).

Inappropriate is the right term to define those influences that cannot be accepted in the exercise of a public function. Also, in the ECN+ Directive[7] there is the recognition of distinction between accountability and inappropriate pressures. In article 4(1) the Directive states that the

[7] ECN+ Directive is a directive adopted in 2018 with the aim to empower the competition authorities of Member States to be more effective enforcers and to ensure the proper functioning on the internal market. The Directive aims to ensure that when applying the same legal basis - the EU antitrust rules - national competition authorities have the appropriate enforcement tools in order to bring about a genuine common competition enforcement area. To that end, the proposal provides for minimum guarantees and standards to empower national competition authorities to reach their full potential.

independence of NCAs shall be ‘subject to proportionate accountability requirements and without prejudice to close cooperation between competition authorities in the European Competition Network’ (Wils, 2019).

As stated in the Directive, to NCAs is recognized operational independence, therefore there should always be a balance between accountability and independence of actions. However, notwithstanding this balance, to independence is attached great importance, also in virtue of the aims that it pursues (Alves et al. 2015). As an example, it is worth it to consider some of them, such as ensuring that the NCAs can perform their duties and powers independently from political and other influences. In addition, it is necessary to guarantee the exclusion of any instructions from the government or other private parties, in order to assure that the NCAs refrain from any action incompatible with the duties ascribed to them by law. Furthermore, it should be assured that the appointment and dismissal of personnel and especially of management staff are pursued according to law and without any kind of other interest (Monti, 2014).

In definitive, when considering the independence of an NCAs three main characteristics should be considered:

- Appointment and dismissal procedures
- Budget granting and utilization of resources
- Degree of control by external actors also in the setting of the agenda of NCAs (Monti, 2014).

Having analyzed the independence notion, it is necessary to turn to the second, but still important concept, which is efficiency. In this text, efficiency will be defined as quality of the agency performance. Given that independence can set the premises for a strong and stable authority, the following step is to consider the practical application of the power which the authority has been entrusted on. For this reason, the quality of performance is a useful concept, nonetheless vague. To better understand the level of performance it is useful to apply practical measurement that can offer also a cross-national comparison. For this analysis, it will be worth to use:

- Annual report of activities
- General level of expertise of the staff
- Time consumed
- Welfare effects of competition enforcement on society (Monti, 2014).

3.2 National Courts Institutional Set-up and Scope of Action

3.2.1 Direct applicability of EU Competition provisions

As already explained in the chapter above, NCs are entitled through Regulation 1/2003 to enforce directly provision 81(3) EC (now art. 101(3) TFEU). However, their role has been shaped also in the past through court cases, that asserted the direct applicability of competition provisions.

Specifically, for the first time, in the seminal judgment in *BRT v SABAM* (1974), the Court of Justice affirmed that, since article 81 and 82 produce direct effects in relation between individuals, they also create direct rights towards the same individuals, and those rights must be protected by NCs. Of course, this statement involved the fact that individuals and companies can invoke these articles and the rights coming from them before NCs. This case followed the famous decisions in *Van Gen den Loos* (*Van Gen den Loos v Nederlandse Admnistratie der Belastingen*, 1963), where the court recognized for the first time that Treaty provisions could produce direct rights of individuals belonging to Member states, and that NCs must protect these rights (Ó Caoimh, 2014).

However, as it was explained, the previous method of implementation and enforcement of competition provisions was an obstacle to the effective enforcement of competition rights in NCs. Regulation 17/62 provided for extraordinary restrictions for NCs to independently apply competition rules. In the 1990s, the Commission started to face this problem, together with the idea of a decentralized application of competition rules, thanks also to a series of relevant cases of the Court of Justice.

In the *Delimitis* case (*Stergios Delimitis v Henninger Bräu AG*, 1991), the Court of Justice indicated that NCs could directly apply article 81(1) EC if it was not possible to apply article 81(3) EC, and in addition, they can also adopt interim measures pursuant to national rules of procedure. In this same case, the Court also stated that NCs can apply to the Commission in order to receive any information on the state of the procedure before it, and in case of difficulties in the application of the relevant provisions, the NCs can also request economic and legal guidance to the Commission. These recognitions were in the bigger frame of the division of competences between the Commission and the NCs, for which, the Court itself underlined the possibility of conflicting decisions issued by NCs: “Such conflicting decisions would be contrary to the general principle of legal certainty and must, therefore, be avoided when national courts give decisions on agreements or practices which may subsequently be the subject of a decision by the Commission” (*Stergios Delimitis v Henninger Bräu AG*, 1991).

A second case, which is of relevant importance for the application of competition rules by NCs is *Courage v Crehan* (1999), in which the Court of Appeal (England and Wales) referred a preliminary question to the Court of Justice. The case involved the validity of beer tie agreements between the Crehan Ltd. and a pub owner Mr. Courage. In its preliminary rulings, the Court of Justice indicated the importance of private claims for damages for loss caused by conduct liable to restrict or distort competition. In this sense, it has been stated that "any individual can rely on a breach of article 81(1) of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provisions" (*Courage v Crehan*, 2001). The court even stated that the full effectiveness of the treaty provisions and their practical effect would be endangered if they would not be open to any individual to claim damages or losses caused by a breach of the same provisions (Ó Caoimh, 2014).

A third case, which is of paramount importance is *Masterfood* case (*Masterfoods v HB Ice Cream*, 1992). In this case the Court restated what has been already mentioned in the *Delimitis* case, with more strength, the fact that conflicting decisions of NCs in respect of decisions of the Commissions are not permitted. If in the *Delimitis* case, the Court envisaged a system of competences based on the application of principle of legal certainty, in *Masterfoods*, the Court subjected NCs to a clear duty, based on article 10 EC, not to take decisions running counter to decisions of the Commission, in the case the Commission has already reached a decisions on the matter. The Court's ruling is based on four pillars. Firstly, the primacy of the Commission should be justified according to the role assigned to it by the Treaties, and therefore the application of the principles laid down in article 81 and 82 EC. Secondly, the referral to article 10 EC which impose a duty upon NCs to ensure effectiveness of Community law. Thirdly, it is up to Community Courts to revise the legality of Commissions decisions, and NCs can disapply a Commission's decision only when Community Courts defined it as void. Finally, the Court relied on the general principle of legal certainty. In this sense, the Court strengthened its decisions invocating general principles and the uniformity of Community law, avoiding the accuse of being motivated by the Commission's traditional exemption monopoly (Komninos, 2008).

As affirmed in the previous sections, the direct applicability of article 81 and 82 EC (now 101 and 102 TFEU) created a general discourse on how to avoid conflicts in the application of competition law by NCs and the Commission. It has been clearly stated in *Masterfoods* case, that Commission has a primacy on NCs application, and it has been motivated through the uniformity and the effectiveness of Community law. With the entrance into force of Regulation

1/2003, article 16 tried to regulate the possible conflict. Article 16 makes NCs not subject to the Commission rules, but to the Court of Justice rule, the only judicial body that can review Community acts through article 234 EC (now 267 TFEU), also in line with the reasoning gave by the Court itself in *Masterfoods*. In principle, the Commission's decisions should not be treated as positively binding, instead, the nature of the EU legal system requires that NCs should take decisions which are compatible with those adopted by the Commission, in order not to compromise the supremacy and uniformity of EU law. In doing so, Komninos (2008) identified some interesting scenarios of possible solutions.

The first scenario is a case in which the Commission has initiated a procedure, and the national court must avoid a conflicting decision. The best practice for the national court would be to stay the proceeding and wait for the Commission final decisions and rely on it in order to give its own decisions. The only possibility to depart from a Commission's decision is to refer to the Court of Justice for a preliminary ruling on the validity of the Commission decision, through article 267 TFEU.

A second scenario involves a non-final national court judgment and an envisaged Commission decision. The national non-final decision could be still open to appeal or an appeal is already pending, therefore, there is not *res judicata* yet, and the Commission may adopt a contrary decision in any moment, since its autonomous power to adopt a decision notwithstanding the existence of an earlier judgment of a national court. However, the Commission should act according to the general principle of sincere cooperation. In this specific case, the Commission may intervene in the case of appeal, either because the Court itself requires the Commission expertise, or though the *amicus curiae* possibility.

A third scenario provides for the case in which there is a final national court judgment finding inapplicable the competition rules and an envisaged applicability Commission decision. In this situation, the Commission is entitled to adopt a decision under article 81 or 82 EC even when the practice in question has been already judged by a national court. If the national court decision is still open to appeal, the appeal court must rely on the Commission decision, while if it is the case that the national decision is not open anymore to appeals, the effect of *res judicata* remains *inter partes*, and the Commission decisions produces effects *erga omnes* for everyone except for the litigants, with the final effect that the *res judicata* becomes just nominal.

The fourth scenario is in respect of a final national court judgment finding a violation of the competition rules and an envisaged inapplicability Commission decision. In this case, usually the Commission has stressed that it would normally not seek to contradict that judgement, since

the public interest is not severely harmed by an erroneous over-application of competition provisions. However, if national procedural law permits it, the losing party may request the reopening of the contested judgements, or it could ask for compensation for the unjustified enrichment of the winner party. The further civil follow-on proceeding must follow the Commission decisions in this case. In any case it must be reminded that the Commission may brought before the Court of Justice an infringement procedure for all the cases of national judgements conflicting with its decisions, under article 258 TFEU (Komninos, 2008).

3.2.2 Functions of National Courts: Public vs Private enforcement

The previous section has highlighted the difficulties involved in the direct applicability of competition rules by NCs, and the several type of conflicts that can arise with the main enforcer of competition provisions which is the Commission. However, it should be given some space the discussion of the main functions of NCs when applying competition rules.

Implementation of EU competition law by the judiciary can be defined in two different ways. NCs can apply European competition law through the judicial review of administrative decisions of NCAs. Moreover, NCs can enforce competition law in private law claims, especially in damages claims based on national tort law (Cseres and Karova, 2013).

Judicial review of the administrative decisions of NCAs plays a crucial role in the overall enforcement of competition law, since it has the ultimate goal in controlling the legality of the administrative authorities' decisions, however, each country has its own system of judicial review, and this diversity impact also the intensity of the standard of judicial review. A debate has been raised on whether this review should be intense or restrained when it comes to the assessment of the NCAs' economic analysis of cases. It has been argued that more intensive judicial control is one way to address the emergence of independent NCAs with wide discretionary powers, a sort of counterbalance to the lack of political and administrative accountability. It is evident that national judicial review is indispensable with its complementary function of judicial accountability. In its ruling *Tetra Laval* (*Commission v. Tetra Laval BV*, 2005) the Court of Justice defined a moderate standard of judicial review of competition decisions, based on the European Commission. According to this method, the evaluation of complex economic issues should be reviewed in a marginal way, with courts checking whether the procedural requirements are satisfied, that the reasons for the decision taken are properly specified, or that the facts are accurately articulated and that there has not been a clear error of assessment or a misuse of powers. For what concerns the countries under analysis, it is rather difficult to form a judgment on how judicial review functions in the CEECs, mostly because there is little data available on judicial appeal cases, often without access to the

content of the cases. There is even less information about the way in which national courts apply EU or national competition law and the rate of references they make to EU jurisprudence. Moreover, certain jurisdictions even consider judicial review as an impediment to the efficient and effective enforcement of the competition law, since judges are inexperienced with the principles of competition law analysis and find it difficult to properly evaluate competition law. In the following scheme, there is a brief overview of the method applied in CEECs for what concerns judicial review (Cseres and Karova, 2013).

	YES	**NO**
Standard of judicial review Restrained á la Tetra Laval	Hungary, Estonia, Latvia, Slovenia	Lithuania, Poland, Slovakia, Czech Republic

Table 7: Source Results of the questionnaire on the reform of Member States national competition laws after EC Regulation No. 1/2003

If it is difficult to find results for judicial review of NCAs decisions, even more difficult is finding data about private enforcement of competition law before NCs. Generally there are good economic reasons in favor of public enforcement, such as the information advantages of competition authorities, the fact that social benefits of law enforcement deviate from private benefits as well as the expected size of sanctions, and these advantages tend to support a perceived primacy of public enforcement over private enforcement. However, the Commission started to launch a discussion on how to facilitate private enforcement of competition law in Europe, since the active invocation of competition rules in national courts is still scarce (Cseres and Karova, 2013).

For this specific discussion, it is worth recalling the definition of public and private enforcement. Public enforcement concerns the enforcement of competition by a public authority, therefore in the EU the Commission and the NCAs. The main aim of the public enforcer is to identify the violation of competition law and bring it to an end, in order to deter future distortive practices. To achieve this objective, it may levy heavy fines on the violators of competition law. On the other hand, private enforcement concerns the use of competition provisions in national courts, involving the injured party making claims for compensation under the Treaty provisions for damages due to anticompetitive practice. Because of the main presence of private parties and private interests, private enforcement is still considered mainly as a channel for corrective justice through compensation, however, private enforcement is also viewed as an important tool in advancing deterrence (Ezrachi and Ioannidou, 2011). This is because, although NCs mainly decide disputed *inter partes*, they cannot simply confine themselves to considering the interests of the litigants but must also regard to the general interest of economic policy. Together with this double objective, private enforcement has been

said to have several advantages, such as the compensatory function, for which anti-competitive practices can make up for their losses only before a civil court, since public enforcement cannot have any direct power in this situation. Then it is said that private enforcement has an overall deterrent effect, making the same market agents instrumental in implementing the regulatory policy on competition, though this the general level of compliance is raised. In this sense, private enforcement fills the gap left by public enforcement, the so called "enforcement gap" generated by the perceived inability of the public enforcement to deal with all the cases worth of attention. Furthermore, the private enforcement constitutes the only way for private parties and individuals to exercise their rights derived from the Treaty provisions, as already said both pursuing private and general interests (Komninos, 2008).

However, for the countries under analysis, it must be said that if public enforcement has managed to achieve good results, private enforcement encountered difficulties, that pertains both to the economic and social sphere. One relevant factor in these countries is the probability of high interdependence of stakeholders that is likely to increase the probability of lobbying and rent seeking, parallel behaviors of firms and collusive practices. As a consequence, the self-correcting mechanisms of the market is not a reliable instrument as in large markets, furthermore, the reliance of private actors on market-based solutions is less feasible. Public agencies are the most favored institutional design but, at the same time, a stricter adherence to principles such as independence, accountability, transparency and administrative efficiency should be guaranteed. So, while most of the NCAs have built up sufficient legal and economic expertise with regard to competition law issues, national courts face a double barrier: unfamiliarity with competition law issues, and lack of basic knowledge of European law. In addition, further obstacles to private enforcement are inherent in the transitional phase of this countries, that is not complete yet. Moreover, private actors' readiness to bring damages actions to courts is discouraged by the low degree of awareness of competition rules, the weak and fragmented civil society, weak party autonomy, the often-lacking involvement of private actors in law making and enforcement and the lack of confidence in the judiciary (Cseres and Karova, 2013).

For these reasons, the Commission has started in 2005 a process for the enhancement and improvement of the private enforcement before NCs. Following the paramount interpretation of the Court of Justice in *Courage v Crehan*, the Commission published a Green paper on damages actions for infringements of EU's competition rules, with the aim of identifying obstacle to a more efficient system for bringing such actions. Building of this assessment, in 2008, the Commission published a White paper on the same issue, recognizing that although

some states have implemented national procedural law for private enforcement, these rules referred mainly to follow-on actions[8]. On this basis, the Commission considered that the problems already identified remained unchanged and that victims were rarely compensated. In 2009, the Commission set out a draft of a directive on damages claims for infringement of EU competition rules, but that document was not adopted. Taking advantage from the *Pfleiderer* case[9] (*Pfleiderer AG v Bundeskartellamt*, 2011) and the decision of the Court of Justice, the Commission issued for a second time a draft of a directive that was then adopted in 2014. The directive has two objectives: the first is to ensure that anyone who has suffered harm caused by an infringement of the relevant rules of competition law can effectively exercise the right to claim full compensation for that harm and to ensure the proper functioning of the internal market by ensuring equivalent protection throughout the EU. The second objective is to determine the degree to which the private enforcement possibilities provided for are to be limited so as to safeguard the effectiveness of the existing public enforcement mechanism. To achieve these aims, the directive relies on a dual legal basis: article 103 and article 114 TFEU. Article 103 TFEU permits to the Commission the adoption of the appropriate regulations or directives to give effect to the principles set out in article 101 and 102 TFEU and Article 114 TFEU empowers the EU to legislate when necessary for the purposes of its internal market (Wilman, 2015).

For what concerns the provisions of the directive, other to the explicit recognition of the right to full compensation, given the difficult task of calculating the damages and therefore, the quantity of the compensation due to the party, the directive sets out four specific measures in an attempt to address the difficulties. Firstly, the Member States must ensure that the burden and standard of proof required for the quantification are not such as to render the exercise practically impossible or excessively difficult. Secondly, the national courts must be empowered to estimate the amount of the harm in question, taking account that the quantification is a hypothetical exercise which is not completely accurate. Thirdly, the directive

[8] Cases come from a public investigation and they use the authorities' decision to support the claim for compensation before the court

[9] A case of a German preliminary reference. The competent national authority had imposed fines on several undertakings for infringements of Article 101 TFEU. Some of these undertakings have submitted a leniency application to this authority. Pfleiderer AG was a customer of one of the infringing undertakings. With a view of preparing a claim for damages, it applied to the competition authority requesting full access to the case file, including the said leniency applications. After access had been refused, this private party appealed to the national court. The latter asked to the Court of Justice whether EU law precluded the granting of such access. The answer of the Court of Justice highlighted that there are no binding EU rules in respect of national leniency programmes on the right to access to documents related thereto, and therefore it is up to the Member States to establish and apply such rules, however, noting that the effectiveness of the leniency programmes could be impaired if documents were not disclosed, and further it recalled that any private party has the right to claim damages for loss caused by an infringements of competition law.

provides for a presumption that cartel infringements cause harm, in any case, any individual must still demonstrate he or she has suffered harm and quantify it. Lastly, the directive provides for NCAs to assist NCs regarding the determination of the quantum of damages, upon requests by the court and only when the authority considered it appropriate (Wilman, 2015).

In addition to these specific provisions, the directive also defined moderate regulations about the disclosure of evidence. The text stated that the private party requesting the disclosure of evidence must provide a reasoned justification containing reasonable facts and evidence to support the plausibility of its claim from damages. When the disclosure concerns documents of NCAs three additional requirements apply: the specificity of the request for disclosure as regards the nature, object or content of the document; whether the party requesting disclosure is doing so in relation to an action for damages; and lastly, the need to safeguard the effectiveness of the public enforcement of competition law. Furthermore, the directive prescribed that specific type of documents can be disclosed on a temporal basis, while others (leniency statements and settlement submissions) cannot be disclosed at any time (Wilman, 2015).

3.2.3 Specialized or General Courts

Through the decentralization of EU competition law, national judges strongly need to be familiar with the European Commission's practice and guidance in the field, as well as developments in the jurisprudence of the EU Courts. Furthermore, the emergence of private as well as public enforcement of EU competition law raised the question of how to ensure damages compensation coherently and effectively all Member States.

For these reasons, there has been a tendency across many Member States to establish specialized courts, or to dedicate specialized chambers within courts, in order to deal with such cases, often alongside other regulatory matters. Concerning private enforcement, the situation varies considerably from one Member State to another. Following this situation, DG Competition introduced the "Training of National Judges" funding programme in 2002, with the objective need for judges to be trained in EU competition law, given the stark variations in degrees of specialization.

Turning to data, in almost all Member States, a specific court is responsible at first instance for the judicial review of NCA decisions and/or handling applications from the NCA. The basis for a given court being responsible may be either the attribution by law of specific thematic competences or simply the geographic location of the competition authority and the respective

court. For what concerns the first category, in no Member State is there a court dedicated solely to competition law (Coughlan, 2016).

Specialization is an important factor in applying EU competition law at national level. It may be formal specialization, such as the thematic specialization, or de facto specialization, such as the fact that a specific court is competent by geographical correlation for reviewing NCA decisions or that private actions tend to group in a particular court. Thanks to the survey organized for the "Training of National Judges" funding programme in 2002, researchers have found that judges in more specialized courts or chambers have a higher competition law-related caseload than non-specialized judges, even if this remains small compared to their caseload in other areas of law. There is a strong connection between the degree of specialization of courts and chambers and the level of knowledge of their judges (Coughlan, 2016).

For what concerns CEECs, in the following schemes there is a brief overview of the specialization of courts both for judicial review of NCAs decisions and for private enforcement.

	YES	**NO**
Specialized national courts for dealing with competition issues in the context of civil proceedings	Slovakia, Czech Republic	Estonia, Hungary Latvia, Lithuania, Poland, Slovenia
Specialized national courts for dealing with competition issues in the context of judicial review of NCAs decisions	Czech Republic, Hungary, Lithuania, Poland, Slovak	Estonia, Latvia, Slovenia

Table 8: Source Results of the questionnaire on the reform of Member States' national competition laws after EC Regulation No. 1/2003

As explained by the scheme, the specialization of CEECs NCs is very low, and the judges in those countries are confronted with stark difficulties in dealing with competition law enforcement.

3.2.4 Independence and Efficiency of National Courts

In the general application of and compliance with competition law, NCs have a very strong impact, given their dual objective of both protecting rights of individuals and the more general public interest for the effective functioning of the internal market. However, to reach these objectives, NCs must be independent from external pressures. The independence of institutions, especially in case of enforcement of law, is the primary guarantee for an effective application of law. In the *Margarit Panicello* case (2017), the Court of Justice stated that the criterion of independence is composed of two aspects. The first one refers to "the court that exercises its

functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever (…), and is thus protected against external interventions or pressure liable to jeopardize the independent judgment of its members as regards proceedings before them". The second aspect is based on the "impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law". Among the elements considered to be indicators of independence the Court of Justice ascribed guarantees to protect the judges against removal from office and the reception by members of the judiciary of a level of remuneration commensurate with the importance of the functions they carry out. In addition, in the *TDC* case (2014), the Court has also added the existence of rules regarding the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as the neutrality of that body (Larion, 2019).

Independence of the judiciary acquires even more importance if read together with the right of fair trial, which is recognized as a general principle of law, and specifically, in the text of article 47(2) of the EU Charter of Fundamental Human Rights, which can be read in conjunction with Article 6(1) of the European Convention of Human Rights, both emphasized that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". According to the jurisprudence of the European Court of Human Rights (ECtHR), it is possible to determine general guarantees of independence such as the members of the court are entirely free from instructions in the exercise of their judicial duties, or concerning the manner of appointment of judges (Olbourne, 2003).

As last juridical basis for the independence of courts, it must be referred to a new reading of article 19(1) TEU which in recent times had acquired new significance in relation to independence of judiciary as necessary tool in the bigger frame of the application of effective judicial remedies by national judges. According to the Court of Justice, in the case *Associação Sindical dos Juízes Portugueses* (2018), article 19(1) TEU should be interpreted not only as generally giving to national judges the task of ensuring the right application of EU law, but is should be read in a more enlarged application for which, assuring the right and effective judicial remedies, do not only ascribe to procedural rules, but also to substantive rules, like ensuring the right independence guarantees for national judges. This new reading of article 19(1) TEU has been used again by the Court of Justice also in the case *Indépendance de la Cour supreme*

(2019), as a tool to protect the independence of Polish judges after the intrusive reforms made by the government, for which the Commission has started an infringement procedure.

When measuring independence, a distinction between *de jure* and *de facto* independence. The first concept deals with formal rules designed to insulate judges from undue pressure, either from outside the judiciary or from within, such as multilateral appointment procedures, budgetary autonomy, and judicial councils. The second concept is behavioral measure and can be further differentiated between two sub-concepts. The first one is when the judge is independent when decisions reflect preferences (autonomy), while the second reflects influence, and how much the judge's decisions has been followed and respected. Whichever conception of independence is used, de jure indicators are usually the ones most used in measurement (Ríos-Figueroa and Staton, 2012).

Concerning this specific discussion, in order to understand the degree of independence of NCs of CEECs, it will be used the BTI index, a scale from 1 (low) to 10 (high). De jure indicators are used to consider whether the judiciary is free both from unconstitutional intervention by other institutions and from corruption. It should be noted if there are mechanisms for judicial review of legislative or executive acts. (Ríos-Figueroa and Staton, 2012).

As stated in the previous sections, for this discussion, the concept of efficiency is considered to capture the quality of performance. For this reason, the present text will rely on the data defined by Pilot field study on the functioning of the national judicial systems for the application of competition law rules, together with the annual report on Competition enforcement by the Commission. In all these documents the main indicators of the quality of performance are based on the number of cases presented, and the number of those which have been finally decided. For this present text, also the number of judicial review case will be assessed. For all these cases, not only the quantity of cases will be considered, but also the time used to issue a final decision, and the costs imposed on claimants. The quality of performance can also be portrayed through the training of judges and their expertise. All these indicators will serve to define a general measure of efficiency for NCs in CEECs (Kaufman and Petrović, 2017).

3.3 Comparison of National Competition Authorities in Central Eastern European Countries with EU core Member States

3.3.1 Comparative data on Independence

a) Czech Republic

The Office for the Protection of Competition (UOHS) was established by Act no. 173/1991 Coll. of 26 April 1991 and started its activity on 1 July 1991. From 1992 to 1996 worked under

the name and the functions of the Ministry of competition. From 1 November 1996, the present UOHS started its activity with its current name on and continued the activity of the former Ministry of Competition. The headquarters of the UOHS are located in Brno, a choice aimed at guaranteeing the independence of the decision-making process of the UOHS. The UOHS is a central administrative authority and is independent in its decision-making process. It is headed by a Chairman appointed for a term of six years (renewable once) by the President of the Czech Republic on the proposal of the Government. To assure the independence of the Chairman, he or she must not be a member of any political party or movement. The President can recall him of she from his or her office because of duly reasons. the independence of the body was strengthening widening and improving its powers of investigation and decisions, which followingly raised also the control on the market and the number of fines imposed (European Commission 2014).

Generally, the employees are mostly concentrated in the competition division, while fewer are at disposal of merger and state aid divisions.

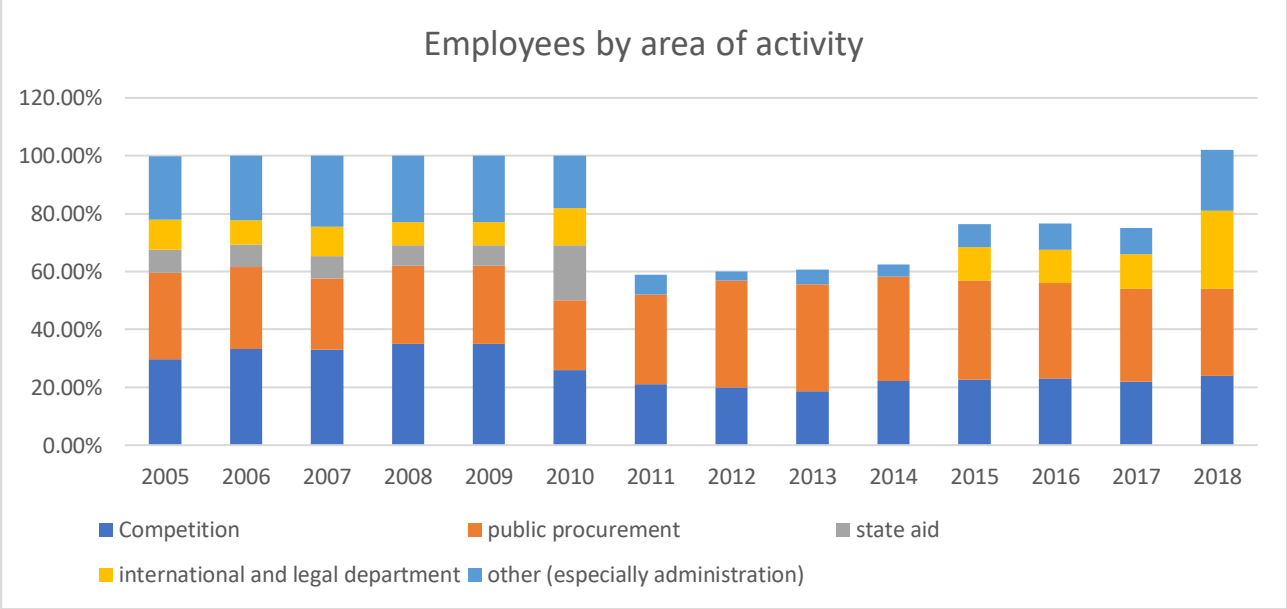

Figure 1: Source Annual Reports of UOHS years 2005 - 2018

The age differentiation is well balanced, and also from a gender point of view data show that the office likely represents gender divisions in the society.

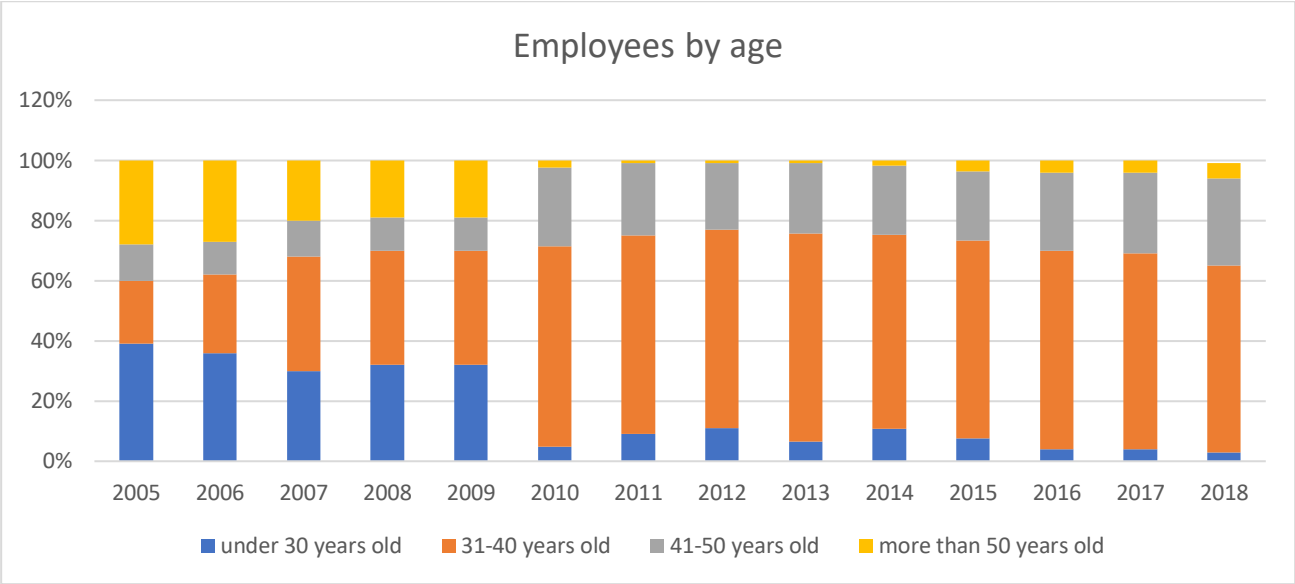

Figure 2: Source Annual Report of UOHS years 2005 - 2018

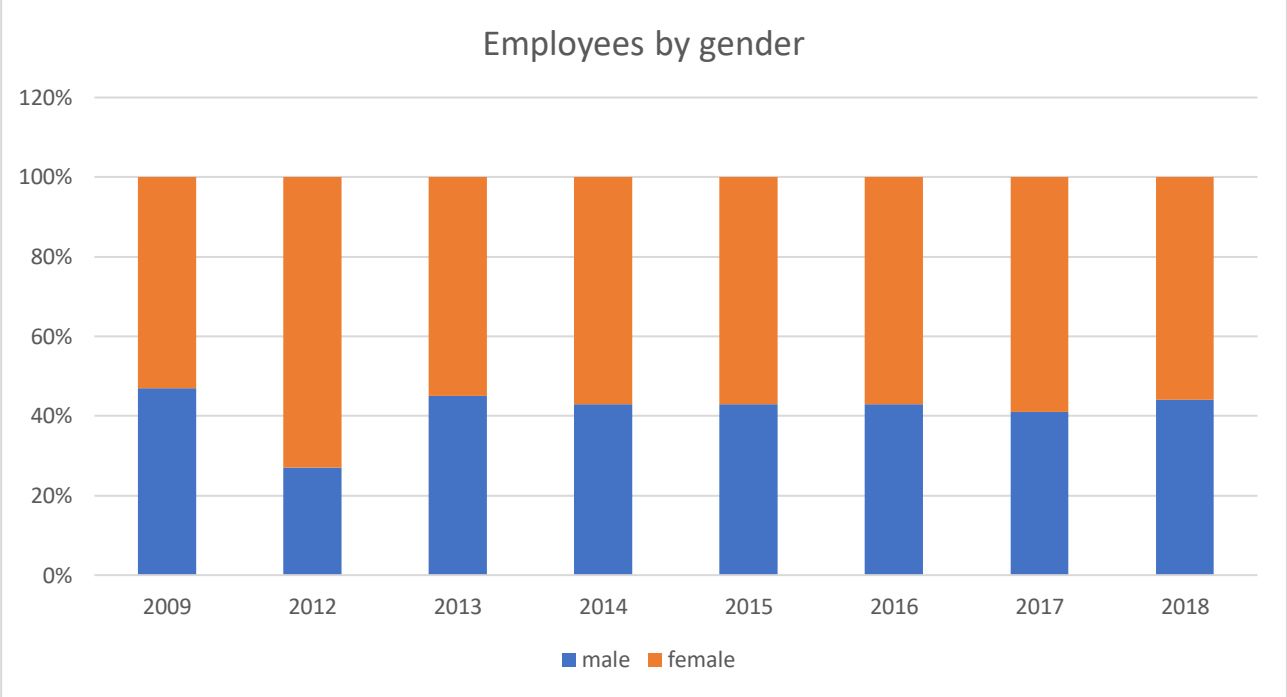

Figure 3: Source Annual Report of UOHS years 2009 - 2018

From the point of view of the education of the employees, data show that most of them have a university background, thus assuring a level of professionality in dealing with difficult subject matters. Here a brief overview of data from the Annual reports of the UOHS.

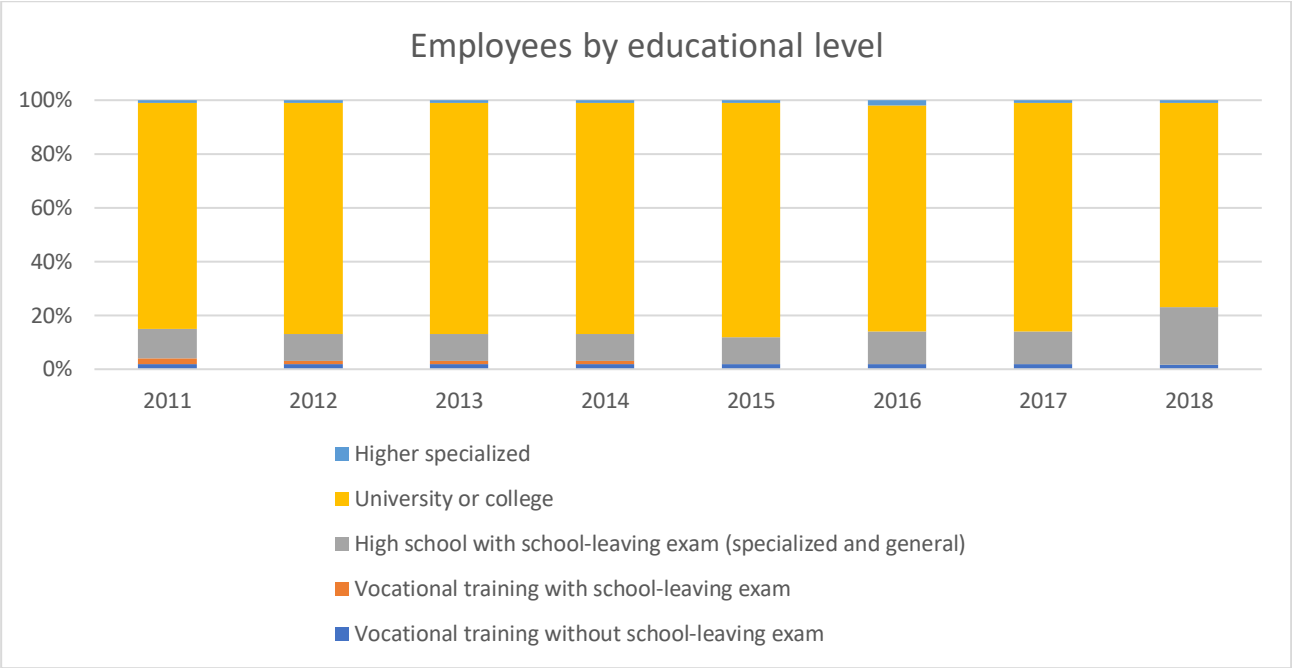

Figure 4: Source Annual Report of UOHS years 2011 - 2018

Referring to the accountability of the UOHS, it is an institution that applies an integrated administrative model, for which the same body bring forward both investigation and prosecution. The decision may be challenged within 15 days from its delivery, before the Chairman of the UOHS. The decision of the Chairman may then be challenged within two months from its delivery before the administrative courts.

Another important trait of the independence of a body is the amount of public budget disposed by it and granted by the central government. here a brief overview of the trend in budget amount given to the UOHS during the years under analysis.

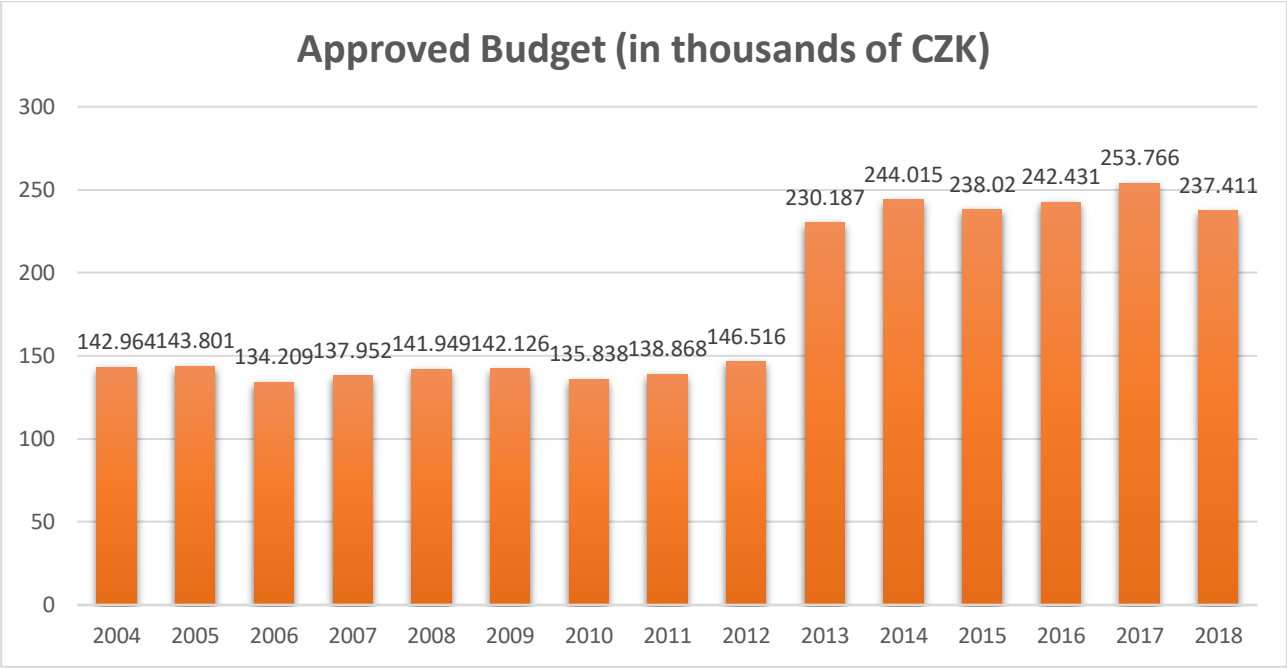

Figure 5: Source UOHS Annual Reports years 2004 - 2018

During the years, the amount of money given to the UOHS has raised, especially it is possible to see a leap between 2012 and 2013. One of the possible explanation, resting on data published in the BTI index for the years 2012 and 2013, was a peak of inflation, reaching the values of 4.3%, which could explain the raising level of money given to the public institutions, in order to manage the fluctuation of the currency.

b) Estonia

The Estonian Competition Board (ECB) was set up on 21 October 1993 within the Ministry of Finance to supervise the implementation of the 1993 Competition Act. The ECB was headed by the Director General appointed and removed from office by the Minister of Finance. When the current 2001 Competition Act the Competition Board's structure reflected its workload: three supervisory departments dealing with anti-competitive agreements and abuses of dominant position in various economic sectors and a merger control department exercising control over concentrations in all economic sectors. Thus, initially the organizational structure and the powers of the ECB reflected those of the Directorate General Competition of the EU Commission.

From 2007 until 2012, the ECB underwent many changes, which made it an institution combining the control of the competitiveness of the market and some important regulatory functions on specific sectors, such as the railway, energy, communications and also aviation. In this sense, the government had operated a concentration of functions vital for the economy of the country in just one institution, now renamed ECA. From an independence point of view,

this could have a dual effect. From a good point, it could make more difficult from private interests to pressure the ECA for specific issues. From the bad point of view, instead, the concentration of functions made the institutions vulnerable to possible government pressures in case of specific industrial plans.

Furthermore, the government already exerts a great control on the ECS, since it is a government agency which operates under the responsibility of the Ministry of Economic Affairs and Communications. The Minister approves and amends the ECA's annual budget, oversees its implementation, approves the staff and structure of the ECA upon a proposal of the Director General European Commission, 2014).

Further data on employees and average budget are not freely available.

c) Hungary

The Hungarian Competition Authority (GVH) was established by Act LXXXVI of 1990 on the prohibition of unfair market practices and started its operations on 1 January 1991. The GVH is an administrative authority and has its seat in Budapest. The national Parliament is responsible for accepting the GVH's budget on an annual basis. Furthermore, the President of the GVH is required to submit an annual report on the activities of the GVH to the Parliament and upon request (European Commission, 2014).

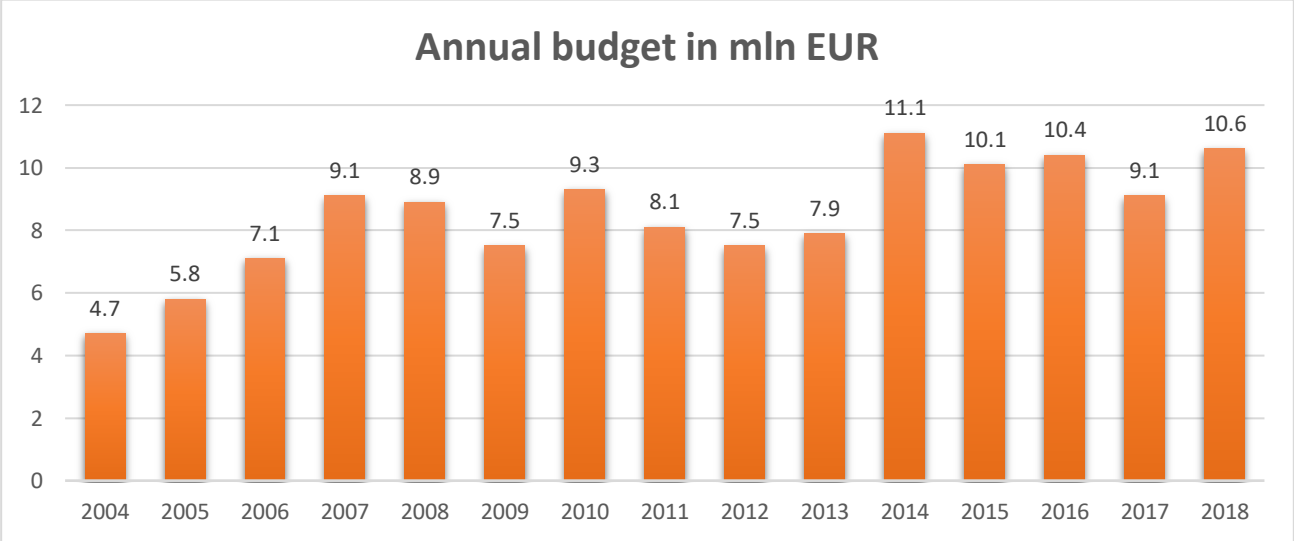

Figure 6: Source GVH Annual Reports years 2004 - 2018

As the graph shows, the budget given to the body is relatively stable, this means that the institutions did not have fluctuations in its budget because of Parliament's decisions.

The GVH is headed by the President, whose work is assisted by two Vice Presidents. The President is nominated by the Prime Minister and appointed by the President of the Republic

for a period of six years. The two Vice Presidents are nominated by the President of the Authority to the Prime Minister who, in agreement with the nomination, submits the nomination to the President of the Republic. One of the Vice Presidents is the head (Chair) of the Competition Council, while the other directs and supervises the investigative sections (European Commission, 2014). Despite a good legislative basis, during the years, the government has started to put pressure on the GVH, and in 2012, the BTI index (2012) expressively stated that big multinationals have been treated very carefully by the government and have enjoyed many privileges, lessening the control the GVH had on the market. Always resting on the BTI index (2013), a 2013 amendment to the competition law enabled the government to bypass GVH in authorizing mergers considered to be of national interest. The government used this provision in 2014 to permit 13 mergers. In April 2014, the European Commission opened infringement proceedings against Hungary, because its parliament had adopted a law preventing GVH from sanctioning cartels on agricultural products.

The decisions of the GVH are final, there is no administrative appeal against them. The decisions can only be challenged at the competent courts. However, as will be analyzed in the following sections, also the court system and the judiciary have troubles times in Hungary.

For what concern employees, the situation is fairly balanced, the number of them has raised during years, and the main part had an economics and legal education (GVH).

d) Lithuania

The first Competition Council (CC) was set up in 1992 and subsequently it became independent from any particular governmental institution in 1999. The Competition Council of Lithuania is the only competition enforcement authority in the country.

The CC is composed of the chairman of the Competition Council and four members, which can be chosen from a pool of Lithuanian citizens of irreproachable reputation and holding a university degree in the fields of either economics or law. They are appointed by the President of the Republic of Lithuania upon the proposal of the Prime Minister. They are appointed for a term of six years, and the same person may be appointed a chair or a member of the Competition Council for not more than two consecutive terms of office.

The resolutions of the Competition Council are adopted by majority vote, with participation of at least three members of the Competition Council, including the chair. Generally, Competition Council meetings are public, except for situations which are aimed at protecting state or service secrets, or commercial secrets of economy entities. This would be a sign of higher

accountability and transparency, which permit to the CC not only to legitimate its work with the public, but also to raise the level of competition culture in the country. However, corruption and government pressure on the CC did not permit to the institution to effectively perform its tasks. According to the BTI index (2010), the CC *de facto* does not enjoy sufficient independence from political influence, rarely takes initiatives to investigate the most important markets, and imposes relatively mild fines on business entities for violations of competition without assessing the damage done to the market and consumers (therefore fines do not have a sufficient deterrent impact).

However, the biggest problem of the CC is the very low level of the budget given by the government to the institutions, that can really threaten the effective enforcement of competition in the market. Despite the 26% rise in the annual budget in 2015, its financing remains one of the smallest budgets for a national competition authority in the world. The last available data for CC annual budget is just 1.36 million euros.

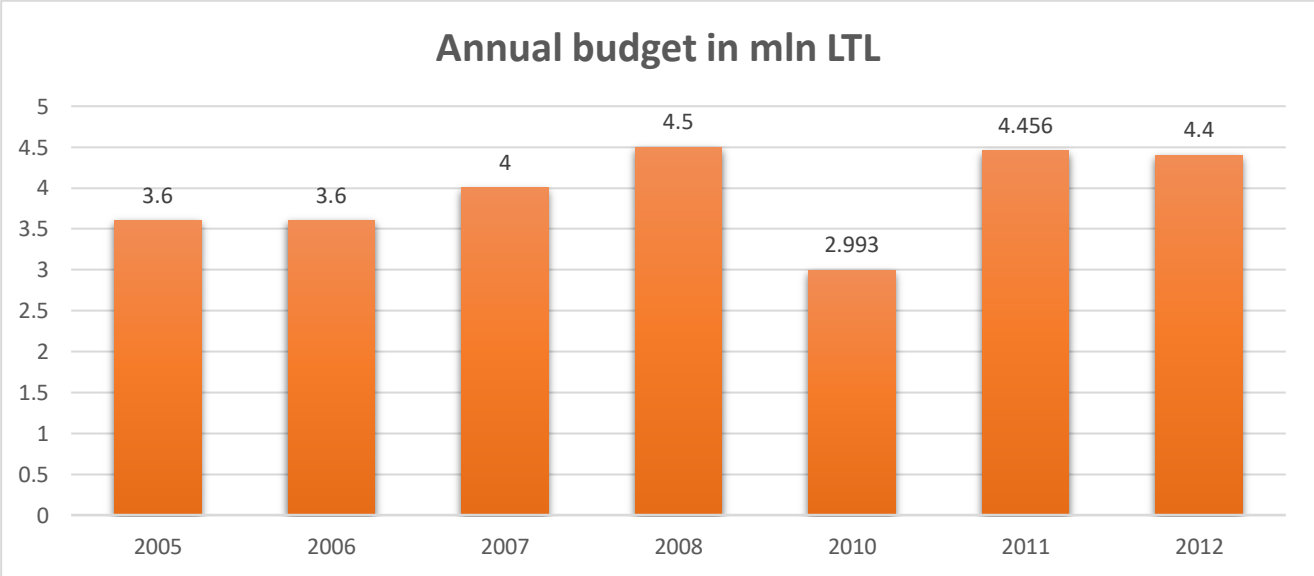

Figure 7: Source CC Annual Reports years 2005 - 2012

e) Latvia

The Competition Council was established in 1998, replacing the former State antitrust authority. The Competition Council is a State institution which is financed from the State budget. The Competition Council acts under the supervision of the Ministry of Economics. The NCA consists of two bodies: the governing body, which consists of three members, and the executive body, which is the Executive Directorate. The chairperson and two members of the governing body are appointed by the Government upon the nomination of the Minister of Economics for a five-year period (European Commission, 2014).

The NCA has been reformed several times during last ten years. These reforms mainly have been related to and changes of responsibilities of the NCA and increase or decrease of personnel employed by the NCA. When the crisis hit Latvia in 2008, many employees of the NCA were laid off. Now, the most discussed issue is the independence of the NCA. The NCA together with its supervising authority, i.e. the Ministry of Economics, is currently discussing the proposal for legislative amendments to ensure full independence for the NCA. However, the European Commission has repeatedly expressed its worries about the poor resources given to the NCA, as an example in 2018, the annual budget given by the government was about 1.3 million of euros (BTI Index, 2018).

For what concerns employees, the situation is fairly balanced.

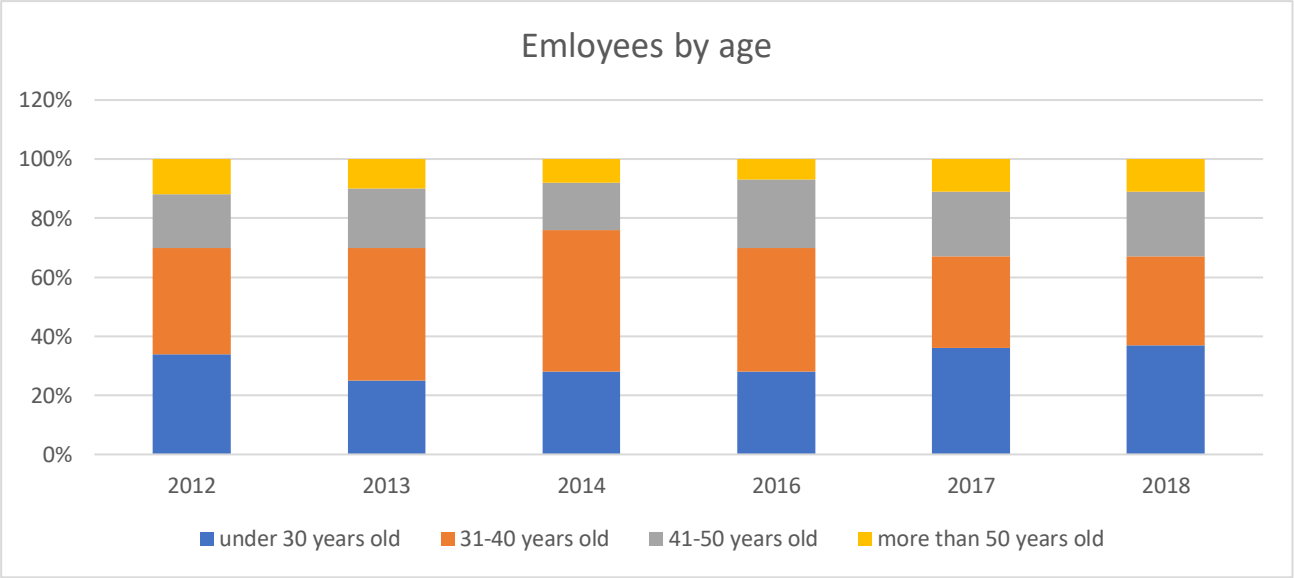

Figure 8: Source Annual Reports years 2012 - 2018

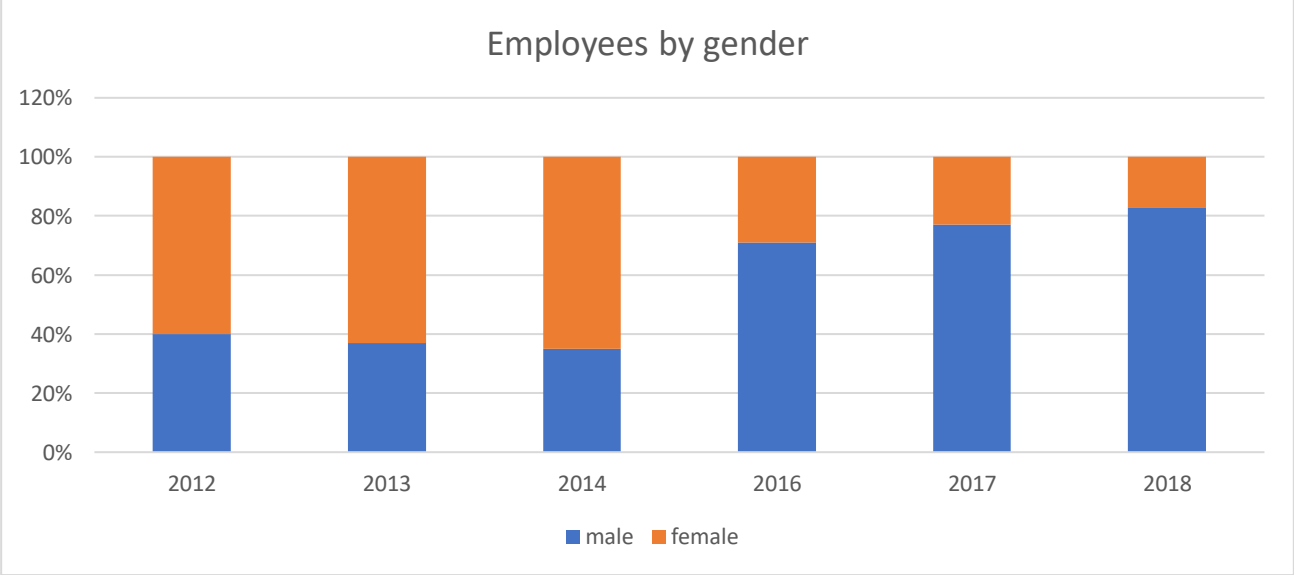

Figure 9: Source Annual Reports years 2012 – 2018

f) Poland

The Office of Competition and Consumer Protection (OCCP) was established in 1990 as the Antimonopoly Office. In the 2000, the office of the President was introduced as the main body for competition and consumer protection in Poland. The President performs all the functions and the Office is an administrative body with a supportive role. Regarding the role of the President, he/she is appointed and supervised by the Prime Minister. The Prime Minister nominates the President from persons selected in a specific open and competitive recruitment process, given certain requirements ascribed by law: possession of Polish citizenship, holding minimum 6 years of employment track record, including minimum 3 years on managerial positions, possession of education and knowledge in the fields for which the President is responsible. However, the term of office is not specified, and the Prime Minister appoints the President for an indefinite period of time, and also has the prerogative to dismiss him/her at any time (European Commission, 2014).

According to the BTI index (2018), OCCP generally maintains good level of competition enforcement, and it is quite independent from the government pressure. Also, the annual budget reserved to the institution is acceptable. It has a stable increased during the years, to match the improvement of the market size and the trade with other countries.

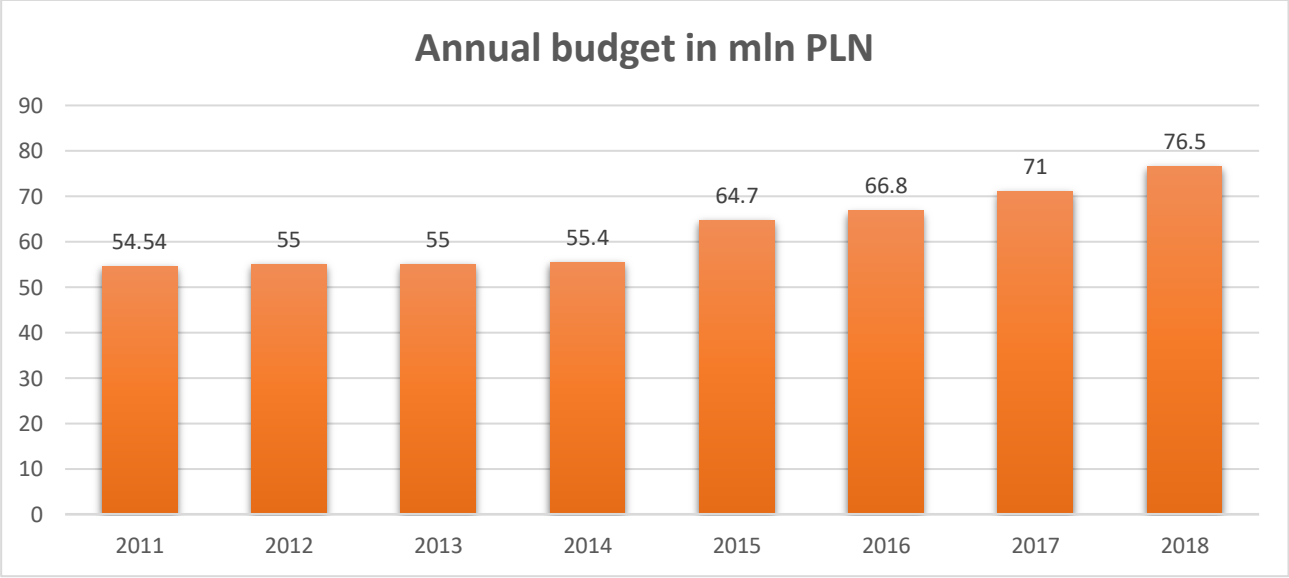

Figure 10: Source OCCP Annual Reports years 2011 – 2018

g) Slovenia

The SCPA is independent and autonomous in the performance of its tasks and responsibilities, and none of the State authorities may direct or give instructions, even though, exceptionally, the National Parliament or the Government may give general instructions, however not in

relation to individual cases. There are two bodies within the SCPA: the Council and the Director. The Director is the Chairman of the Council, an organ composed of five members, appointed by the National Assembly, upon the Government's proposal. The candidates are selected because of their expertise and qualifications in the field of work of competition. The Director is also appointed by the National Assembly upon the Government's proposal, through an open competition held by the Minister of Economic Development and Technology. Both the Director and the members of the Council rest in office for the period of five years and may be re-appointed.

If in the first years after the accession, the operation of the SCPA were heavily criticized, during the years, the institutions managed to acquire better reputation and from the 2008 it has occupied higher places in the BTI index of market economy. In 2009 and 2010, there were some successful and publicized actions against different companies and their cartel agreements, and it seems that the office will continue its successful work. Furthermore, the institution managed to increase the number of employees, even if during a period of cuts in the public sector, and this brough visible results (BTI index, 2018).

h) Slovak Republic

The Antimonopoly Office of the Slovak Republic was first established with Act No. 188/1994 Coll. on Protection of Competition which stipulated its competences, the relevant competition rules and procedures. It is an independent central State administration body and is the only body entrusted with the application of competition rules in the Slovak Republic.

The AMO is headed by the Chairperson, on in case of absence, by the Deputy Chairperson. The Chairperson is appointed and recalled by the President of the Slovak Republic based on a proposal from the Government, among any citizens that is eligible to the National Council of the Slovak Republic (i.e. the Slovak Parliament). The Chairperson's term of office is five years renewable once consecutively. The Deputy Chairperson is appointed and recalled by the Chairperson of the AMO.

On the other side, the Council of the AMO Office is competent to decide on appeals and review decisions outside appellate proceedings. Council members are appointed and recalled by the Government of the Slovak Republic following a proposal from the Chairperson of the AMO. Usually, these are professionals with long experience in the field of competition law and regulation. The term of office of Council members is five years. Council members are appointed in such a way that the term of office will end for a maximum of three of them during the course

of one calendar year, in order to maintain consistency among the decisions and during years (European Commission).

Another trait of independence is the amount of the budget given to the AMO, that maintained itself quite stable during the years, even if the country faced a strong impact after the 2008 crisis.

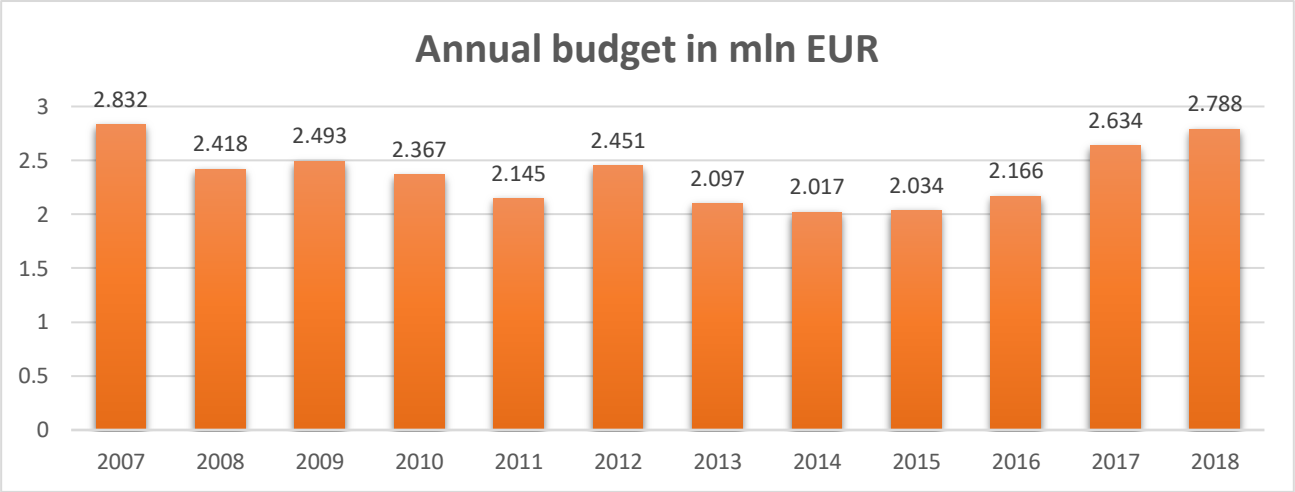

Figure 11: Source AMO Annual Reports years 2007 – 2018

For what concerns the employees, the situation is well balanced and reflects the other countries data.

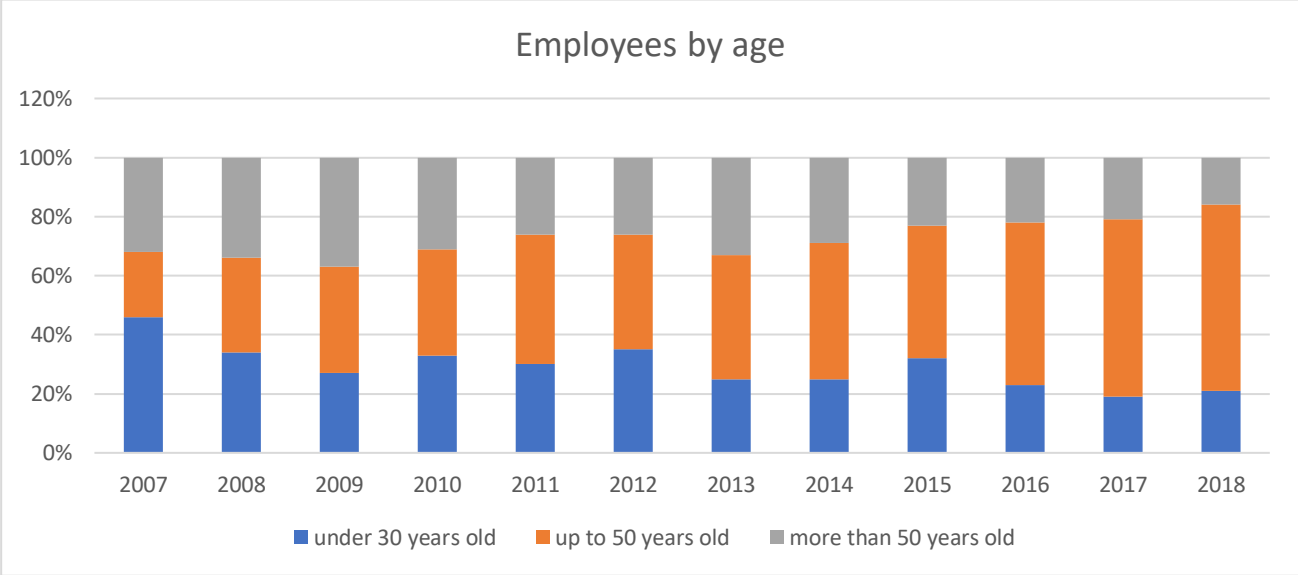

Figure 12: Source AMO Annual Reports years 2007 – 2018

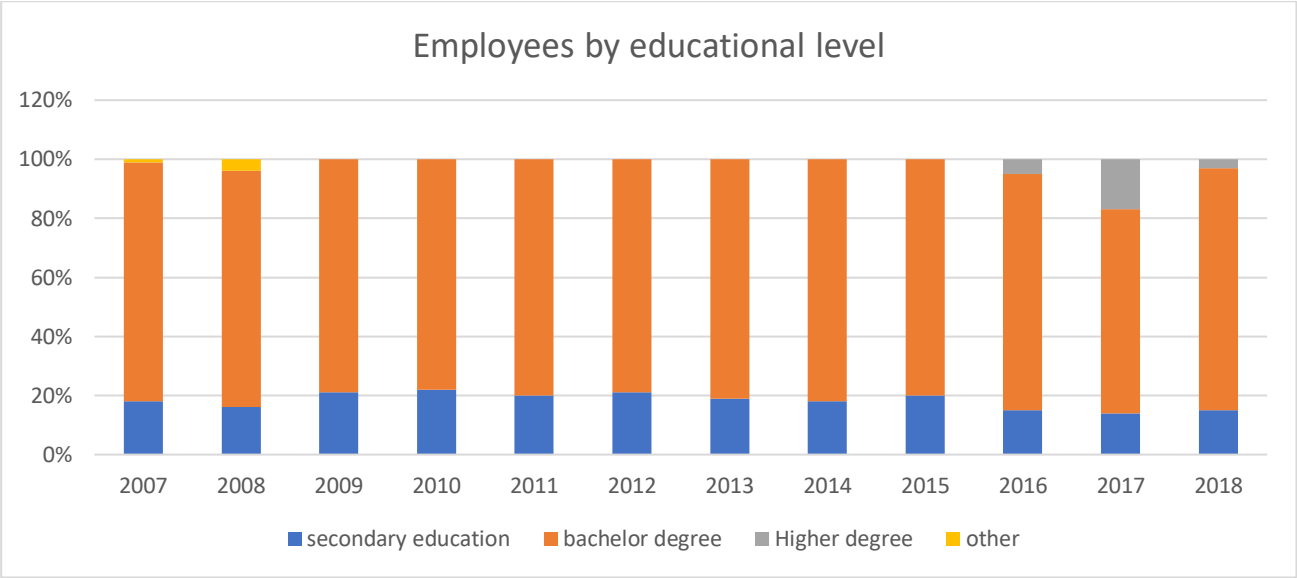

Figure 13: Source AMO Annual Reports years 2007 – 2018

3.3.2 Comparative data on Efficiency

If the previous paragraph draws a general frame of independence guarantees for NCAs in the CEECs, this paragraph will rely on data for the efficiency of these institutions. In the period under analysis, thus from 2004 to 2018, the NCAs are supposed to have initiated 2,147 investigations under Articles 101 and 102 TFEU, and as many of final decisions ordering termination of infringements, imposing fines or accepting commitments in 1,097 cases. During the same period, the European Commission had provided data for 379 investigations of its own and 105 envisaged final decisions. Therefore, the NCAs have become the primary public enforcers of EU competition rules, adopting more than 90% of all decisions (Wils, 2019).

More specifically, the analysis of efficiency will rely on data of investigation, decisions and fines imposed by each NCAs for a sample of years under consideration, so years 2004, 2008, 2012, 2016 and 2018. Furthermore, the data will show also the average appeals to NCs of the NCAs decisions, with the aim of considering the effectiveness of the institutions in maintaining their power. The comparison between data from CEECs and three core Member States of the EU (Germany, France and Italy) will give an overview of the effectiveness of the NCAs enforcement in CEECs.

For what concerns the application of article 101 TFEU, thus the prohibition of agreements restricting competition, most of the NCAs displayed higher levels of enforcement in respect to core Member States, as the following graph shows. For some of the CEECs no data are freely available. Specifically, for Estonia, part of the reason is the fact that it is one of those NCAs that punish antitrust violations as criminal offences, and, perhaps, for this reason data are not displayed publicly.

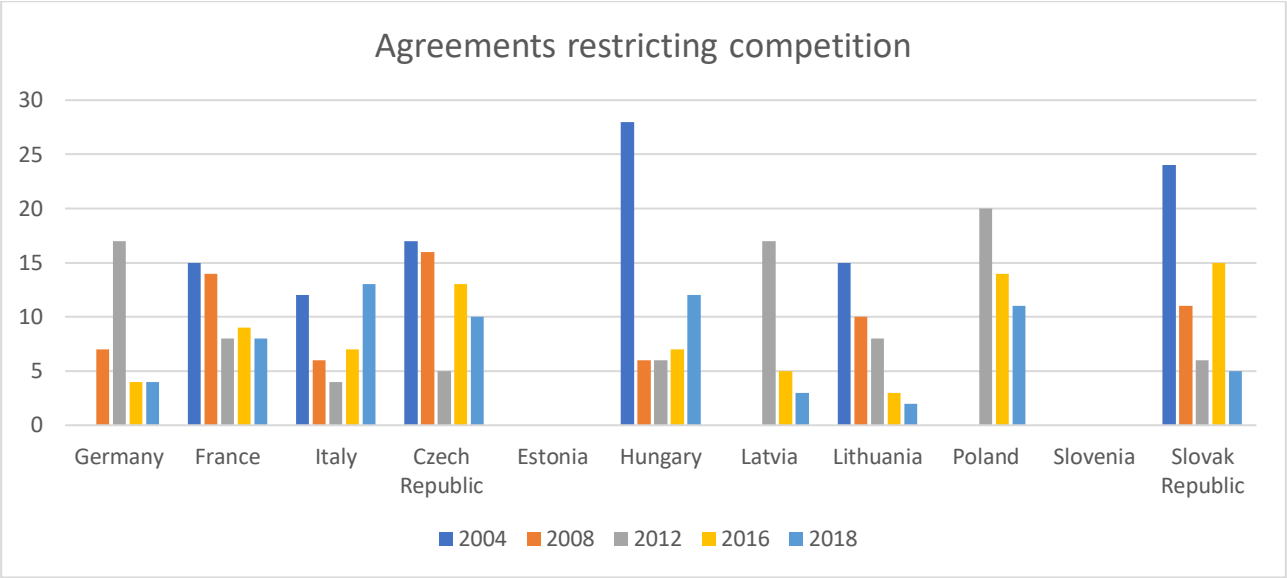

Figure 14: Source NCAs Annual Reports years 2004 – 2008 – 2012 – 2016 – 2018

On the other side, regarding the application of article 102 TFEU, thus, prohibition of abuse of dominant position, also in this case, the numbers of application for CEECs do not go very far from those of the core Member states. Except for a sharp difference between the year 2004 and the following one, that could be explained by the new entrance into force of Regulation 1/2003 that brought many more instances before the NCAs in each Member State of the EU.

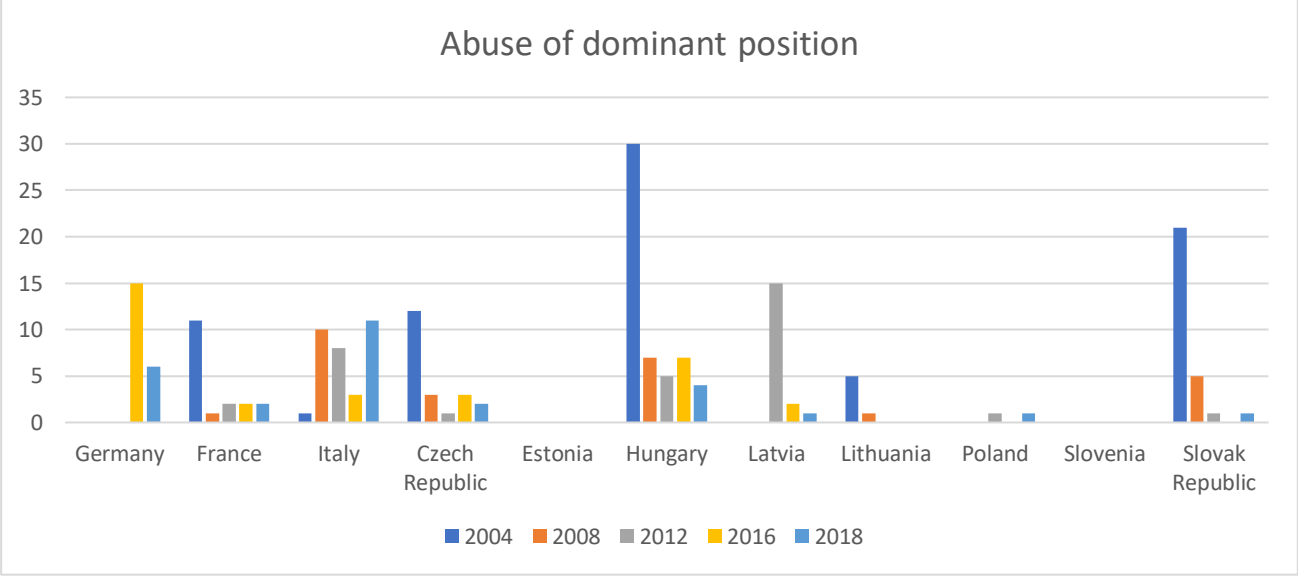

Figure 15: Source NCAs Annual Reports years 2004 – 2008 – 2012 – 2016 – 2018

Another important element to consider, when analyzing the efficiency and the quality of these institutions is the amount of fines imposed by each NCA, which can show the relevance of the power of the NCA and the control exercised over the market.

Amount of fines imposed in €

	2004	2008	2012	2016	2018
Germany	*no data*	313.700.000	316.000.000	124.600.000	376.000.000
France	50.200.000	631.300.000	540.500.000	203.000.000	237.500.000
Italy	320.000.000	4.945.530	59.012.003	597.000.000	1.277.000.000
Czech Republic	47.472.886,11	11.444.894,84	7.297.080,60	17.905.499,57	7.604.326,10
Estonia	*no data*	*no data*	*no data*	*no data*	*no data*
Hungary	36.000.000	2.600.000	6.120.000	17.300.000	no data
Latvia	*no data*	*no data*	377.767,59	1.657.196,70	308.514
Lithuania	82.802,77	844.058,79	18.600.502,47	824.811	780.800
Poland	*no data*	*no data*	37.599.864,51	24.337.366,85	43.547,479,45
Slovenia	*no data*	*no data*	*no data*	*no data*	*no data*
Slovak Republic	2.839.025	33.134.513,05	160.419	3.712.736,10	10.628.934,09

Table 9: Source NCAs Annual Reports years 2004 – 2008 – 2012 – 2016 – 2018

As it is demonstrated through the scheme above, come Member States imposed higher level of fines during their investigations, while the amount imposed by CEECs is very low, especially in some cases, such as Latvia and Lithuania. However, it must be remembered that market in central and eastern Europe were under transition from the 1990s, still during the first years of the 2000s, therefore, huge amount of fines would be disproportionate in respect of the size of the actors and of the competition distortions. Therefore, generally, it could be asserted that NCAs have a uniform impact on the market though their fining powers.

As third indicator of the quality of NCAs decisions, it is interesting to see the rate of appeal to NCs, and how many of those decisions are upheld or quashed. This would give to the general analysis a more specific image of the authority that the NCAs have in the society and, furthermore of the level of dialogue and relationships between the NCAs and the NCs.

Judicial review of NCAs decisions											
	Germany	**France**	**Italy**	**Czech Republic**	**Estonia**	**Hungary**	**Latvia**	**Lithuania**	**Poland**	**Slovenia**	**Slovak Republic**
2004	//	22	//	**9**	//	//	//	**8**	//	//	**29**
upheld		12						**5**			
quashed											
pendent		4						**2**			
2008	//	12	//	**23**	//	//	//	**40**	//	//	**31**
upheld		5						**16**			
quashed								**2**			**4**

pendent		6						19			16
2012	//	10	//	7	//	50	16	51	60	//	9
upheld				4		29	12	17			
quashed						3		4	3		
pendent				3				20			
2016	//	10	//	20	//	55	12	//	36	//	5
upheld		1		12		29	10				3
quashed						3			9		2
pendent		9		8							
2018	//	8	//	12	//	//	7	//	25	//	5
upheld		2									
quashed											
pendent		6									

Table 10: Source NCAs Annual Reports 2004 – 2008 – 2012 – 2016 – 2018

From the graph above, it is evident that finding clear data is pretty difficult, but from the evidence founded it is possible to see that except for large numbers in Hungary, the other NCAs do not differ very much from the data found for France that represents the core Member States in this case. Therefore, it could be said that NCAs in CCECs have similar authority than NCAs in core Member States.

3.4 Comparison of National Courts in Central Eastern European Countries with EU core Member States

3.4.1 Comparative Data on Independence

Judicial independence is a requirement coming from the principle of effective judicial protection referred to in Article 19 TEU, and from the right to an effective remedy before a court or tribunal regulated in Article 47 of the Charter of Fundamental Rights of the EU. It aims at guaranteeing the fairness, predictability and certainty of the legal system, necessary elements for the rule of law and for an attractive investment environment. The perceived independence of the judiciary is useful to improve investments and growth. Relying on data from the 2019 EU Justice scoreboards, here an overview of the perceived independence in the EU Members States.

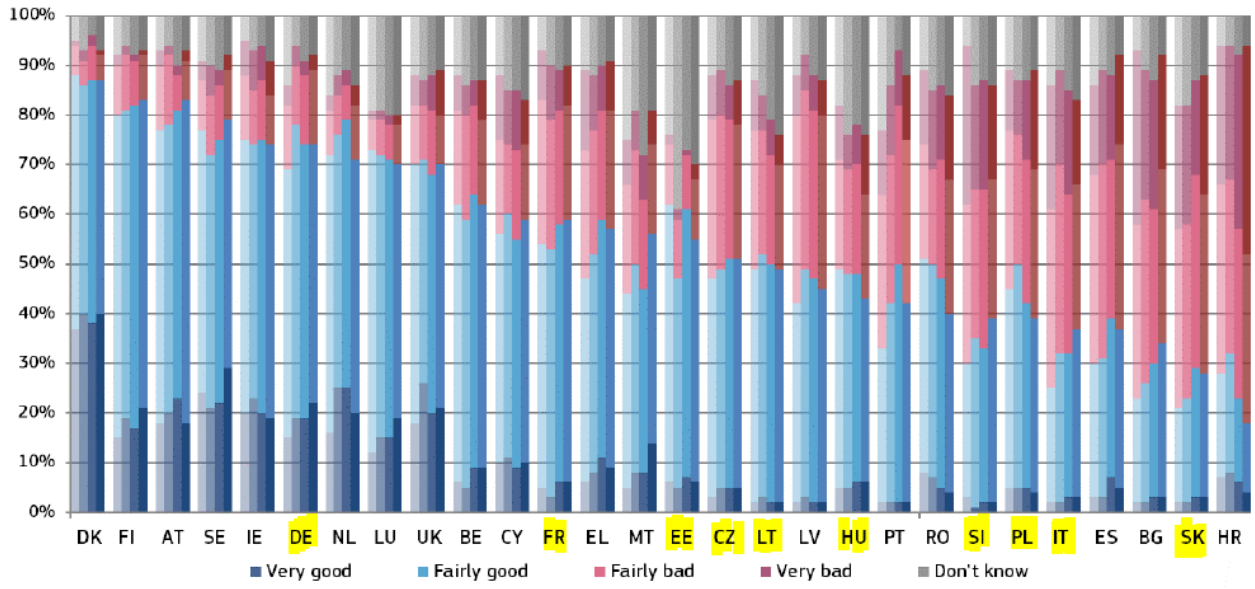

Figure 16: Source Eurobarometer - light colors: 2016, 2017 and 2018, dark colors: 2019

The countries highlighted in yellow are the countries under analysis. As it is possible to see from this analysis, the perceived independence of the judiciary is quite similar for countries like Germany and France that represents in this case the core Member States. Their values resemble to those of some of the CEECs like Estonia, Czech Republic and Lithuania, while others of that group have lower level of perceived judicial independence, especially in the last years. This is the case of Hungary and Poland. Among those that have very low level of perceived independence there is also Italy as a core Member State. Among the reasons advanced by the interviewed for the lower perceived independence there are three main relevant conditions: either the status of the judges that do not give sufficient guarantees, or the interference of specific economic interests, or lastly, the pressure form government, here below the results.

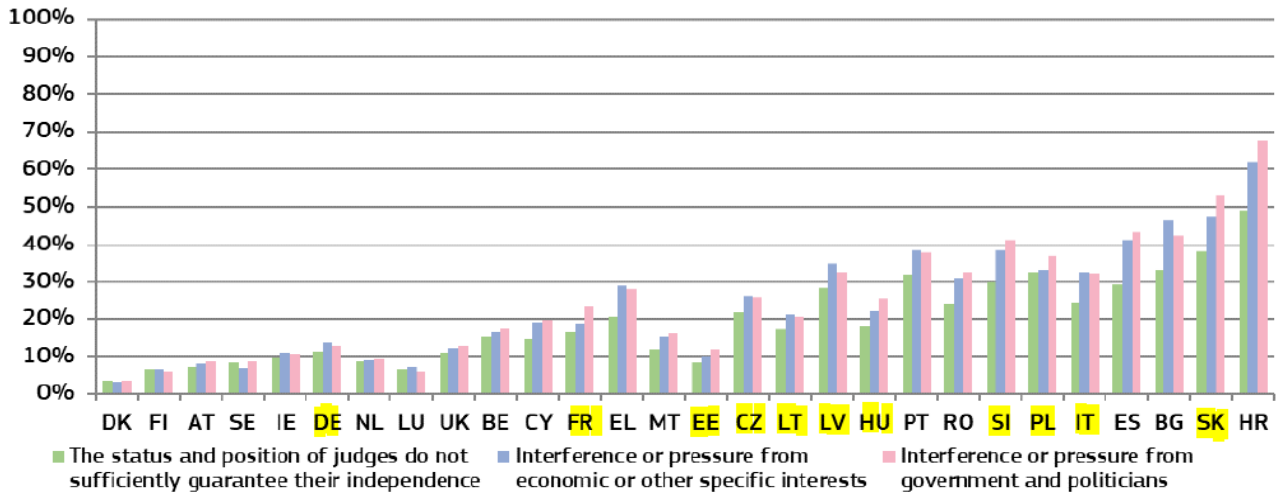

Figure 17: Source Eurobarometer 2019

Again, the position of countries in respect of the previous graph does not differ too much, even though the reason that was predominantly advanced was the pressure for government, which have very high levels especially in countries like Latvia, Slovenia, Poland and Slovakia. It is very high also in Hungary but not so much as in the other cases.

However, this is the opinion of the general public, and it is worth to see the opinion of legal officers that work in the courts of the states considered as practitioners. In the study done in 2013 for the assessment of the functioning of the national judicial systems for the application of competition law rules, practitioners were asked to rate the independency of their courts on a scale from 1 to 5. The majority of them (53%) considered their courts very independent and among them it is possible to find representatives of Czech Republic and Germany as it would be expected. 29% of them gave a rate of 4, so still a high valuation of the independence of their courts, and in this group, there are representatives of again Czech Republic, but also Estonia, Latvia, Poland and Slovakia. 12% of them (Latvia, Lithuania) considered the courts deserved an average mark of 3. No practitioner gave a rating of 2 and only 6% (Hungary) considered their court was very dependent giving a rating of 1.

As last element to analyze for what concerns independence is the resources given to the judiciary. In the 2019 EU Justice Scoreboard, it has been inserted an overview of the financial resources that the judiciary has in all Member States.

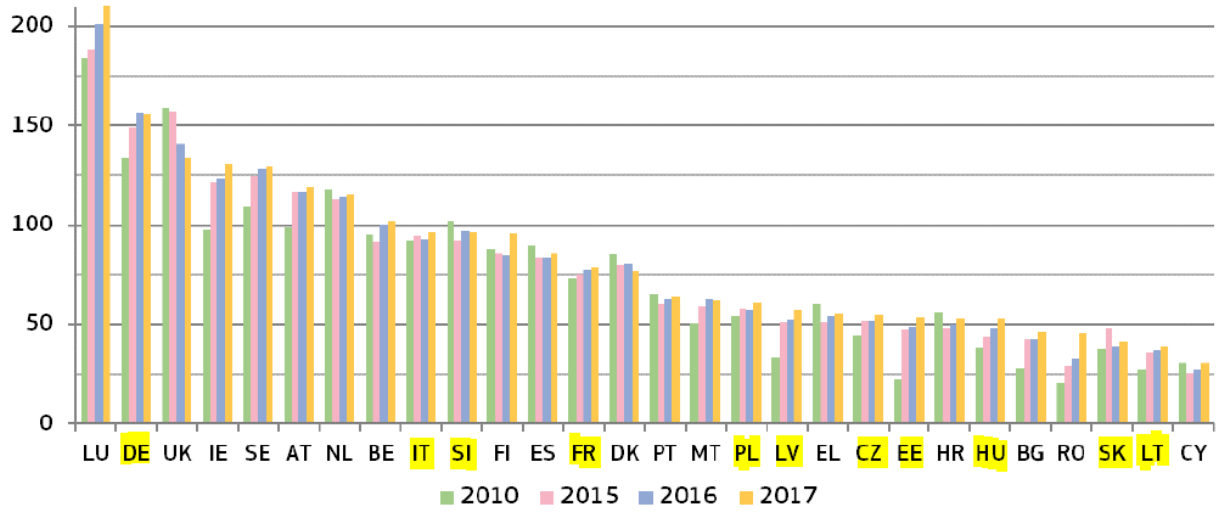

Figure 18: Source Eurostat

As evident from the graph, core Member States reserved higher amount of financial resources for the judiciary, while CEECs still have poor finances devoted to the judicial branches. Critical are the situations in the cases of Slovakia and Lithuania.

Given this overview it is needed a more specific analysis of the different judicial systems and their perceived independence. For this reason, the document will rely on the BTI index reports from the year of entrance in the EU (2004) until the last report (2018).

a) Czech Republic

In the Czech Republic, the judiciary is formed by a three main courts: the Constitutional Court, the Supreme Court and the Supreme Administrative Court. The Constitutional Court deals with cases of constitutional importance; the Supreme Court is the court of highest appeal in most legal cases; and the Supreme Administrative Court deals with administrative law cases as well as political cases. Judges are appointed by the president and approved by the Senate, with different tenure: in the Constitutional Court are appointed for 10 years, in the Supreme Court and Supreme Administrative Court for an unlimited period. Generally, the process of appointing judges is transparent.

In 2006 the BTI report evidenced a problem for Czech courts in the time management of their cases, and this problem was highlighted also from the European Commission, given the evidence that frequently Czech citizens turn to the European Court of Justice with their cases for this reason. However, according to the index, individual courts are able to interpret all legal norms within their powers independent of political pressure. In 2008, the BTI report highlighted the same problems of the previous year, however, criticizing the raising level of cases against the Czech Republic before the European Court of Justice because of waiting period for a court hearing, that could amount also to two years. In the same way, the report restated the evident independence of the judiciary from the executive. In 2012, the BTI reported of evidence of strong collusions and corruption among the judiciary with the organized crime. In 2016, it has been reported of open clashes between the at that time President Vaclav Klaus and the Constitutional Court for the appointment of judges. With the new President Milos Zeman, the clashes slow down, and the Court managed to have 10 new judges with fair and transparent appointment. In 2018, a new evidence of the independence and the authority of the judiciary in Czech Republic was the attempt by the new Ministry of Justice to reform the judicial system, but the proposals were not in agreement with the judiciary that tried to give relevant opinions on the work of the Ministry. Given that an agreement could no be reached, the reform was postponed.

b) Estonia

The highest judicial authority of Estonia is the Supreme Court with nineteen judges. The Chief Judge of the Supreme Court is appointed by the parliament after nomination by the president.

Lower-court judges are appointed by the President of the Republic on the proposal of the Chief Justice of the Supreme Court. Overall, effective safeguards against unconstitutional intervention and guarantees for judicial review are in place, especially after the judicial reform of 2003.

In terms of judicial independence, the issue of financing for the judiciary has been a controversial topic for many years. Even if the Supreme Court has always been considered as a constitutional institution with a separate segment of the national budget, ministry of justice has the competence to set the financing for the lower courts, a situation which may potentially make the judiciary dependent on the executive. In 2008, the minister of justice formed a working group to find a better financing scheme. The group completed its work in December 2009, delivering to the parliament multiple proposed amendments, including the creation of an independent administrative agency for the judiciary. However, the entire reform was heavily criticized, especially for the proposal to give justices and judges higher up in the system the duty to assess the performance of colleagues beneath them. at the end of 2009, given this high level of critics, the Parliament decided to give up on the reform, without finding a solution to the issue of financing.

c) Hungary

There is an independent judiciary with a working self-government, called National Judicial Council, which is composed of the president of the Supreme Court, and nine judges elected by the judiciary, the minister of justice, the chief prosecutor, the chairman of the Hungarian Bar Association and two parliamentary deputies. The Constitutional Court and, to a certain extent, the president's office, are functioning as judicial reviewers, since the president of the republic can send bills back to parliament to modify them. However, there are some persistent problems like the judiciary's fiscal dependence on the government. Furthermore, the interferences of the government became more and more pressing, and in 2006, the government asked to the judges who sentenced the participants in the fall 2006 street riots organized by extreme right forces to explain their judgments before a parliamentary committee. The former Constitutional Court Judge Géza Kilényi said that "Hungary ceased to be a rule of law state". In the 2016 report has been stated that the judiciary's independence is constrained by the political authorities. In March 2013, parliament amended the constitution to restrict the Constitutional Court's scope of review, and the Court is forbidden to review proposed constitutional amendments and may not refer to its jurisdiction predating the new constitution's entry into force. In addition, it was extended the prohibition to review laws related to public funds. At the end of 2014, 11 of 15 Constitutional Court judges had been appointed by the governing majority unilaterally, no

opposition opinions were taken into account. In 2012, the government forced 274 judges and prosecutors into early retirement by reducing the retirement age. In the last report of 2018, the independence of judiciary in Hungary scored 5 out of 10.

d) Latvia

The judicial branch in Latvia has been considered fairly independent, also through the establishment of the 12-person Judicial Affairs Council in May 2004, which is responsible for screening candidates for the office of judge. Thanks to this the Court Department became more independent of the Ministry of Justice. However, the legal system still lacks efficiency due poor resources. A big problem envisaged in Latvia is the perceived corruption of the judiciary. Trials can be delayed or penalties can be weakened for those who have the means to influence procedure, while ordinary people might be punished more severely. Attacks to the independence and efficiency of judiciary have happened in May 2010, when the Latvian parliament elected parliamentary deputy Vineta Muizniece to Latvia's Constitutional Court, a person that had never previously worked as a judge or a legal scholar the two traditional sources for Constitutional Court judges. Of course, the BTI report highlighted that this appointment suggests the politicization of Latvia's highest court. Muizniece was subsequently suspended and she was forced to resign from the court. She was replaced by Ineta Ziemele, a respected Latvian judge at the European Court of Human Rights. In a report of 2017, the European Commission noted that Latvia's parliament had not yet adopted an amendment to the law on judicial power, which aimed to strengthen the Council for the Judiciary.

e) Lithuania

The judiciary is free of both unconstitutional interferences and corruption. There are mechanisms for judicial review of legislative or executive acts. The fight against corruption has intensified in recent years showing encouraging results, still remaining relatively high. In any case, the Constitutional Court is highly esteemed and has a reputation for safeguarding democratic values. From 2010, all judges are subject to a periodic assessment of their performance, in order to improve corruption levels. Since 2009 and the reform to Law on Courts, selection procedures have become stricter and more transparent. According to the 2016 report of the European Commission for the Efficiency of Justice (CEPEJ), based on 2012 data, Lithuania continued to be the top performing EU member state in the courts with regard to litigious civil and commercial cases.

f) Poland

The judiciary is said to be relatively free from unconstitutional interferences by other institutions. The mechanisms for judicial review of legislative or executive acts are sufficient and the Constitutional Court has a solid reputation. However, despite the high number of judges in Poland, legal cases proceed slowly and inefficiently. When PiS came to power in 2015, the government merged the offices of the attorney general and the minister of justice, an act criticized as an attempt to politically interfere in the judicial system. In addition, the government exerted strong pressures on the Constitutional Tribunal in two main dimensions: the nomination of judges and the court's procedures. In 2015, the parliament adopted a controversial amendment to the Law on the Constitutional Tribunal, which tightened the deadline for proposing candidates to replace those Constitutional Tribunal judges with expiring term, in this way allowing the PO-PSL majority to replace five judges before the parliamentary elections. This act was saw as a politically motivated attempt to prevent the new majority from electing the judges, since only three of five judges' terms ended before the parliamentary elections. President Duda refused to swear in the judges, thus, the parliament had to elect five new judges. The second dispute is about the new voting procedure of the Constitutional Court that after an amendment has to adopt decisions with a two-thirds majority. Previously the court had reached decisions in groups of five judges. In addition, judges have to rule cases in order of appearance not according to priority. These rules make difficult reaching decisions and cause even bigger problems of efficient management of cases. The Constitutional Court declared this law unconstitutional, but since President Duda did not publish this decision, the government claimed that it is not valid, despite the Supreme Court's rejection of that interpretation. In addition, the government decided in July 2016 that only judgments made after March 10, 2016, would be published and considered valid, this exclude the declaration of unconstitutionality of the Court which is from March 9.

g) Slovakia

In the Slovak judicial system, there are three levels of courts (ordinary jurisdiction) and a specialized Constitutional Court. The justice system is said to be relatively free from unconstitutional interference by other institutions, however, during the years was under strong pressure and it became extremely politicized after 2008. The long-term and most serious weaknesses relate to the courts' overload, the growing abuse of disciplinary proceedings against judges, and alleged corruption. Problems became bigger when the former Justice Minister Stefan Harabín was appointed Chair of the Supreme Court and attempted to take out many powers from the courts directly to the Supreme Court and other bodies under his control. In September 2009, Harabín's actions as justice minister led to a petition signed by 105 judges

warning about the growing abuse of disciplinary proceedings against judges. After the formation of a new government, tensions have increased between the executive and a Supreme Court, and judiciary was almost fully controlled by Harabín. The Finance Ministry was unable to conduct an audit of the Supreme Court, as Harabín three times refused Finance Ministry auditors access to the court's accounts. The Ministry fined the court, but the case ended up at the Regional Court, that decided in favor of the Supreme Court. After 2014, Harabín was not reappointed as Chair of the Supreme Court nor of the Judicial Council, thanks to an amendment to the constitution. However, the amendment also introduced clearance procedures for judges, and this has raised concerns among watchdog and transparency organizations, such as the Council of Europe's special body - the Consultative Council of European Judges (CCJE). Since Štefan Harabin's departure, the SC's performance had improved, however, it still has to cope with Harabin's negative legacy, who often discredit the new SC Chair and the Chair of the Judicial Council.

h) Slovenia

The judiciary is independent from unconstitutional interferences and private interests, judges hold a permanent mandate and are elected by the National Assembly after being nominated by the Judicial Council, an independent and autonomous body. However, the excessive length of judicial proceedings continues to present a problem, furthermore, officers are severely prosecuted for abuse of their positions. In this sense, the period between 2013 and 2015 was quite chaotic for the judiciary, since for the first time, a district court judge was imprisoned for accepting bribes and the Judicial Council withdrew a permanent mandate from another judge. In some famous cases there was the recognition of evident mistakes from the courts. In 2013 and 2014, after charges and convictions of influential persons, trust for the judicial branch started to grow again. In 2017, there was need to fill high posts in the judiciary, including the president of the Supreme Court, elected by the National Assembly. The procedures were lengthy and difficult. Also, the appointment of other judges whose term was expiring attracted much attention from the public. Some political parties were critical of the selection procedure of the two new judges of the Constitutional Court in 2016, claiming their nomination and election in the parliament was part of the political trade between the biggest governmental and opposition parties.

3.4.2 Comparative Data on Efficiency

An effective justice system, upholding rule of law principles, has been said to positively impact economics, this is because with a right and efficient enforcement of law. Creditors are more likely to lend, businesses are dissuaded from opportunistic behavior, transaction costs are

reduced, and innovative businesses are more likely to invest. For these reasons, it is necessary to maintain a vital and efficient judicial environment. To measure the efficiency and therefore, also the quality of the judicial system of the countries under analysis, the document will be based on data taken from the Pilot study on the functioning of the national judicial systems for the application of competition law rules (2014), on the 2019 EU Justice Scoreboard and finally, also on the Study on judges' training needs in the field of European competition law (2016).

As first indicator of the efficiency, it will be surveyed the number of cases solved, analyzed for subject matter (application of article 101 or 102 TFEU) and for type of procedure (public enforcement or private enforcement).

Country	**Article 101 TFEU**	**Article 102 TFEU**	**Article 101 and 102 TFEU**	**Total**
Germany	82	36	23	141
France	103	48	57	208
Italy	277	91	0	368
Czech Republic	12	14	0	31
Estonia	//	//	//	//
Hungary	61	10	0	71
Latvia	4	0	0	4
Lithuania	25	21	9	55
Poland	12	38	0	50
Slovakia	11	9	0	20
Slovenia	14	5	0	19

Table 11: Source Pilot study on the functioning of the national judicial systems for the application of competition law rules

In this scheme, it is evident how the core Member States have huge number of cases solved in the field of competition law in respect to the CEECs for the years 2004 – 2013. This is important in the light of the difficulties highlighted in the previous section for what concerns independence of the judiciary. The difference is even more striking if this number will be analyzed in function of the type of procedure implied, either public enforcement (thus judicial review of NCAs decisions) or private enforcement (claims of damages before the courts).

Country	**Private Enforcement**	**Public Enforcement**	**Total**
Germany	86	55	141
France	51	157	208
Italy	6	362	368

Czech Republic	0	31	31
Estonia	//	//	//
Hungary	6	65	71
Latvia	0	4	4
Lithuania	4	60	64
Poland	2	48	50
Slovakia	0	20	20
Slovenia	0	19	19

Table 12: Source Pilot study on the functioning of the national judicial systems for the application of competition law rules

As anticipated, the difference is striking. The number of private proceeding before CEECs courts is irrisory in respect to the numbers of Germany or France. Again, Italy is in between. In this sense it must be said that the numbers of private enforcement are lower than public enforcement also in core Members States, but in this way, it verifies the statement that private enforcement is low developed in general. In the same way, it must be noted that the number in CEECs are too low for an effective enforcement of rights deriving from competition rules.

As another evidence, the Pilot study provided also the average length of cases by type of procedure, in order to see the efficiency in the time management of cases in EU Members courts.

Country	**Private Enforcement** **Mean (in days)**	**Public Enforcement** **Mean (in days)**
Germany	388 (year 2004 – 2008) 410 (year 2008 – 2013)	255 (year 2004 – 2008) 337 (year 2008 – 2013)
France	718 (year 2004 – 2008) 697 (year 2008 – 2013)	340 (year 2004 – 2008) 374 (year 2008 – 2013)
Italy	453 (year 2004 – 2008) 831 (2008 – 2013)	375 (year 2004 – 2008) 384 (year 2008 – 2013)
Czech Republic	//	466 (year 2004 – 2008) 496 (year 2008 – 2013)
Estonia	//	//

Hungary	576 (year 2004 – 2008) 576 (year 2008 – 2013)	583 (year 2004 – 2008) 583 (year 2008 – 2013)
Latvia	//	309 (year 2004 – 2008) 309 (year 2008 – 2013)
Lithuania	282 (year 2004 – 2008) 348 (year 2008 – 2013)	229 (year 2004 – 2008) 225 (year 2008 – 2013)
Poland	//	636 (year 2004 – 2008) 650 (year 2008 – 2013)
Slovakia	//	503 (year 2004 – 2008) 581 (year 2008 – 2013)
Slovenia	//	651 (year 2004 – 2008) 690 (year 2008 – 2013)

Table 13: Source Pilot study on the functioning of the national judicial systems for the application of competition law rules

The higher time necessary per case in CEECs is disproportionate to the lower requests to the courts in terms of cases. And even in case of public enforcement the average time needed to solve a case is very high in respect to the one needed in core Member States. This is one of the reasons advanced for a scarce willingness for individuals and companies to sue for a damages case before a court. Another important reason is the expensiveness of the court fees.

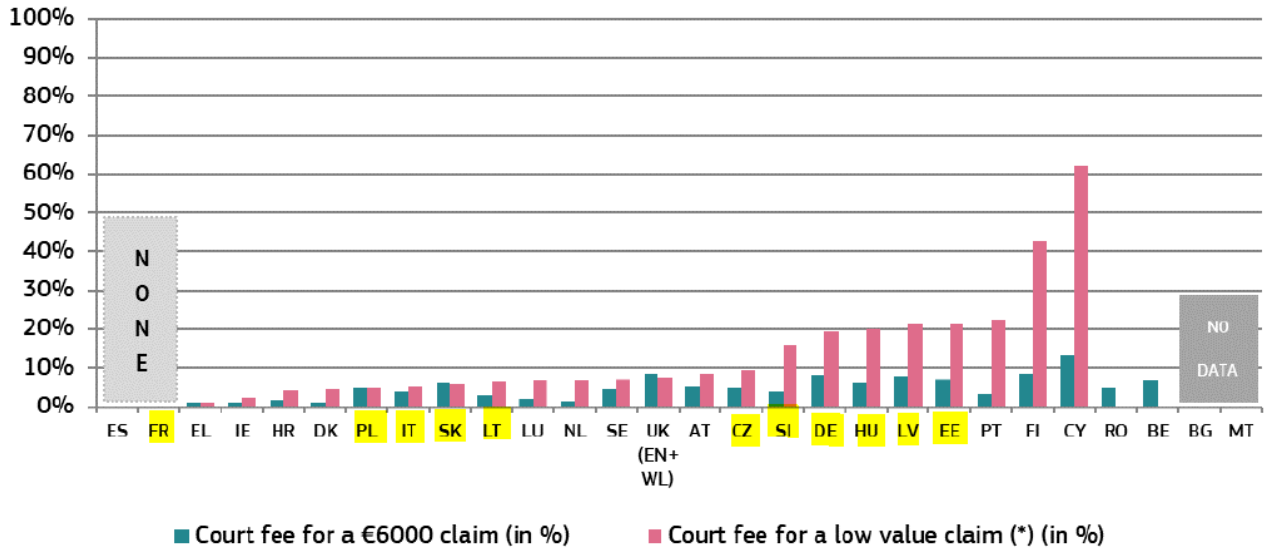

Figure 19: European Commission with the CCBE

The low value claim corresponds to the Eurostat poverty threshold for a single person in each Member State, converted to monthly income (e.g. in 2018, this value ranged between €110 in RO and €1 716 in LU). The court fees are calculated as a percentage of the value of the claim. In this sense, looking at the court fees for the low value claim, which present the higher values, this give an idea of how disproportionate is the requests for fees to individuals that go before a court for a breach of their right deriving from competition rules, resulting in discouraging the individual recourse to courts.

As last indicator of the lower recourse to courts is the general distrust in courts because of their poor specialization and knowledge in this type of subject matters. This general sentiment is validated by the results inserted in the 2019 EU Justice Scoreboard and the Study on judges' training needs in the field of European competition law (2016).

In the Study published by the Commission in 2016, it was asked to the respondents to the survey whether their court, division or chamber was "exclusively", "partially" or "not specialized" in competition law. 49% said exclusively or partially specialized and 51% said not specialized. Over 80% of judges dealing with public enforcement described themselves as exclusively or partially specialized, as did a high number of those with experience of private enforcement. Even though, in many jurisdictions, there are no specialized courts for private actions, data suggest that a correlation between the number of such actions and the fact that specialized courts exist, either formally or informally, is present. Therefore, there is a strong connection between the degree of specialization of courts and chambers and the level of knowledge of their judges. However, it must be questioned which is the level of training and specialization in specific domain of EU law, such competition law.

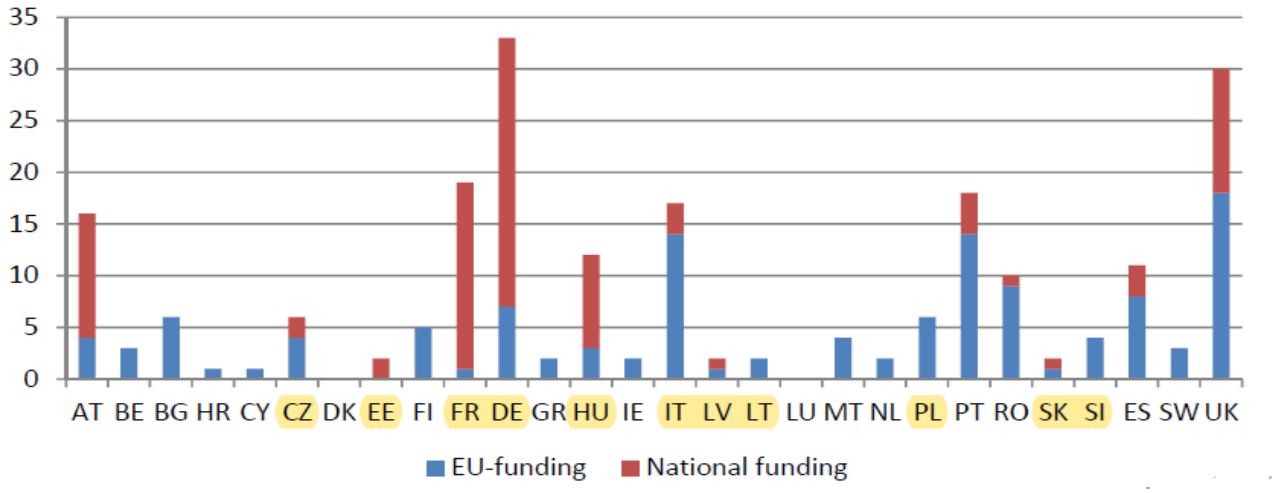

Figure 20: Source Study on judges' training needs in the field of European competition law

As explained by the graph, very few of the states under analysis spend enough resources of their national budget for training measures for judges who have to deal with competition issues, this provokes inefficiency in the management of cases. Especially in Poland, Slovenia and Lithuania all the finances dedicated to this aim come from EU funds.

3.5 Final remarks

As demonstrated by the previous discussions, the data for the NCAs showed that authorities in CEECs performed quite well in respect to authorities in core Member States, given that also the differences in the size of the markets in CEECs is much smaller than in countries like Germany, France or Italy. This is also underlined by the much greater amount of resources devoted to the NCAs especially in Germany, which is one of the most ancient authority on this matter, with a great resonance also at the international level. However, also in this case, considering the economic situation of CEECs, and that most of them still not belong to the Euro area, the resources devoted are considered sufficient, with the exception of Lithuania and Latvia, that present very poor financial funds.

Considering the differences among CEECs NCAs, what is interesting is that small countries perform very well even if with lower amount of financial and human assets at their disposal. This is the example of Lithuania and Latvia which have very good scores in terms of activity, instead of Poland and Hungary, countries with bigger markets and with higher level of foreign investments, but that have more difficult problems of cartelization and concentrations in the market. Czech Republic after a period of lagging behind the other members, after 2010 started to score much better.

Turning to the analysis of Courts performance, the situation is much different from core Member States and the CEECs, with the latter staying behind in the enforcement of competition law before national courts. If judicial review of NCAs decisions perform sufficiently well, private enforcement levels are extremely low in respect to Germany, France and Italy. If it could be acceptable in the very first years after the entrance in the EU and the decentralization of competition law, given the very poor notion of market economy that private and individuals have, and furthermore, the rights enjoyed by them according to the Treaties, after nearly 17 years of application is difficult to accept such poor results. Looking at the differences among the CEECs themselves, here again the small members perform much better that the bigger one. Considering the general data on judicial independence and the Eurobarometer results, much of the explanation can be given to the low level of trust that the general public give to the NCs in terms of independence and efficacy.

Differently from NCAs, NCs have very stronger links with the government and they are much more in danger to be captured by the government interests. As widely demonstrated by the recent cases in Poland and Hungary, judges and the judiciary are under an extreme attack by governing political forces in these countries. Furthermore, it must be recalled the extreme importance of the European Competition Network as a forum for learning and peer-to-peer review among NCAs core each EU Member State, as it will be explained in the next chapter.

4. THE MISSING LINK: THE EUROPEAN COMPETITION NETWORK

4.1 Theoretical traits of the Network model

4.1.1 Network Governance

The variety of understandings in the governance literature reflects distinctions along two dimensions: about methods, according to which networks are considered as analytical tools, or about ontology, which looks at networks as a typology of interest intermediation and as a specific form of governance. More specifically, intermediation means entailing different forms of institutionalized exchange relations between the state, business and civil society. Such form of intermediation presents a perspective of analysis different from the general centrally concerted policy action, indeed, the network concept draws attention to the interaction of many separate, but at the same time, interdependent organizations, which coordinate their actions through interdependencies of resources and interests. In definitive, networks can be conceived as a particular form of governance, defined as institutionalized modes of coordination through which collectively binding decisions are adopted and implemented, involving non-hierarchical modes of coordination, based on mutual resource dependencies and/or informal norms of equality among the actors involved (Börzel and Heard-Lauréote, 2009).

In addition to the previous distinction, networks can also be differentiated according with their functions. Following Slaughter's (2004) distinction. There three type of functions accorded to networks, the first category comprises information networks, exchanging information between governmental agencies or other authorities on several matters. Then a second category with the harmonization networks, designed to foster closer uniformity in regulatory standards; finally, the enforcement networks, designed to render enforcement more efficacious across international boundaries.

Much interesting for this discussion are the enforcement networks, which are established by EU legislative acts (usually regulations or decisions) which define their tasks, their functioning, and specify their involvement at the European level, either by making the Commission itself a member or a specialized European agency. The national entities belonging to the network are a responsibility of the Member States, but what is most important, is that EU enforcement networks are composed of actors with domestic regulatory authority, usually with powers to detect non-compliance and to levy fines. They can cooperate according to the internal rules of the network to a varying degree to strengthen their own domestic authority, in order to identify a problem and to raise the issue in the network to motivate enforcement by those members with the requisite authority. Two types of networks can basically be discerned. The first type includes networks consisting of national entities which manage Community programmes, while the

second type is a network of national authorities responsible for the application of EU Law in certain areas of EU politics. Usually created under EU legal acts, composed of relevant national authorities established under national law, this second type of network has the aim of creating an institutionalized platform for exchange of information, ideas, and concepts between the respective national authorities of all the Member States and to simplify and improve their mutual cooperation. In this case, the national authorities do not act on behalf of the Commission, since they are national authorities exercising administrative functions in a specific Member State, but they still apply EU law, for the general Member State's obligation and competence to implement EU law, thus, in the end, they act as institutions of decentralized application of EU law. However, they are bound together in a network so that the uniform and consistent application of EU law in a certain policy area is guaranteed everywhere in the EU by their cooperation and exchange. Furthermore, since the Commission usually forms part of the network, the exchange and cooperation in the network enriches the Commission's capacity to supervise and monitor the national authorities' implementation and application of EU law. Looking at their functions, such bodies were established for a more consistent, mutually concerted implementation and application of EU law, and in reason of these functions they may issue soft law instruments, therefore, they constitute an alternative type of law enforcement (Poncibò, 2011).

4.1.2 European Administrative System

The European Union is widely considered as a unique system of multilevel governance. Member States are required to have administrative systems and public administration institutions capable of transposing, implementing and enforcing the acquis according to the principle of *obligation de résultat*. Due to its multi-level structure, the EU has been widely conceptualized as a system of network governance in which a system of negotiation between state and societal actors is often implemented. This consideration was also affirmed by the White Paper on Governance published by the European Commission in 2001, in response to the crisis of effectiveness of centralized EU policymaking and its presumed lack of democratic legitimacy. However, networks have been present in the EU governance structure since the very beginning of European integration, with private actors seeking to use them in order to influence the Commission, the European Parliament and the Member States by offering their expertise and their political support. Yet, it must be recalled the asymmetrical nature of these informal relations, that not always satisfy the general criteria of governance by networks. Indeed, these forms of informal politics are better described as governance in networks rather than governance by networks, thus forms of governance entailing combinations of supranational

structure, intergovernmental negotiations and market competition. The Commission in particular, strategically used these networks to strengthen its position in EU policy-making, since networks lend significant power to the European Commission, which often acts as an arbiter making use of the resources provided by private actors to form the design and implementation of EU policies according to its interests (Börzel and Heard-Lauréote, 2009). Undoubtedly, the rise of networks in EU law has been possible by "process of double delegation" (Coen and Thatcher 2008). The process consists of two parallel delegations of powers: the first by national governments to supranational bodies, such as the European Union, and the second, to domestic independent authorities. At the supranational level, European states have given the EU progressively greater powers to extend its activities (Poncibò, 2011).

4.1.3 Effectiveness of the Network Governance

Like legitimacy, effectiveness contributes to the maintenance of political systems. The emergence of networks has been closely related to the declining effectiveness of centralized governance in domestic politics and the absence of it in international politics. The EU combines the functional differentiation of modern societies with the absence of a central authority in the international system, and in this system, networks allow EU policymakers to mobilize resources widely dispersed among public and private actors at different levels of government. While business and civil society actors offer information, expertise, financial means, or political support to the Commission, the European Parliament and the Member State governments, these latter can enforce EU law effectively. In exchange, private actors can influence the contents of EU norms and rules, with which they have to comply (Börzel and Heard-Lauréote, 2009).

Networks can enhance the quality of the policy and decision-making process through five major mechanisms. Firstly, networks have a highly flexible nature, capable of adjusting to complex contemporary policy problems, difficult to be tackled by existing formal institutional arrangements. Secondly, policy networks allow interested and affected actors to be involved in proactive governance decisions. A third valuable element is the capacity of networks to provide multiple resources, since no public actor can face the difficult modern policy problems addressing issues single-handedly. Fourthly, networks are aggregative institutions that can exchange and negotiate with public officials attempting to achieve compromises and avoid conflicts in order to resolve policy problems. Networks have the capacity to reach agreement, resolve conflict and help in the transfer of ideas. Continuous interaction between multiple strategic actors can boost trust levels between actors, that can conduct to further interaction and communication, providing a framework of consensus building for the structure itself, but also for the contents it discusses. Fifthly, networks have a socialization function, which is especially

important for the political and cultural diversity arising from enlargements, facilitating the development of shared meanings and values, often described as the human dimension of policy networks: direct personal contacts may facilitate the de-politicization of issues and the creation of particular understandings of policy issues and measures to resolve them. The socialization of individuals in network-like contexts at the supranational level is an important mechanism for deepening the European integration process (Börzel and Heard-Lauréote, 2009).

Networks equally enhance the quality of policy outputs, firstly by generating appropriate decisions shared by their target groups, since often, network actors possess credible basis for making difficult policy choices. These bases are founded on the networks capacity to gather information and knowledge, for the injection into the policy process. Secondly, and because of networks' ability to promote debate among multiple stakeholders, networks also enhance the quality of output. Thirdly, networks tackle major problems associated with horizontal coordination between actors, such as facilitating the reconciliation of diverging interests, and achieving collective outputs and outcomes. If this happens, interests develop a sense of joint responsibility and ownership for decisions. In sum, networks possess a real capacity to create increased compliance and reduced resistance to policy implementation (Börzel and Heard-Lauréote, 2009).

4.2 General Characteristics of the Network

4.2.1 Design of the Network: Objectives and Hierarchy

The ECN brings together the national competition authorities of the EU Member States and the EU Commission with the aim of cooperating closely on the enforcement of European competition law. While in principle, the network members are considered equals as enforcers of EU competition law, the Commission in fact occupies a central role in the network in order to ensure consistent application of the EU rules. According to the literature, the ECN represents a centralized interactive model: centralized because the Commission directs a system, where, generally the NCAs apply EU Law, and interactive in the sense that all members have to share information and cooperate with each other (Poncibò, 2011). The ECN discussion is framed according both horizontal and sectoral competition policy issues, although at different levels, indeed, the network has different sub-bodies, the first one is the Director General, whose meetings discuss major policy issues, while in the ECN Plenary takes place the discussion of horizontal antitrust issues and the ability of NCAs to implement them at the level of officials, in addition, working groups deal with horizontal issues such as leniency and sanctions, and finally, there are subgroups that work on particular sectors (Sauter, 2016).

The ECN's core activities are the allocation of cases and the exchange of information to provide a framework for cooperation, and finally, to create and maintain a common competition culture in Europe. The ECN is a highly juridified network with detailed cooperation mechanisms that are defined in Regulation No. 1/2003 and the Notice on Cooperation within the Network of Competition Authorities. These measures were supplemented by a political declaration: the Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities (Poncibò, 2011). Maybe the ECN started as a mere channel for information exchange, but it has progressed to become a policy network. The Commission's evaluations indicate that the ECN has become central to the implementation of the modernization attempt and its activities effectively reach beyond the primary coordination objective. The role of the ECN is also noteworthy because, even as a policy network, it does not have automatic legal status and the power to adopt binding rules in EU law (Sauter, 2016). Indeed, the Commission is the body entrusted with designing EU competition law doctrines through its individual decisions on the enforcement of Articles 101 and 102 TFEU, which is subject to judicial control by the EU courts. It can also communicates its interpretations of EU competition law rules to the public in soft law measures, but it is up to the Commission delegated legislative powers from the Council to enact block exemption regulations, and additionally, under the law of the Treaties, is the Commission that has the right of legislative initiative to the Council and the European Parliament, which makes the Commission a decision-maker and a veto player in the legislative process. The Commission's position as the policymaker in the EU competition law regime is also recognized in the case law that recognizes individual Commission decisions as pieces of EU competition policy, unless the EU courts overturn them (European Parliament, 2016). However, even though the internal proposals of the ECN issued externally through simple recommendations cannot have legal value, the work done internally has a weight for the general competition enforcement within the EU. The Commission has to take into account the opinions of the ECN and of the NCAs, and during years, the ECN showed that its internal work produced results, such as the publication of the Model Leniency Programme[10] in 2006, revised in 2012, and the 2013 ECN Recommendations on investigative and decision-making powers[11] (Sauter, 2016).

[10] The ECN Model Programme sets out a framework for rewarding the cooperation of undertakings which are party to agreements and practices falling within the scope of article 101 and 102 TFEU, to undiscover those practices and to sanction them easily. The ECN members commit to using their best efforts, within the limits of their competence, to align their respective programmes with the ECN Model Programme. The ECN Model Programme does not prevent a NCA from adopting a more favourable approach towards applicants within its programme.

[11] The ECN Recommendations are intended to serve as guidance for policymakers. They set out the ECN's position on the powers authorities in the Network should have in their competition enforcement toolbox, without prejudice

4.2.2 Legislative Basis

Devising a new system of enforcement, Regulation 1/2003 and the Notices, which the Commission published, aim to provide transparency in the applicable rules and in the actions that administrative authorities undertake to enforce compliance. Based on Article 3 of Regulation 1/2003, the NCAs are entrusted with the concurrent application of Community and national competition law to infringements within the meaning of Article 81 and 82 EC (now 101 and 102 TFEU). Furthermore, the common system of enforcement of Community competition law requires a close collaboration between all enforcement agencies. They have to cooperate in finding evidence for infringements, and they are to inform each other about investigations so as to "ensure both an efficient division of work and an effective and consistent application of EC competition rules" (European Commission, 2004a). Indeed, the ECN was created to meet these tasks: coordination of enforcement and coordination of results, given that the Regulation 1/2003 did not establish a system whereby the decision of one NCA binds the others (Smits, 2005).

However, Regulation 1/2003 still defined the basis for the work of the ECN. Under article 11, the Regulation expressed the notion of parallel competences for the NCAs and the Commission, thus, the fact that they have to apply competition rules under strong cooperation. Always under article 11, the Commission is called to transmit to NCAs copies of the most important documents related to its powers, such as the power to end infringements and to impose remedies (Article 7), the power to order interim measures to avoid harm to competition (Article 8), power to make commitments with undertakings in the light of investigations upon them (Article 9), to find inapplicability of articles 81 or 82 (now 101 and 102) to a specific conduct (Article 10) or to withdraw individually the benefit of an exemption regulation (Adinolfi, et al, 2007).

In the same way, always in light of article 11, NCAs are obliged to inform the Commission and a competence to inform the other NCAs of the starting of formal investigative measures. Furthermore, the NCAs must also communicate to the Commission and other NCAs of a decision requiring an infringement to be ended, accepting commitments from an undertaking, or withdrawing the benefit of an exemption regulation, at least 30 days in advance of decision to be taken (Adinolfi et al, 2007).

In addition, under article 12, the Regulation provided for a continuous exchange and flow do information among the NCAs and between each NCA and the Commission, with the general aim of using this information as evidence. This use is limited to the investigations of conduct

to the legal frameworks of those ECN jurisdictions which go beyond their scope. According to the ECN, greater convergence in this field would facilitate cooperation in the Network and bolster the level playing field in Europe.

punished under articles 81 and 82 EC (101 and 102 TFEU) or similar articles with the same objective under national legislation, and in any case this information must respect two characteristics: the source of information provide for sanctions similar in case of conduct breaching articles 81 and 82 (102 and 102 TFEU), and secondly that this information must be gathered respecting same level of defense of human rights of the receiving authority. Furthermore, this information cannot be used to impose criminal sanctions (Adinolfi et al, 2007).

In view of this complicated system of parallel application of competition rules, the Notice on Cooperation within the Network of National Competition Authorities published by the Commission (2004), provided for the functioning of the ECN in the beforementioned two main objectives: case allocation and cooperation mechanism.

4.2.3 Allocation of Cases

The ECN incorporates an informal work allocation regime that is set forth in detail in the Commission's (2004) Network Notice, then it is confirmed by the General Court that the national and EU courts cannot enforce the rules of work allocation, since its informal character. As a general principle, the allocation mechanism aims to minimize the number of authorities involved in a single investigation to minimum possible. Usually, under this regime, the authority which opens the proceedings either *ex officio* or upon a complaint, remains competent to act until the end of the investigation. However, the reallocation between the members is possible with the aim of the effective enforcement of EU competition rules. In such cases, network members attempt to allocate the case to a single well-placed authority as far as possible. For an authority to be considered to be well-placed, there must be a material link between the infringement and the geographical jurisdiction of the authority in question. That material link is deemed to be present when there are these three cumulative conditions:

- when the violating conduct has substantial effects on competition within the territory of the authority,
- when the authority is able to bring to an end the violation effectively by adopting a positive decision, and finally
- when the authority can gather evidence required to prove the infringement, also with the help of other members.

To achieve the bigger aim of cooperation, NCAs are given the authority to close their proceedings when another NCA is dealing with the same violation, although there is not a strict obligation. The allocation of work rules of ECN makes difficult that a single breaching conduct

can be investigated by a large group of network members. However, in cases where more than one NCA shows an interest in investigating, the NCAs may form an enforcement group and appoint one of them as the lead authority, with the aim of coordinating the overall activities. The logistical aspects and the communication among themselves are not governed by the Commission Notice (2004), but NCAs enjoy autonomy in utilizing mechanisms provided by their respective national procedural laws, as long as they do not breach the EU principles of effectiveness and equivalence. The Commission still enjoys a privileged position also in the allocation mechanism, and it can take cases where the violation in question affects the market in more than three Member States, where the case is closely related to other EU provisions exclusively enforced by the Commission, or if the EU interest requires adoption of a Commission decision to develop EU competition policy when a new issue arises. The NCAs do not enjoy parallel competence in such cases, as the initiation of formal proceedings by the Commission relieves the NCAs from their authority of investigating the same case. In other words, the Commission enjoys exclusive authority over the issues with potential or actual impact on the European market and the doctrines of EU competition law (European Parliament, 2016).

4.2.4 Cooperation mechanism

In order for the Network to function properly, authorities must be able to exchange information gathered by one of them. The law should provide for a free exchange of information among the members of the ECN. In practice, network members communicate with each other through an electronic database called the 'ECN Interactive' administered by the ECN Unit of the Commission, where the NCAs and the Commission file information regarding the proceedings they have opened that can be consulted by other network members. This mechanism is not only an ordinary tool of the network management, but it also provides the Commission with an important capacity of monitoring the action of NCAs as the network watchman. Through such communication, the Commission obtains all information regarding the facts available to the NCAs, the enforcement strategies, and their decisions. Thus, the Commission is enabled to intervene before the NCAs take any action that would go against the EU competition law doctrines or the enforcement consistency of EU competition rules. The Commission may try to alert the NCA in question with a written opinion, which, however, is not open to inspection by the parties under investigation.

When investigating an infringement of Articles 101 and 102 TFEU, the Commission and the NCAs are empowered to provide one another with any matter of law and fact, including confidential information. Although, the range of information that can be exchanged is pretty

extensive, there are certain precautions aiming at protection of rights of defense which are particularly important when anticompetitive behavior may be sanctioned through criminal remedies, for some NCAs remedies regime. The NCAs and the Commission may also seek one another's cooperation in the collection of evidence. In such cooperation, network rules show differentiated deference to procedural autonomy depending on whether the cooperation takes place between the Commission and the NCAs or among the NCAs. If the NCAs enjoy discretion as to whether they respond positively to another NCA's request for cooperation, they are under an obligation to respond positively and take the necessary investigative measures when such a request comes from the Commission (European Parliament, 2016).

4.3 Ten Years After

4.3.1 Convergence

In its five-year evaluation the Commission (2009) has claimed that "the network is an innovative model of governance for the implementation of Community law by the Commission and Member State authorities". With regard to the ECN, Wilks (2007) argues that "it offers an exceptionally powerful model of policy enforcement which reflects the politics of competition policy and the normative coherence of the policy community". Also, he states regarding the Commission that "it has Europeanized the national competition regimes with powers that are the equivalent of a transnational agency".

Indeed, resting on the already good results of 2009, the 2014 Commission's Report on the 10 years of enforcement of Regulation 1/2003 bring to light the impressive enforcement work that the Commission and the NCAs have undertaken together in that period. In terms of enforcement activity of the Commission and NCAs, during the reported period the Commission has adopted 122 decisions enforcing the EU competition rules, whilst NCAs have informed the Commission of 665 envisaged decisions applying these provisions. This means that one of the pillars upon which the ECN is grounded has demonstrated a brilliant functioning and great success. The level of convergence in the application of Articles 101 and 102 of TFEU was defined as satisfactory, also thanks to the formal consultation mechanism established by Article 11(4) of Regulation 1/2003 and by the informal dialogue within ECN. This dialogue, together with the mechanism of formal consultation between the Commission and the NCAs, provides the best mechanism of checking the quality of the legal and economic reasoning of NCAs cases involving the application of Articles 101 and 102 of TFEU and gives a greater help not only in terms of the robustness of the evidence and the standard of proof but also higher legitimacy and respect in front of the national courts. All these instruments contributed to assuring the

convergence when the NCAs have enforced the competition rules at EU level set in Regulation 1/2003 (Chiriţoiu, 2017).

An important feature of the system is that the NCAs are using the informal information exchange not only to co-ordinate themselves and their jurisdiction, in order to give guidance on each other on potential breaching conducts, but also to bring their proposed decisions to the Commission. This interplay between the NCAs proved to be as strong as the formal mechanism of communication, and it permitted to NCAs to share arrangements and to obtain detailed awareness into each other's practice, thanks also to informal discussions of cases (Mataija, 2010). As described in a French report: "This system of reciprocal information [...] gives each national competition authority [...] visibility over its counterparts' activities and, in practical terms, enables investigating case officers to share details of actual cases and pool their experience. [...] Discussions about cases take place well before the authority concerned adopts a decision. They form a sort of interactive, dynamic system enabling the different authorities to pool their knowledge and expertise, so as to ensure that infringements are dealt with as effectively as possible" (Conseil de la Concurrence, 2006).

These brilliant results are even more relevant if considered in the bigger frame of the enlargement process. Regulation 1/2003 was issued also in the light of the entrance of ten new Member States, most of them coming from a past of centralized economy, therefore, the mechanism of cooperation and communication was even more important. The importance attached to it can be explained through the bigger aim of guiding those new Member States in the right application of Community laws. As demonstrated in the previous chapter, most of the NCAs pertaining to those new Member States scored very well in the application of competition law (Chiriţoiu, 2017).

4.3.2 Puzzles to solve

The Commission, in its 2014 Communication, not only appreciated the virtues of the decentralized enforcement system, but also it requested a forward-looking exercise, in order to preview the possible challenges that must be overcome and the priorities for an effective enforcement given the latest developments in the field.

Apart for few points, Regulation 1/2003 did not harmonize any institutional or procedural aspects of NCAs' antitrust enforcement, indeed it avoided to define duties of Member States when designing the procedural framework under which NCAs operates. It could be considered a certainly a sensible and gradual approach to an evolution of a system that previously gave very little space to Member States. The main objective could be seen in an observation of the

development of NCAs' practice over time, together with the harmonization of the substantive rules, in order to identify possible procedural shortcomings. After 10 years, the Commission was able to identify the first observable deficiencies. There were identified three main spheres of action for possible enhancement of NCAs practice: the NCAs' institutional position; the convergence of NCAs' procedures; and the effectiveness of sanctions imposed by NCAs.

Firstly, the position of a national authority is essential to an effective enforcement. Within this essential aspect, the tool of freedom from political interference means that agencies can objectively determine which anti-competitive conduct cause harms the most consumer welfare, and thus needs an intervention. In this sense, the Commission consider necessary that minimum guarantees should be in place in order to ensure that NCAs can act and decide independently. Of course, the Commission recognizes the crucial role of parliamentary oversight, but it rather focused on protecting agencies against political and interested interventions in their practice (Mundt, 2014).

Secondly, regarding the procedural tools available to NCAs, the ECN efforts have already led to the production of several recommendations on key powers that NCAs should have to properly pursue their role in investigation and decision of breaching conducts. The aim of those issued recommendations is to push national legislators to bring NCAs' powers in line with the powers the Commission has according to Regulation 1/2003. An interest for convergence makes sense, both from an ECN point of view and from the point of view of undertakings operating in the Union: effective cooperation between authorities, and thus effective enforcement of Articles 101 and 102, is only possible where all authorities have similar investigation tools. With similar decision-making powers, undertakings have assured to themselves a more even treatment of competition cases within the ECN, also because, according of principles of legal certainty and equality, a company should not face different treatment in a procedure applying the EU antitrust rules, depending on which authority takes the case (Chiriţoiu, 2017).

Finally, according to the Commission Report (2014), effective sanctions are the most important factor to achieve effective antitrust enforcement. It is worth to notice that not all NCAs have even powers to impose sanctions and fines on undertakings for breaching of competition rules. The report also pointed out fining system should be also sufficiently aligned to the relevant EU cases precedents, because of the paramount importance both of the addressee and the liability for a fine (Mundt, 2014).

With the Report, the Commission has provided a welcome impulse for further thinking at this important stage of EU antitrust enforcement. Enlarging the harmonization from substantive law

to institutional and procedural features will serve to further strengthen the ECN authorities, and thus ensure that the EU's unique form of decentralized antitrust enforcement will continue to flourish (Chiriţoiu, 2017).

4.3.3 Legitimacy question

In 2004 the ECN was created in order to secure uniform and consistent enforcement of Articles 101 and 102 TFEU, and furthermore, it has also proved to be a prominent forum for Member States to discuss enforcement methods, for mutual learning and most likely the informal starting point for converging enforcement policies and rules. Much of the success of the ECN is said to be mainly to be found in its informal mechanisms of information exchange, however, it could be argued that this mechanism comes with certain costs in terms of accountability and due process due to the ECN's isolation from other policy-making exercises. It is true that National Parliaments control NCAs and the European Parliament has some forms of control on the European Commission, however, they are different in strength (Cengiz, 2009). Moreover, the procedures of the ECN and its recommendations in the form of soft law instruments make judicial control by the European courts difficult, as confirmed by the General Court in *France Telecom* (2009). The success of the ECN among the Member States can be explained by the fact that the consultative nature of the ECN can be used to justify "Europeanizing" national policy. On the other hand, if it is true that the NCAs are accountable and evaluated by national control and audit mechanisms, it must be highlighted that there is also a certain "peer accountability" present within the ECN and other international networks, that makes pressure on the action of Member States in order to respect the ECN and other network work. However, in the last period, the Commission's proposals for further harmonization, coming from the discussions of the ECN, raises problems of accountability, which has to be evaluated by having regard to the Commission's dominance in the ECN. The work within the ECN and the possibility to be a common forum for national laboratories is limited by the primacy of the Commission and its clear intention to push EU law as the benchmark of harmonization. In the same way, the Commission intentions show similar problems of legitimacy, since it lacks competence and a clear legal basis. In accordance with Article 5 TEU, the Union is only empowered to act within the competences conferred upon it by the Treaty. Looking at the harmonization of procedural rules, Article 114 TFEU (ex 95 EC) forms the legal basis for harmonization measures when such measures have as their objective the establishment and the functioning of the internal market. However, this Article has been strictly interpreted by the Community Courts and it can be applied only when it can be proved that without the harmonization measures the functioning of the internal market would be endangered and

competition distorted. Furthermore, as mentioned above, the work and procedures of the ECN are determined by soft-law measures beyond Regulation 1/2003 and the Network Notice and these procedures fall beyond the control of judicial review by the EU Courts. The work in the ECN result in non-binding policy communications but these might impact significant policy changes (Cengiz, 2009). Due to the ECN's lack of transparency for outside actors, it is difficult to see whether the harmonization coming from its work is the result of voluntary harmonization or Commission primacy. However, it must be recognized the ECN's success, that could be seen as a result of its character as a new mode of governance based on consultation, negotiations and soft law instruments instead of governance by command and hierarchy in the form of hard law (Coen and Thatcher 2008). In any case, flexibility should be balanced with formal controls, not leaving the Commission's as well as the NCAs' activities uncontrolled (Cseres, 2013).

4.4 European Competition Network: Experimental Mode of Governance

4.4.1 The Right instruments for an experimental mode of governance

As highlighted in the text, the proposals and the recommendations issued by the ECN, even though non-binding, and pertaining to instruments of soft law, gain more and more importance in the legal scene. However, at EU and national level, courts and political actors resist in taking soft law instruments in the field of competition law as legal sources creating certain legal effects. Judicial recognition of competition soft law at the national level is not only necessary, but also needed in order to legitimate the analytical framework called "more economic" approach, which is defined in soft law instruments, with the objective of setting its use as main framework of analysis and avoid the possibility of divergent judicial interpretations across the different EU Member States. Secondly, in order to determine the currently uncertain legal position of subjects of the de-centralized competition regime, such NCAs and also natural and legal persons affected by anticompetitive conducts. More specifically, national judicial resistance to soft law could create great uncertainty for the NCAs, since the latter are bound by Commission decisions which should incorporate the more economic reasoning of the guidelines, and therefore, NCAs are most likely also going to adopt a more economic reasoning. Conversely, national courts could depart from the guidelines because national courts are obliged to follow the case law of supranational courts, which do not necessarily support soft law instruments, in which the more economic approach is defined. In this case, NCA decisions would not be upheld on appeal, posing a serious problem from a rule-of-law perspective and the principle of legal certainty, particularly. Taking the principle of legal certainty as a theoretical starting point, this recognition should be achieved through adoption of a flexible view on law, and a prospect of soft law producing legal effects via the intermediation of

traditional legal categories such as general principles of law (legal certainty, legitimate expectations, community loyalty, and equality) is of greatest importance for the preservation of the procedural and substantive consistency of the decentralized system of competition enforcement (Georgieva, 2015).

In the end, the issue goes down to the question of whether the EU legal system can adjust soft law as a legal, and not merely political, phenomenon. In addition, given that the adaptation option exists, it should be asked how soft law can be adjusted, and the answers to these questions will certainly be different according to the policy sphere. Therefore, even if it is evident that multi-level governance in competition domain has presented novel opportunities for fitting soft law into legal discourse, it must be analyzed if this instrument can be adopted also in other law domains. In definitive, it is necessary the role of national courts as ultimate instances of normative ordering within EU Member States, that will certainly play an important role in shaping the recognition of soft law instruments as legal documents (Georgieva, 2015).

4.4.2 EU law and its specificities

As already said the ECN is not a typical example of network governance, mainly for two reasons: it is not a self-created body, but it was based on a Commission and Council decision with a specific objective to pursue. In addition, generally networks are based on informal means of cooperation, while the ECN is framed in a more formal set of rules, already discussed and based on clear legislative basis. Furthermore, it must be highlighted the strong role of the Commission in respect to the other NCAs, that could be regarded as more as a role of regulator and watchman on the task of decentralized application of competition rules. However, as already pointed out, the Commission has set its dialogue with the NCAs in a very open way, and it has never used those tools prescribed by law to oversee the NCAs decisions or actions. The work of the ECN proceeded smoothly and produced interesting and relevant proposals also in the field of policymaking, from which the Commission had taken for its own documents.

This special relationship grounded on peer-to-peer review and open dialogue could be explained based on the specificities of competition law. On the one hand, competition regulation is highly technical and requires skills in both legal and economic analysis, this naturally leads to look for more experienced professionals, rather than political actors to occupy places of control within NCAs and within the ECN, especially in the case of smaller NCAs. One of the best examples that NCAs could follow for ameliorating their skills is of course the Commission, the agency with the most significant previous experience in enforcing EU competition rules. Through this mechanism based on replicating experiences of authorities with higher skills, developments in European competition law are transplanted to the national level

not only thanks to legal hierarchy, but as a result of learning. Furthermore, an international view is a natural attitude for European competition experts, given that competition law in Europe was adopted in the Member States only after its adoption in the Treaties (with the exception of the German competition law). Therefore, competition law has always principally reflected a common EU policy, and for this reason, even in the presence of a decentralized enforcement as the one implemented after 2004, after half a century of learning from most prevalent and international competition authorities, decentralized enforcement hardly cold have led to drastically divergent views. In practical terms, this integration is also helped by the fact that the competition authorities' community is relatively small and well connected internationally, often described as an epistemic community. While this development has occurred gradually over the years, in the European context, the Commission has actively participated to this goal. One of the explanations of the fact that the ECN is functioning well is precisely the "success of competition specialists in the epistemic community in working with and through DG Comp to create a persuasive set of coordinative discourses" (Mataija, 2010).

Thanks to this analysis, a more general discussion comes to mind, and it is about the high level of specificity and neutrality that the interpretation and application of European Union law requires by the actors involved. Not speaking only of EU competition law, even if it has been taken as an example, but more generally for every field of EU law. These novelties in the structure, meaning and scope of EU law make the actors involved to have a special role, since they have to depart from purely national understanding of law, or from previous traditions in the interpretation of law, and putting themselves to the service of a new conception of jurisprudence. Taken these characteristics, that are far from being easy to practice, it can be wondered if specific legal, political and cultural traditions can produce problems to the neutral and highly specialized interpretation and application of EU law. In this sense, in recent times, strong political pressures brought by some extremist and populist parties in some Member States have brought to discussion the possibility for specific countries to effectively apply and respect EU law, due to precedent legal, political and cultural traditions. This reasoning is of special importance for this discussion given the fact that much of the problem is concentrated in CEECs countries, like Poland and Hungary. The previous sections have demonstrated that, at least for competition law, the records of compliance do not significantly vary across Member States, and especially if considered the CEECs. This text highlighted just one difference for which the variation in enforcement compliance is attributable to different types of coordination mechanisms. If for NCAs is present the above-mentioned ECN which operates as an information and learning network, for NCs this type of mechanism is absent. Given the already

explained specificities of EU law in general, the network mechanism seems to be a useful tool to reach a level of socialization and internalization of EU law that would be beneficial especially to those countries that have particular legal, political and cultural traditions, like CEECs.

5. RULE OF LAW BACKSLIDING IN THE CENTRAL EASTERN EUROPEAN COUNTRIES: PLACE FOR A NETWORK

5.1 The Limits of Conditionality

5.1.1 The Linearity Paradigm

A prevailing linear interpretation of democratization has been applied to Central and Eastern Europe based on an evolution from liberalization to democratic transition to democratic consolidation. Even though each stage has its own principles and standards, it has generally been thought that the process is cumulative, once the next stage has been initiated, it is impossible to go back to the previous one. However, the consolidation of democracy cannot be reduced to the presence of a simple series of characteristics like the acceptance of alternation in power or to the absence of a veto players against the constitutional order, in the same way it cannot be only measured solely on the basis of structural factors such as modernity or stateness. Democratization and institutional transformation are complex process that implies the adoption of EU norms and practices, in the recent CEECs developments, it has been noted that EU guidance works until a country gets in, but once joined there are few incentives or means to encourage further reforms or the adherence of democratic norms, to make EU conditionality to work best, it must achieve cognitive and behavioral change in the countries that undergo a transition. This is proved by the fact that most of the pro-European parties that dominated CEECs politics during the accession phase did not manage to stay in power after they had achieved EU membership, while, at the same time, harder or softer exponents of Euroscepticism have grown, this is also because the EU is a very appropriate target for populist dislike since it is a liberal project implying a redefinition of national sovereignty and identity. This highlights that the accession process was based on an inherent asymmetry, accepted by those who already shared the principles of the European membership, but it was also effective in a different way with the illiberal domestic actors, that discovered that the costs of non-membership would be excessive. Once joined the EU, however, this logic no longer applies (Rupnik, 2007).

As explained above, the assumption of the linearity paradigm did not permit good results if not in presence of strong incentives for those countries that have to undergo a democratic transition. These strong incentives are assured by the implementation of conditionality, for which an external actor, in this case the EU, apply on the domestic actors, in this case the CEECs, specific tools to reach the final objectives, thus democratic consolidation. Essentially, the action of conditionality is applied by means of tools like incentives and sanctions. Using incentives means that it is applied a positive type of conditionality, therefore an external actor granting benefits, concessions, exemptions or privileges to others in international relations. These

incentives aim at influencing the conduct of a State to reach a final objective that depends on the relationship between the actors involved. The objectives that are pursued can be different, from maintaining a status quo or to converging with certain goals, mainly in trade and economic cooperation, but also in the political and security field. On the contrary, negative conditionality is based on sanctions, even though, it cannot be recognized as clearly as a positive conditionality since these sanctions often are hidden in forms of delays, suspensions, freezing negotiations. The essential difference between the two types of conditionality is that in the negative one the external actor uses several forms of coercion to ensure an objective that the domestic actor does not want to pursue. The aim of conditionality can be political, economic or commercial without changing its political nature, in this sense, it can pursue the enforcement and defense of certain principles such as the introduction of a democratic system, the respect of the rule of law, the formation of the market economy, the protection of human rights and minorities, but the means used to achieve this objective can be encouraged through economic and commercial sanctions. The philosophy is based on the abovementioned linearity paradigm, for which economic success would imply a democratic transition to democracy, the rule of law and the market economy (Puente, 2014).

5.1.2 Compliance Conditions

Talking about EU conditionality application, it is possible to distinguish four issue areas on which conditionality applies in different degree: the rules that are part of the acquis communautaire; rules for which conditionality still applies after accession; rules subject of EU political conditionality; and rules that are neither part of the acquis nor an explicit part of conditionality. Further analysis should be added for what concerns rules part of the acquis Communautaire and rules under political conditionality, for the sake of the discussion in this document.

With regard to the acquis communautaire, EU institutions can sanction persistent non-compliance through the intervention of the ECJ imposing financial penalties, however, there is a difference between the degree of asymmetry present before the accession and after the accession, since the eventual sanction of withholding membership is no longer existing and financial penalties take time to impose. Therefore, even in case of probable non-compliance, the breach of rules is most likely to be temporary until the ECJ imposes sanctions. This case can be easily applied to any kind of breach of competition law, as the previous chapters have explained. While, rules that are not part of the acquis, but were part of the EU's political conditionality, include respect for rule of law and democratic principles, human rights, and minority rights. In these cases, EU institutions do not have any sanctioning power towards full

members, except for extreme cases, in which they initiate the mechanism under Article 7 of the EU treaty to suspend certain membership rights. Relying on the reasoning of the incentive-based approach, absence of sanctioning power would assume a significant loss of influence after accession, resulting in new members non implementing rules or in the worst case reversing the situation achieved for the accession (Epstein and Sedelmeier, 2008).

Based on the previous reasoning, in order for rules under conditionality application to effectively contribute to democratic transition and democratic consolidation, some conditions should apply. There are two main approaches that try to understand actors' compliance within conditionality implementation: enforcement and management approaches, based on the rationalist institutionalist perspective for which the new member states are particularly prone to compliance problems, because of shared domestic and structural characteristics. According to the first, the enforcement approach emphasizes the excessive costs of implementing EU legislation, which lead to acceding states to deliberately cheating at the implementation stage. Therefore, according to this view, adjustment costs should be at least bearable in order to be accepted by the transitional actors. Another point observed by this approach is the fact that, while excessive costs are considered bearable in order to achieve the accession objective, after accession, domestic consensus on the strategic goal of EU accession disappears, thus, it is more difficult for governments to use arguments about the overall benefits of membership to constrain actors unwilling to bear the costs of EU legislation in specific issue areas. Always the enforcement approach sheds light on the problem of weak post-communist societal mobilization, which is another factor affecting compliance, and it is usually problematic for post-communist states, where structural societal mobilization is lower. Societal mobilization is important for compliance in the EU because the EU's decentralized monitoring mechanism relies heavily on private actors at the domestic level to raise complaints with the Commission or to litigate in national courts against breaches of EU law. Yet in the CEECs, widespread social interest is generally weak because of past legacies coming from the administrative apparatus in the communist system (Sedelmeier, 2008).

On the contrary, according to the management approach, problems of non-compliance can derive by non-voluntary sources, especially on administrative capacity limitations, mainly because of the legacies of the communist period, creating a distinctive challenge for the CEECs. The administrative and institutional structures necessary to implement and enforce EU rules often had to be created from zero, for this reason, the EU decided to include the creation of administrative capacities in the CEECs in its accession conditionality, but with mixed results, mainly because of the scarcity of technical expertise in implementing EU law, worsened by

the extreme politicization of the civil servants. Also, at the Courts level, the enforcement of EU rules could have problems due to poor references to the ECJ jurisprudence and the scarce technical expertise in the legal profession (Sedelmeier, 2008).

Having outlined the compliance conditions necessary from the point of view of the actors that undergo a democratic transition, in this case CEECs, scholars also have pointed out that the state or the external actor implementing conditionality measures to induce democratic transition should consider basic conditions to make its action successful. In general, the effectiveness of political conditionality depends on three core conditions: the size of international rewards, the size of domestic adoption costs, and the credibility of political conditionality. First, the size of the rewards must exceed the costs that the domestic actor incurs in fulfilling the conditionality conditions. Second, political conditionality must be credible, and its conditions should clear, determinate, and consistent. Finally, the domestic actor must be sure that the reward will be paid when the political conditions are fulfilled and suspended otherwise (Schimmelfennig, 2007).

5.1.3 Beyond conditionality

When calculating the long-term prospects for democratic consolidation, it should be taken into account not only the calculation of the governments in power, and therefore, some of the conditions previously outlines, but also on the potential future governments. Especially in newly democratic space, or democracies in transition, the number of parties is usually very high, and each of them can be a veto player against the main objective, therefore, in order to have a complete frame of the compliance assessment towards EU rules, party constellation have an influence on the longer-term effectiveness of political conditionality. On this basis, we can distinguish between three types of transition countries: countries with a liberal, an antiliberal, and a mixed party constellation.

There is a liberal party constellation, if all major parties base their claims and programs on liberal reform and integration into the EU. Usually, liberal party constellation appears in countries that have undergone though a quite rapid and smooth process of democratic consolidation, resulting in high and stable conformance with EU standards. This is because, based on the claims and programs if these parties, the political benefits of EU integration were high, and the costs of adaptation were low. On the contrary, in countries with an antiliberal constellation of political parties, government pushes on antiliberal ideologies in order to legitimate its claims and programs and to preserve power. These actions are based on the high political costs of adopting democratic norms. In the mixed constellation, liberal and antiliberal parties or coalitions compete for political power, and if liberal parties reach the power, they do

not exclusively form the country's post-communist development. Therefore, in these countries, governmental authority can shift more than once between the two coalitions. And the democratic transformation may develop in a stop-and-go or up-and-down pattern (Schimmelfennig, 2007).

If it is possible to depart from a pure rationalist perspective of compliance to conditionality rules, other two important factor should be taken into account when considering future compliance. The first one is the increased legislative capacity building of the new states that through conditionality incentives have successfully transplanted all the *corpus iuris* required for the transition and to enter in the EU. However, it must be recalled what has been explained in the previous chapters, that is an excessive emphasis on formal compliance indicators may distract from practical application and enforcement. The transposition of a literal translation of the text of EU directives into national law can facilitate high rates of correctly and timely transposed legislation, but at the same time, the lack of debate about legislation and the most appropriate tools for the national context to achieve the same aims involves the risk of simply postponing the arrival of problems until the stage when the law has to be applied and enforced (Sedelmeier, 2008).

Lastly, the important factor of socialization should be considered. Even in case of anti-liberal political environment, and despite their dislike for the hierarchical and top-down nature of conditionality, the process of continuous monitoring and assessment may trigger a form of hegemonic socialization, therefore making to the new members perceive good compliance as appropriate behavior for good community members. They therefore remain sensitive to criticism from EU institutions and other members, thus, when compliance problems emerge and are discovered at the EU level, these problems are resolved fairly quickly (Sedelmeier, 2008).

If the CEECs had successfully reached a democratic consolidation and they effectively comply with EU rules is an open discussion. Already before the access of the CEECs in the EU, the former Czech President, Václav Havel, expressed worries about the consequences of the imperfectly developed civil societies in the new potential member states. In a speech to the European Parliament in Strasbourg, Havel argued that it was necessary to promote and strengthen support for shared values in the new member states to achieve greater trust in the EU as a whole. It is possible to say that after more than 10 years, there is a situation where the interpretation of the fundamental values, for a long time considered the bases of the EU, no longer seem self-evident (Petersson, 2019). The populist backlash in Central and Eastern

Europe reveals the absence in the new democracies of checks and balances, of truly independent judiciary and media to counterweight slightly authoritarian government (Rupnik, 2007).

5.2 Rule of Law as a value for Central Eastern European Countries

5.2.1 Rule of Law and the Application in the Transitional Period

According to many, the first modern and systematic analysis of the concept of "rule of law" was provided by the famous English jurist Dicey in 1885. It expresses the notion that nobody is above the law, not only the people, but also the rulers must follow predetermined and publicly known rules. Other sources highlight the implication of a separation of powers and a system of checks and balances. Equality before the law, democratic elections, and free media are also often cited as essential elements of the rule of law. Yet other sources focus on the importance of the judiciary for the rule of law. In addition, others try to establish a necessary link between rule of law and good governance. Last but not least, the rule of law has also been made responsible for the appropriate functioning of a market economy. Though, given this wide variety of meanings, it is easy to create some vagueness and ambiguity, with the danger to become useless. However, from this long list of characteristics, what is evident is the fact that rule of law is about vertical relations of private individuals or entities with the public administration or state authorities. Taking from Craig (1997) definition, it rests on three pillars:" first, any level of public administration, from the highest to the lowest level of administrative position, requires a legal basis for any decision or action. Second, every decision or action, as every legal basis, has to be in accord with superior norms in the corresponding legal system. Third, every decision or action of the executive must be reviewable by an independent judiciary for compliance with the first and second principles, respecting in the review procedure the minimum standards of fair trial, thus resulting in a reasoned and published decision (Emmert, 2009).

For states dealing with democratic consolidation, strengthening the law systems looks as a way to achieve better state performance and to manage a smooth and effective transition and consolidation. For backsliding systems, reinforcing the rule of law seems an attractive response to authoritarianism and the threat to the constitutional order. Usually, the process of rule of law reinforcing is studied and categorized by subject matter, or an alternate method focuses on the depth of reform, with three basic categories. The first type focuses specifically on the laws through a process of law revision, with often the economic domain as the focus. The second type of reform is the strengthening of law-related institutions, usually to make them more competent, efficient, and accountable. The reform also implies increasing the training and salaries for judges and court staff, and improvement dissemination of judicial decisions. Reform

also touches the police, prosecutors, public defenders, and prisons, with the aim of strengthen ethic codes and professional standards. Much importance is given to the revitalization of legal education, broaden access to courts, and the establishment of alternative dispute resolution mechanisms. The third reform type aims at the deeper goal of increasing government's compliance with law, and a key measure is achieving real judicial independence, therefore assuring that government officials refrain from interfering with judicial decision-making and accept the judiciary as an independent authority. The success of this type of reform depends less on technical or institutional measures and more on rational leadership and comprehensive changes in the values and attitudes of those in power (Carothers, 1998).

Probably the most active region for rule of law reform has been Eastern Europe. Since 1989, most Eastern European societies have taken significant steps to broadly reform their legal systems. During the period of negotiations to enter the EU, the Copenhagen European Council in 1993 devised a number of conditions to be achieved before accession. In addition to various political and economic reforms, the CEECs had to undergo a process of institutional and legal reform encompassing five central elements: constitutional reform; legislative reform; court reform; administrative reform; as well as reform of legal education. Other similar declarations followed in six-month intervals at every European Council, but still in vague and laconic language. Through the chapters in the Europe Agreements about political dialogue and the creation of Association Councils, some guidance was made toward the integration of the highest level of governmental structures in the CEECs according to the EU institutional system. However, already during the negotiations it became apparent that the CEECs had difficulties reforming their courts and public administrations (Emmert, 2009). However, the main problems to such reform are not technical or financial, but political and human. Rule of law reform will be successful only if it solves the fundamental challenge of leaders who refuse to be ruled by the law (Carothers, 1998). Aggravating these problems, there is the very structure of the EU legal system, in which there is neither a network of EU or federal courts across the Member States like we find in the United States, nor its own administrative agencies and officials. With very narrow exceptions in competition law and anti-dumping, the EU relies on national legislatures and administrations to implement its law and it relies on national courts to oversee that implementation. The EU Commission and the Court of Justice can only perform very limited services as overseers of that national implementation. Therefore, institutionalization of rule of law norms is essential for the successful compliance of new members (Emmert, 2009).

5.2.2 Challenges of Institutionalization

As previous sections have underlined, institutions and values cannot be simply transposed to be successfully enforced, but they should be internalized and crystallized in a process of institutionalization. According to Selznick (1957), institutionalization means that an organization, a norm or an object is "infused with value beyond the technical requirements of the task at hand". Either these values are approved or condemned, institutionalization involves an observable process of "envaluation" that occurs to and within organizations and has significant consequences. There are two ways in which organizations become institutionalized: one is process, the other is project. The most prevalent and universal form happens as a spontaneous social process over time, developing particular habits, relationships, networks, sharing and learning values, symbols, identities. Through this process the values appear to have a natural dimension, since they are products of interaction and adaptation; and this makes important the history of institutions, their customs, and traditions. On the contrary, projects of institutionalization, are rarer and more difficult, they appear as deliberate project to institutionalize an organization, to encourage particular loyalties and connections. It depends upon leadership guiding the transition from organization to institution. Making deliberate institutionalization so difficult is the presence of already existing institutionalized practices and structures that oppose the new institutions wanted by the leadership. In these situations, citizens may consider the new laws and institutions unrelated or in conflict with the past habits. In the case of CEECs, for some of the reasons explained before, many of the institutions and practices of constitutional democracy have not been effectively institutionalized in the region, though transplanted, they did not reward the efforts (Krygier,2019).

5.2.3 Freedom House statistics

Freedom House is one of the most important observatories for political and civil freedoms around the world. One of the indicators, to which they put much attention is the Rule of Law indicators, that observe prominently: the independence of the judiciary with respect to the executive and other external actors, the respect of the right to a fair trial, the presence of absence of non-discriminatory practices and finally, the use of illegitimate force.

According to Freedom House 2019 Report of the CEECs these are the values reported for the Rule of Law indicators on a scale from 1 to 4.

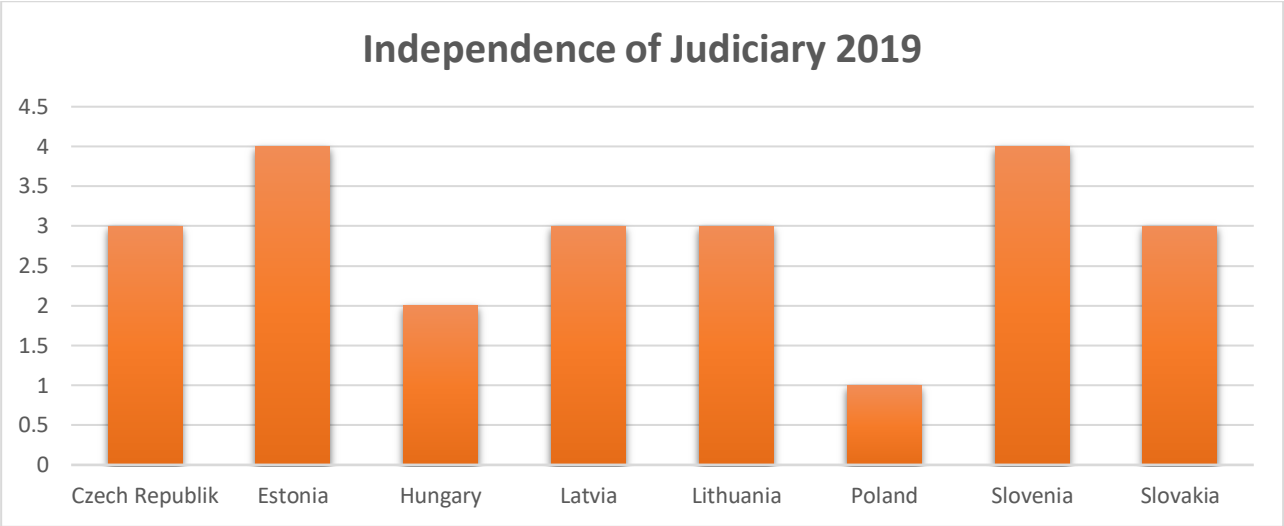

Figure 20: Freedom House Reports 2019

In this graph, it is reported the score for the independence of judiciary assigned to each CEEC. As it is evident from the scheme, Estonia and Slovenia have managed to obtain the maximum, while the laggards in this case are Hungary and Poland with respectively, 2 and 1.

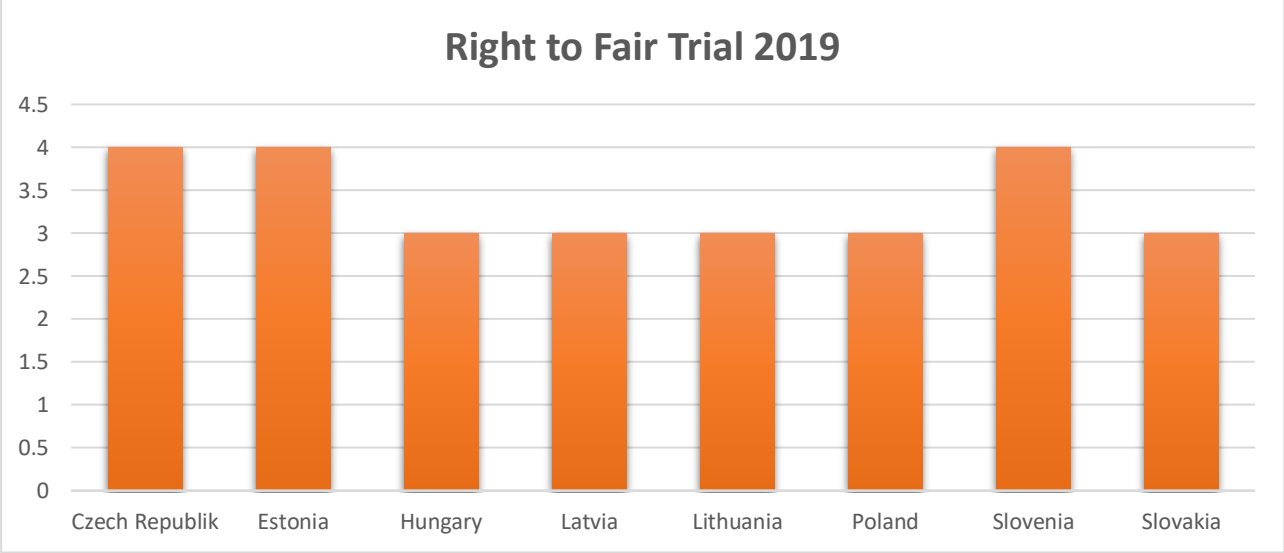

Figure 21: Freedom House Reports 2019

This second graph shows the scored assigned to the respect for fair trial in CEECs, and while there is a light increase in the performance of Hungary and Poland, they still remain lower than the others. The main reasons adduced for the score of 3 in the cases of Latvia, Lithuania and Slovakia are the overburden, corruption and inefficiency.

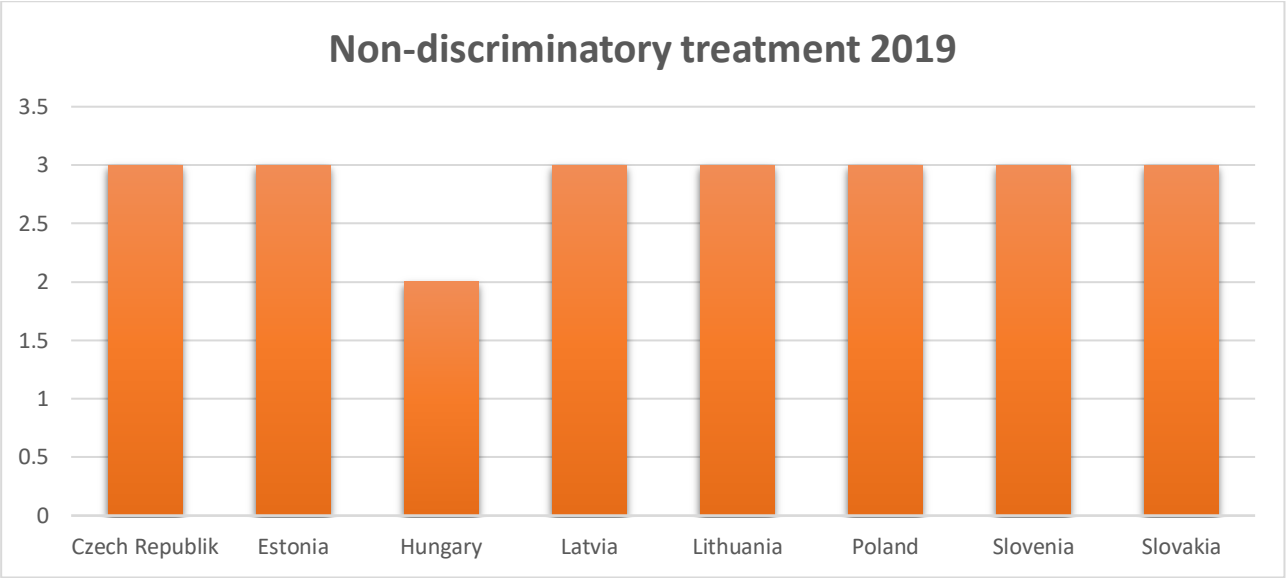

Figure 22: Freedom House Reports 2019

For what concerns non-discriminatory treatment, all the countries cannot manage to reach the maximum score of 4, in this case, the laggard is again Hungary.

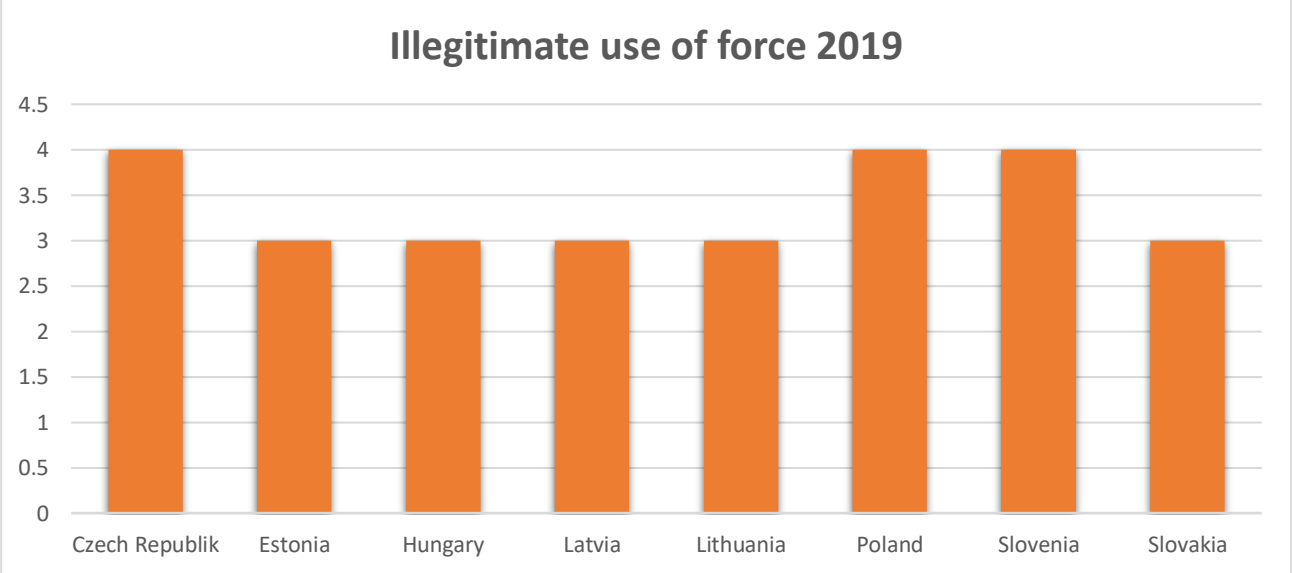

Figure 23: Freedom House Reports 2019

Lastly, Freedom House reported the scores for the protection from the illegitimate use of physical force and freedom from war and insurgencies. Here, surprisingly, Poland scored the maximum, even if in the previous indicators reached poor results.

Generally, during the last 5 years, Hungary and Poland had worried EU institutions and other Member States for their low respect of rule of law, and the following attempts to restrict and lower the independence and the power of the judiciary in respect of the executive branch.

In Hungary, judicial independence remains a matter of concern. Fidesz government managed to appoint all of the 11 judges of the Constitutional Court from 2010 to 2014, in 2016, an opposition party was included into the nomination process because of the Fidesz's loss of the supermajority in the parliament, this resulting in 4 new judges nominated. Despite this favorable turn in 2016, rulings in recent years have favored government interests. Also, the administration of the judicial branch is not immune from government interventions, a clear example is the case of Tünde Handó, president of the National Judicial Office (NJO) since 2012, has been considered as a supporter of the Fidesz government in limiting judicial independence. Another important case is represented by the parliament proposal to create a new administrative court system in 2018, giving to the Ministry of Justice broad powers to appoint and promote judges. However, this proposal generated great opposition in the European Parliament, triggering an investigation under Article 7 of the EU's Lisbon Treaty. As a response from Hungary, the parliament postponed the reforms in June 2019, but a bill passed in late December effectively revived the administrative court circuit. This new legislation also constrained judicial interpretation of existing case law and permitted to members of the Constitutional Court to seat on the Supreme Court, the ultimate judicial arbiter of cases not directly involving the constitution. In addition, it was created a favorable fast-track to the Constitutional Court for administrative authorities in case of unfavorable rulings (Freedom House, 2019).

In Poland, gained the power in 2015, the PiS government aggressively asserted control over the judiciary. The first step of a long series was passing a legislation limiting the powers of the Constitutional Tribunal (TK) and to appoint progovernment judges. In a second moment, in 2017, three significant judicial reforms were adopted. The first entrusted the justice minister to appoint and dismiss presidents and deputy presidents of courts. In 2018, the second reform instructed that 15 out of 25 members of the National Council of the Judiciary (KRS), responsible for nominating judges, should be instead appointed by the parliament. Always in 2018, the parliament passed a bill introducing lower retirement ages for the Supreme Court, causing that 27 out of 73 judges had to retire. Always in the same legislation, new sections of the Supreme court were created: the Chamber of Extraordinary Control and Public Affairs (responsible for declaring the validity of elections), and the Disciplinary Chamber. Although the Supreme Court ordered to suspend the legislation, the government ignored the decision, and the KRS started an accelerated appointment of new judges, usually near to the majority party. The European Commission initiated infringement proceeding against Poland, and the ECJ agreed with the suspension decision issued by the Supreme Court, therefore, the parliament was obliged to readmit retired judges. Always the ECJ recognized that the legislation in question

had breached EU law and, in April 2019, the European Commission launched another infringement procedure. In October, the European Commission formally referred Poland to the ECJ regarding the new disciplinary regime, this was followed in November by the ECJ decision that Poland's own Supreme Court itself must rule on the independence of the new Disciplinary Chamber. In the ECJ decision *Commission v Poland* (2019), the Court reminded the shared value enshrined in Article 2 TEU, thus the respect for the rule of law, and therefore, also for the independence of the judiciary. However, in the same decision, the Court highlighted that despite the amendments to the Polish Law of 2018, it was not certain whether that eliminated the alleged violations of EU law and, in any event, there remained an interest in deciding this case in view of the importance of judicial independence in the EU legal order. Consequently, the Court holds that the application of the measure lowering the retirement age of the judges of the Supreme Court to the judges within that court is not justified by a legitimate objective and undermines the principle of the irremovability of judges, that principle being essential to their independence. Furthermore, concerning the principle of independence of the judiciary, it observes that the conditions and the detailed procedural rules provided for under the Law on the Supreme Court with regard to a potential extension beyond normal retirement age of the period for which a judge of the Supreme Court carries out his or her duties do not satisfy such requirements, given the discretionary power granted to the President of the Republic. In response, PiS strengthened and expanded disciplinary measures to punish individual judges who put in question the KRS validity, the new disciplinary chamber of the Supreme Court, or other aspects of the judicial reforms. The government ignored requests from European Commission vice president Věra Jourová to halt the legislative process until proper consultation could take place (Freedom House, 2019).

These are few examples of a much larger attack to the fundamentals of rule of law, especially in Hungary and Poland. Even if the other states do not have such evident problems, their judicial systems and courts still have to fight against high level of corruption, bribery, with the courts being also under resourced and overburdened. As tried and proved, the infringement mechanism under Article 7 TEU is difficult, burdensome and time-consuming, and it did not give the hoped results. A different method should be implemented, before these changes in the institutional order of these countries can become irreversible.

5.3 Is there a place for a European Rule of Law Network?

The European Union as international organization has initiated the governance by networks, creating networks of ministry officials, legislators, experts and professionals to govern many sectors of the EU polity and economy, thanks also to the multi-level structure that forms the

EU itself (Slaughter, 2004). In line with this trend, also in the legal field, networks of judges, prosecutors and legal professions have proliferated increasingly across Europe. Generally speaking, judicial networks can be described as groups, conferences, commissions or organizations of legal experts, judges and academics created at a transnational level either autonomously or through international organizations' structure.

In this context, judicial networks could be defined as fora where actors routinize the transnational judicial dialogue, representing a privileged way to directly confront each other on legal problems raised domestically, to learn from foreign experience and to coordinate the interpretation of shared supranational legal texts and the implementation of international and supranational law in the domestic jurisdiction (Cassese, 2007). As already stated, a network plays a crucial role for cooperation, since it can foster mutual understanding and trust between national authorities and can encourage the acceptance of convergent approaches among different judicial systems. Furthermore, judicial networks implement mechanisms of influence and interaction on different judicial governance dimensions, managing to make actors action compliant with the law, reliable and predictable for the public's interest, replicable for judges, and receptive to citizens' needs (Dallara and Piana, 2016).

When talking about judicial transnational networks it is also possible to assume a transversal classification based on the main function they do, resulting in four main groups. The first group includes networks established in order to promote training, cultural exchange and lobby activities aimed at fostering the autonomy and the independence of the judiciary, while the second focuses on networks aimed at promoting meetings and forums for discussion devoted to inform and to bring other members up to date as regards domestic experiences. It is possible to have also liaison networks devoted to deepening specific topics by means of studies and research, and finally, technical network of experts in charge of promoting techniques and operating methods among Member States and in charge of building databases (Amato and Dallara, 2012). Among these, a further differentiation should be drawn among networks established by EU law, Council of Europe networks and spontaneous networks. All networks set up by the European law aim at being as contact points, trying to improve the coordination among national legal and judicial systems of EU members and to enhance mutual trust, essential for the work of systems of mutual recognition. They are mainly formed by one or more national contact points, appointed by Member States from the central authorities responsible for international judicial cooperation, or the judicial and prosecuting authorities working in the specific field covered by the network. These contact points operate actively in the net of judicial cooperation, sharing information and informal contacts (Dallara and Piana, 2016).

Network (or Commission)	Structure and Membership
European Judicial Network (EJN)	Central authorities responsible for international judicial cooperation; judicial or other competent authorities; liaison with magistrates; Commission's contact-point
European Judicial Network in civil and commercial matters (EJN-civil)	Central bodies and authorities; liaison with magistrates; other appropriate judicial or administrative authorities; professional associations representing legal practitioners
European Crime Prevention Network (ECPN)	National authorities competent in crime prevention; specialized researchers and academics; other actors in crime prevention; Commission representative
European Network of c.p. in respect of persons responsible for genocide	National authorities (police or justice departments) in charge of investigation of genocide, crimes against humanity and war crimes
European Network for the protection of public figures	National police services and other services responsible for the protection of public figures
Information Network for combating high-tech crime	Law enforcement networks combating IT-related crime
Immigration liaison officers network	Representative of Member States, posted abroad by the immigration service or other competent authorities

Table 11: Networks set up by the European legislature

As exemplified by the above scheme, overall, the duties completed by EU networks can be mainly related fundamentally to exchanging information, to technical and specialist assistance or, to a lesser extent, coordination activities. The final goal is clearly to improve the effectiveness of the whole system as a whole.

The consequence of this tasks is the creation of a supranational judicial epistemic communities (Haas, 1992) spreading knowledge and ideas among their members, who can play as change agents (Piana 2007) using domestically the cognitive skills and the expertise provided by the supranational institutions (Börzel and Risse, 2005). This process of trans-nationalization has special role within the enlargement process from 1993 to 2007. As previously explained, during the pre-accession period, the EU was particularly concerned about the capacity of new Member States to internalize and enforce judicial decisions taken by any other European court, and to followingly operate in the decentralized European judicial system, therefore, exchanging data and evidence (Piana, 2006). The EU encouraged acceding states to take part in the meetings, seminars, and conferences organized by these communities in order to make legal actors able

to build cognitive and interacting capacities and enter in contact with the knowledge that they should use domestically (Morlino and Magen, 2008).

According to Carlos Closa (2016), three normative arguments justify the participation of the European Union in a process of reinforced monitoring of compliance of the Rule of Law required to Member States. The first argument comes from the model of community, inherent to the EU itself, that portrays the EU as a community of law which depends on mutual recognition and mutual trust. The whole integration process has been characterized as 'integration through law', meaning that legal instruments enacted through legally valid and legitimate procedure governs Community actions. Indeed, the absence of specific EU implementation and judicial structures at the national level requires that it is up to MSs and their domestic administrative and judicial structures to protect domestic implementation and compliance. This system relying on MS capacity can work only if MSs recognize each system as equally valid to their own. Related to mutual recognition is mutual trust, that permits recognition because each member trusts the other members' legal systems. Secondly, possible breach of the principle of the Rule of Law affects all the members of the EU community since the loss of Rule of Law protection can extend beyond the MS in which it happened, impacting also other EU citizens and legal persons operating within it, externalizing its effects beyond its borders. Thirdly, erosion of the Rule of Law affects the consistency between the EU's own proclaimed values and policies. EU values enshrined in the Treaties request that the same requirements apply through time and across policies, in order for the community to function well, furthermore, the normative foundation for consistency comes from equality considerations, for which the presence of monitoring mechanisms for candidate members is not matched with same mechanisms for current members, therefore treating the two groups differently.

However, recent events in CEECs makes wondering if the values of rule of law shared and spread through these networks had effectively reached their objective, that is the consolidation of rule of law and democracy in post-communist countries. These events have undermined the feelings of mutual trust among MSs and then also the principle of mutual recognition, intertwined to each other, as explained above. This is particularly evident in the case *Minister for Justice and Equality v LM* (2018) where the ECJ stated that a judicial authority called upon to execute a European arrest warrant must desist to do it if it considers that there is a real risk that the individual subject to the arrest would suffer a breach of his fundamental right to an independent tribunal and, therefore, of his fundamental right to a fair trial because of

deficiencies responsible to reduce the independence of the judiciary in the Member State issuing the arrest warrant.

Although the presence of successful structures like the EJN, higher degree of cooperation and control should be introduced in order to maintain viable respect of the rule of law throughout Europe. A strong and juridified network would permit greater control on the guarantees put on Courts by the governments, since rule of law integrity can be maintained only to the extent that, along with the Constitution, regular laws are also implemented by functional adjudicative and enforcement institutions. In post-communist societies enforcing institutions are in a very difficult position. On the one hand, they are a critical tool for the processes of institutional change necessary for the state democratization. On the other hand, they are the objective of reform at the same time. In addition, post-communist institutions are also faced with a problem of capacity building, as previously outlined, indeed, in these societies the legacy of the authoritarian regimes still remains present with a highly politicized State, and a transition elite in the middle of a past dominated by formal legalism and a future of consolidation of democratic values (Dallara and Piana, 2016). The experience of highly juridified network governance in other field, like the case of competition law examined in the previous chapters, shed light on the possibility to avoid problems arising from past legacies of authoritarian past. However, there is the necessity of clear and specific organization rules, capable of managing possible conflicts or breaching of laws. Gathering and spreading information is necessary but not sufficient for the right enforcement of rule of law; in the same way, cooperation and socialization are essential for the institutionalization of values like the rule of law, but they should be matched by stricter controls and faster remediation mechanisms. In this sense, it is noteworthy the European Parliament proposal of 2013, after the first Hungarian case, where the EP also endorsed the creation of the 'Copenhagen Commission': a high-level expert body of notable and independent experts with the power to monitor continued compliance with the Copenhagen criteria used for admission procedure to the EU. However, then the proposal was not inserted in the last draft of the resolution voted by the Parliament. In response to this document, encouraged by both Council and EP demands for action, the Commission reacted, proposing the development of better instruments for securing respect for Union values through a robust European mechanism to be activated in situations with evidence of serious, systemic risk to the Rule of Law: the Rule of Law Framework. However, the Council and its Legal Service issued an Opinion which underlined the absence of solid and unambiguous competence for the Commission to act under this proposed procedure, therefore, incompatible with the principle of conferral. The Legal Service, however, proposed an alternative solution, for which MS individually could agree on

a peer-review system of the functioning of the Rule of Law permitting the participation of the Commission and other EU institutions if necessary. The proposal rested on a system based on intergovernmental agreement, however, a number of strong limitations is evident, leading to a strong intergovernmental bias. It also lacks precise instructions for space of action, thus leaving it to the complete discretion of the Member States. It has no coercive value, and it fails to ameliorate the already existing preventive and corrective phases of Article 7 TEU. Under these conditions, no significant addition has emerged after intense demands on the issue (Closa, 2016).

6. CONCLUSION

With the Treaty of Lisbon, the newly born European Union has recognized to competition law a cornerstone status in the legal framework of the Union. In Article 3(1)b TFEU, it has been written that competition policy highly contributes to the Union goal of the internal market. Indeed, since the Treaty of Rome, the EC has always given a primary role to competition law and policy in order to attain its goals. This primary role can be understood as the right instrument to reach the bigger objective that the founding fathers of the European Community set in 1958, that is a common and then an internal market. To obtain such goal, the Community and now the EU has a broad spectrum of democratic values, in line of the liberal tradition, for which economic and democratic progress go hand in hand. Rule of law is one of the most important, as listed in Article 2 TEU.

The entire structure of the EU and all its values were an example for many countries around the world, and many scholars have indeed defined the EU as a normative power, capable of influencing the norms and values of other countries. In order to protect this heritage, coming from many years of experimentation, debate and dialogue, the EU decided that aspiring members have to specifically pursue those values and to respect democratic characteristics in order to be accepted as a full member. Since the 1960s, 5 rounds of enlargements have been accomplished, The EU's eastern enlargement was bigger, more invasive and more innovative than earlier enlargements of the 1980s and 1990s. It also had a more comprehensive influence on domestic legal systems because the Europeanization process of the candidate countries' legal orders was engaging with market, constitutional and institutional reforms. Thus, the implementation of EU law by the countries that joined the EU in 2004 was really exceptional, due to a top-down model of rule transposition, and based on strong EU conditionality (Cseres, 2014).

Unlike past enlargement practice, the pre-accession process was characterized by unprecedented length and complexity, using a sophisticated set of pre-accession instruments, strategies and policies. However, according to some scholars, this complicated process of constitutional transformation of these countries was too fast and did not build the right guarantees for future issues. Indeed, this extraordinary journey of CEECs from recovering sovereignty to delegating part of it to the EU, lasted a little more than a decade. While the constitutional lawyers in the old Member States have had time to adapt incrementally to integration, the accession of the CEECs represented a major constitutional leap, with as a central element, the revision of the CEECs' constitutions, where conditionality requirements required the integration of a complex set of guarantees for sovereignty and independence. This proved a

rather challenging and controversial exercise, resulting in most countries in minimal amendments prior to the accession referendums (Albi, 2005).

Among the several laws to adopt, CEECs had to transpose and implement a set of new rules that pertains to the modernization package in the field of competition law, one of the most important legal field of the EU acquis Communautaire. The modernization process of Competition law is often recognized in the adoption of Council Regulation 1/2003, entered into force on 1st May 2004. This regulation decentralized the enforcement of EU competition law and increased the enforcement and monitoring powers of National Competition Authorities (hereafter NCAs) and National Courts (hereafter NCs). Besides the technical changes operated by this document, what is interesting is the fact that, in CEECs, this brought a complete new institutional set of bodies that were completing missing before. The CEECs had no past experience, nor expertise, in how to build efficient and effective institutions like NCAs; in the same sense, the judicial brunch had no knowledge at all of the competition law enforcement. Considering possible shortcomings, especially by the new Members, in the Regulation 1/2003, it was envisaged the creation of a communication network among the Commission and the NCAs that would have served as cooperation and canal of exchange of information. The creation and the effective work of this channel proved to be in a way beneficial to the decentralized enforcement. CEECs NCAs gained experience and expertise thanks to the cooperation and exchange of details among the other NCAs of the other Member States, and the Commission itself, that retains a hierarchical role in the ECN, giving advices on the operation of the NCAs. The same structure does not appear for National Courts, and indeed, the research confirms that National Courts and private enforcement before them still ranks very low in respect of other Member States.

The results of this discussion highlighted the critical position of the ECN as not only a contact-point among the NCAs, but also between each authority and the Commission. Its special structure, with the Commission as *primus inter pares*, permits both real information exchange and cooperation, and also uniform application of EU law. NCs, on the contrary appear under resourced in every field, both speaking of finances and human resources, often judges and lawyers are not specialized enough, and most of the time the proceedings are burdensome and time consuming, so that individuals prefer not to go before courts.

This bigger picture, in which decentralization of competition law is inserted, can be considered as an additional aspect to take into account when analyzing the actors that must enforce competition law in these countries, such as the NCAs and the NCs. Did this constitutional transformation process permit stable foundations for the independent and effective enforcement

of these actors? Looking at the process of institutional set up of the actors involved and the differences among them it is possible to define a possible interpretation of this larger phenomenon. Indeed, a prevailing linear interpretation of democratization has been applied to Central and Eastern Europe based on an evolution from liberalization to democratic transition to democratic consolidation. Even though each stage has its own principles and standards, it has generally been thought that the process is cumulative, once the next stage has been initiated, it is impossible to go back to the previous one. However, values cannot be simply transposed to be successfully enforced, but they should be internalized and crystallized in a process of institutionalization. In this sense, networks have a socialization function, which is especially important for the political and cultural diversity arising from enlargements, facilitating the development of shared meanings and values, often described as the human dimension of policy networks: direct personal contacts may facilitate the de-politicization of issues and the creation of particular understandings of policy issues and measures to resolve them. The socialization of individuals in network-like contexts at the supranational level is an important mechanism for deepening the European integration process.

The results of this documents stressed the functionality of network governance, especially applied to competition law, but as explained in the last chapter, recently, also in the legal field, networks of judges, prosecutors and legal professions have proliferated increasingly across Europe. Especially, recent events in CEECs makes wondering if the values of rule of law shared and spread through these networks had effectively reached their objective, that is the consolidation of rule of law and democracy in post-communist countries. Although the presence of successful structures like the EJN, higher degree of cooperation and control should be introduced in order to maintain viable respect of the rule of law throughout Europe. A strong and juridified network would permit greater control on the guarantees put on Courts by the governments, since rule of law integrity can be maintained only to the extent that, along with the Constitution, regular laws are also implemented by functional adjudicative and enforcement institutions. This document does not oversee the difference between the competition field and the rule of law value. According to the Treaties, while competition enforcement is a prerogative of the EU, and strictly scrutinized by the Commission, the legal field is mainly a domestic jurisdiction, even though it must be remembered that rule of law is a funding value of the EU, and attacks to it, means attacking the foundations of the Union itself. In this light, this document is not calling for the same application of enforcement unification applied in competition field, but surely strengthening the one already envisaged for what concerns respect for the rule of law.

In this sense it is useful to conclude with some valuable instruments that could enhance rule of law through the surveillance of national policies or the application of EU law. These tools have an important early warning and preventive role as they can tackle rule of law issues in the Member States before it is necessary to recur to Article 7. Very special contributions is the one given in the RENEUAL project (2014) which emphasized that uniform and harmonized administrative procedural rules across European policies (such as competition policies) based on the protection of constitutional and democratic principles would certainly enhance rule of law protection. Therefore, permitting a fair and equal access to courts in case of damages from an uncompetitive behavior, results in fostering the right to fair trial for individuals across the EU and improve the capacity, efficiency and independence of the national courts able to judge on these matters. Following this method, the ECN and its attempts of harmonizing national procedures is essential to the final aim. This type of proposals looks at facing rule of law issues from a side perspective, given the reluctancy of MSs to delegate more power to the EU, as happened with the EP proposals. Indeed, recently, has been presented the idea to link the European funds of the Multi Annual Financial Framework to a sort of conditionality referred to protection of rule of law principles. Respect for the rule of law is an essential precondition to comply with the principles of sound financial management and to protect the Union's budget. The proposed regulation would allow the Union to take appropriate and proportionate measures to address those issues (European Commission, 2019).

In the end, in this document it was attempted to consider the relevant issues connected both to the modernization of the competition policy, related to the accession of CEECs countries, and the possible lessons that can be learned from these years of application. Fundamentally, much more should must be said on the possibility to use network governance in other field of EU law, but for the sake of this discussion, the document presented the main examples, providing some proposals that are present in the recent debate.

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