EU Competition policy and the European integration of the Countries of Central and Eastern Europe that acceded to the European Union

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Abstract: *The historical development of the EU competition policy has been instrumental for the structure of the Member States' competition regimes, as well as for the legislative framework in the field of competition of a large number of countries beyond EU borders. This paper analysis how the provisions of the EU's competition policy have been gradually adopted into national competition systems, either by voluntary convergence, or by preconditioning the access to the internal market of the Central and Eastern European countries pursuing EU accession to the alignment and harmonisation of the national legislation on competition to the EU competition provisions.*
Keywords: *EU competition policy, countries of Central and Eastern Europe, European integration, accession preparation strategy, internal market, enlargement.*

INTRODUCTION

As an integral part of the Treaty establishing the European Economic Community, competition policy is one of the first few supranational policies where the Union has exclusive competence. From a historical perspective, the EU competition policy has played an essential role in the process of European integration as it facilitated the creation of the single market with free competition among enterprises.

This article aims to present that over time, the EU's competition policy has shaped and guided the socio-economic development and economic integration of the bloc, by establishing the rules of the single market, furthermore contributing to the completion of the internal market and to a broader economic integration of national markets with the historic Eastern enlargement of the European project.

In the 1990s' the relationship between the EU and the Central and Eastern European states has been based on a new generation of association agreements such as the case of IP law shows[2], which in turn replaced the trade and cooperation agreements concluded as a first step in the late 1980s. This article finds that the adoption of the EU competition laws by the associated countries with economies in transition, apart from the economic importance attached to those laws, was largely due to the prospects of EU membership as well as with EU's conditionality. The EU's imminent enlargement to the East coincided with a major reform of the bloc's competition policy. At the stage of the accession to the EU of a group of countries of Central and Eastern Europe in 2004, the enforcement of the competition rules represented a challenge for the European Commission, therefore pushing the European elites to carry out a radical reform of the EU competition policy.

The first section of the article begins with a brief discussion of the concepts of Europeanisation and European integration, as well as the EU's conditionality in the context of the transition to the market economy of the post-communist Central and Eastern European countries. The aim of the second section is to explore the role of the competition policy in the accession preparation strategy

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[2] Natea Mihaela Daciana, *IP rights and political reconstruction in the '90,* in "*Studia Universitatis Petru Maior Historia"*, 2018, Bolos Mihaela Daciana, *Marcile si indicatile geografice in sistemul relațiilor internaționale,* Bucharest, Ed Universul Juridic, 2013

and assess to what extent has the EU used its conditionality in order to "export" its competition model to third countries. Finally, the last section considers how the perspective of the EU's 2004 enlargement has influenced the debate around the major reform of the bloc's competition policy.

EU'S CONDITIONALITY TOWARDS THE CENTRAL AND EASTERN EUROPEAN COUNTRIES: FROM TRANSITION TO A MARKET ECONOMY TO THE PRE-ACCESSION STRATEGY

The European integration process of the Central and Eastern European countries commenced with the collapse of the Berlin Wall in November 1989, a historical event that marked the fall of communism in Europe. The reform movements in East Central Europe, now called Central and Eastern Europe (CEE), brought about revolutionary changes that culminated with the end of the communist regimes and with the dissolution of the Soviet Union, Yugoslavia, and Czechoslovakia. Henceforth, in their quest of joining the EU, the newly emerging democracies started to undergo the process of transition to market economies.

In the late 1980s, the EU's broader strategy on Eastern Europe was based on trade and cooperation agreements. Between 1991-1993, the EU's policy towards Eastern Europe continued with the conclusion with a majority of the CEE countries, namely Poland, the Czech Republic, Slovakia, Hungary, Bulgaria, Romania, except for Slovenia and Baltic countries, of a new generation of association agreements, called "Europe" agreements. The more detailed agreements introduced a political dialogue between the parties, providing for the gradual establishment of bilateral free trade areas. Economic, financial, and cultural cooperation between the parties was also fundamental. Therefore, the new association agreements have updated the EU's bilateral relations with these states that were aspiring to join the EU. In addition, the treaties provided, inter alia, for efforts to align to the EU rules and procedures and included provisions on the approximation of the EU body of law[3].

The European states that have the overall goal to become EU members, have to undergo the "Europeanization" process. In particular, this implies structural transformative measures while ensuring the necessary administrative capacity for the development or restructuring of national administrative authorities, legislative and regulatory approximation, and adoption of required standards and policies in the view of satisfying the conditions of accession to the Union.

The literature on Europeanization answers a number of questions about how and why European integration affects the governance of Central and Eastern European states. In Western Europe, European integration leads to limited convergence of existing administrative models. Some authors argue that the EU encourages candidate countries to join the convergence process by adjusting their administrative structures to certain institutional models to a greater extent than was required from the states that joined the EU in the 1980s and 1990s. The convergence process of the administrative structures is due to start with the accession negotiations and is sought to be part of the European integration process.[4]

Within the context of the Eastern enlargement of the Union, European integration and Europeanization are conceptualised as "two different but intertwined processes of the interaction of the CEE countries and their elites with the EU." The case of the European integration, the bottom-up approach, is described as the transfer of authority from national institutions to the supranational European level. Europeanization, the top-down approach, which goes along with the European

[3] Bolos Mihaela Daciana, *Marcile si indicatile geografice in sistemul relațiilor internaționale,* Bucharest, Ed Universul Juridic, 2013

[4] Heather Grabbe, *How does Europeanization affect CEE governance? Conditionality, diffusion and diversity,* In "Journal of European Public Policy", vol. 8, no. 6, 2001, p. 1014, Natea Mihaela Daciana "EU political projects in Eastern Europe. Impact on intellectual property." in Studia Universitatis Petru Maior, Series Oeconomica, 2018

integration is sought to have started long before accession took place.[5] This article adopts the above-stated working definition of Europeanization and European integration processes.

E. Semenova, M. Edinger, and H. Best point out that the most identifiable form of Europeanization is the EU's "conditionality" for membership in the case of the CEE countries, laid down at the 1993 European Council in Copenhagen. The Copenhagen European Council agreed to open the prospects of accession to the associated countries in Central and Eastern Europe that desired to join the EU. To this end, a set of detailed membership criteria, known as the "Copenhagen criteria", were defined. According to the set of criteria for EU accession, the candidate countries were required to "(1) …guarantee democracy, the rule of law, human rights and the … protection of minorities; (2) the existence of a functioning market economy and the ability to cope with competitive pressure and market forces in the Union; and (3) the capacity to assume the duties of a member, including adherence to the aims of political, economic and monetary union."[6] The Copenhagen criteria set up political, legal and economic preconditions, including competition law, as essential for the EU membership. On top of that, at the Copenhagen European summit the objective of membership was established, agreeing at the same time to gear the future cooperation with the associated countries towards it.[7]

The EU's conditionality was further present in the programs and instruments that were linked to the Copenhagen accession conditions, be it the PHARE programme, or the European Commission's Opinions on the eligibility of the candidate states for commencing accession negotiations. Moreover, the EU has used its policy of conditionality towards the region before the enactment of its membership criteria in Copenhagen, namely since the conclusion of the agreements with the CEE countries (trade and cooperation agreements)[8] following the signing of the Joint Declaration by the EEC and the CMEA in 1988.[9] Papadimitriou and Phinnemore explain that the conditions imposed towards the CEE countries by the EU in the enlargement "have been the main driving force behind the Europeanization of these countries."[10] Even though the official EU accession criteria were the "most complex and extensive set of conditions" that had ever been established in relation to non-EU countries, they were in fact partially addressing transformation challenges and weaknesses of the applicant countries,[11] as well as the fears of the EU to maintain the proper operation of the internal market after the enlargement.

EU'S COMPETITION REGIME AS A PREREQUISITE TO MEMBERSHIP

The literature argues that the major geopolitical actors from the West, mainly the USA and the EU, have intensively promoted the development and adoption by the transition countries of national competition laws and established relevant public authorities while proving great interest in influencing these countries to align their competition systems to either the US or the EU competition models.

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[5] Elena Semenova, Michael Edinger, & Heinrich Best (eds), *Parliamentary Elites in Central and Eastern Europe Recruitment and representation, Routledge*, Oxon, 2014. p. 14

[6] European Council in Copenhagen, *Conclusions of the Presidency*, Copenhagen, June 21-22, 1993, p. 13

[7] Ibidem

[8] Antoaneta Dimitrova, *Enlargement, Institution-Building and the EU's Administrative Capacity Requirement,* In "West European Politics", vol. 25, no. 4, 2002, p. 175

[9] Dimitris Papadimitriou, *The EU's strategy in the post-communist Balkans*, In "Southeast European and Black Sea Studies", vol. 1, no. 3, 2001, 69-94, p. 69-71

[10] Dimitris Papadimitriou and David Phinnemore, *Europeanization, Conditionality and Domestic Change: The Twinning Exercise and Administrative Reform in Romania*, in "Journal of Common Market Studies", vol. 42, no. 3, 2004, 619–39, p. 622

[11] Antoaneta Dimitrova, *op.cit.*, p. 175

In countries with economies in transition, the fundamental rules and enforcement mechanisms of most competition laws "substantially reflected the influence of Western models", mainly the EU-type competition provisions. It is noteworthy that the new competition laws adopted in the process of the transition from central planning to a market economy, in most cases dealt with all types of anti-competitive behaviour defined under the Western antitrust case law, giving implementing powers to public bodies that were independent of the Government. There is a large acceptance of the fact that the EU has used its bilateral agreements with non-EU countries to "export" its competition model.[12] This suggests that the EU's strategy of exporting its competition model can be easily identified in the context of the pre-accession of the Central and Eastern European countries that have joined the EU.

In their efforts to modernise their post-communist economies, Poland, the Czech Republic, Slovakia and Hungary, have each enacted the early 1990s antimonopoly laws and have set out competition offices. Although the antimonopoly laws were similar to the antitrust law in the United States, and certain provisions reflected the influence of the laws of certain EU Member States, the CEE countries' competition laws were generally designed based on the EU model. Since all of the antimonopoly laws in those four countries were passed prior to the signing of the Europe agreements, they did not copy entirely the EU competition rules and format as provided for in the agreements.[13]

A momentous step towards the European integration of the candidate countries of Central and Eastern Europe was the endorsement by the Essen European Council of December 1994 of the "strategy to prepare the countries of Central and Eastern Europe for accession" presented in July 1994 by the European Commission for approval to the Council.[14] The essential element that had been deemed to be "at the heart" of the strategy was the progressive preparation of the associated countries for the integration into the EU's internal market through the gradual adoption of the internal market *acquis*.[15] The Essen European Council spelled out the fundamental role of competition policy for the integration into the internal market in the context of the established accession objective. Nonetheless, the Essen Council acknowledged the progress achieved by the majority of the applicant countries in terms of the adoption of national laws on competition and in what regards the establishment of competition authorities.[16] As requested by the Essen European Council, in May 1995 the Commission presented the "White Paper on the Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union" which was designed to assist the CEE countries in their phased economic transition to the rules of the internal market. In the White Paper, the Commission explained the importance of competition law in ensuring the proper functioning of the internal market and in achieving the objectives of the Union. The importance attached to the competition policy in the EU's accession preparation strategy and its implementation in the associated countries was confirmed first at the 1993 Copenhagen European Council, whilst its "special importance" and "particular importance" at the Essen European Council in 1994, and respectively by the European Commission's White Paper and its detailed annex of 1995.

Furthermore, in the view of including the Baltic States and Slovenia in the accession preparation strategy, the Essen European Council requested the Commission and the Council to ensure that Europe agreements can be concluded with these four states under the French Presidency

[12] Anestis S. Papadopulous, *The international dimension of EU competition law and policy*, Cambridge University Press, Cambridge, 2010, p. 95

[13] Carolyn Brezezinski, *op. cit.*, p. 1132-1133

[14] Commission of the European Communities, *The Europe agreements and beyond: a strategy to prepare the countries of Central and Eastern Europe for accession, Communication from the Commission to the Council*, COM (94) 320 final, Brussels, 13 July 1994

[15] European Council in Essen, *Conclusions of the Presidency*, Essen, 9-10 December, 1994, p. 11

[16] European Council in Essen, *op. cit.*, p. 12

in 1995.[17] European agreements between the EU and the Baltics and the EU and Slovenia had been signed by mid-1997. The latest agreements included a commitment to eventual EU membership and defined the political and economic cooperation between the EU and the associated countries. The Europe agreements concluded with all the CEE countries incorporated a separate chapter in Title V on "Payments, Capital, Competition and Other Economic Provisions, Approximation of Laws"[18] dedicated to competition policy and provided for deadlines for agreeing on implementing rules. The competition rules of the Europe agreements reflected directly the competition provisions of the Treaty establishing the European Community, including articles 85, 86 and 92 (art. 101, 102 107 TFEU).[19] These agreements required the associated states to further adapt their legislation on competition to the law of the Union, whereas for the integration and participation in the single market, the implementation of the laws on competition was considered to be a precondition.[20]

Nonetheless, the competition systems set out in the CEE states pursuant to the provisions of the Europe agreements did not stipulate any commitment for the associated countries to institute a fully integrated regime based on the EU model. The focus was predominantly on the intensification of bilaeral trade relations between the parties as a prerequisite to the integration into the single market, and presumably into the EU.[21] As compared to the EU agreements with the other CEE countries, a key novelty of the Europe agreements between the EU and Slovenia and the EU and the Baltic States was the reference to the pre-accession strategy, as the latest were concluded following the 1993 Copenhagen European Council.[22]

The EU has converted the Europe agreements into means by which it has been able to pressure the countries of Central and Eastern Europe in complying with its conditions. In practical terms, the EU has insisted that the countries pursuing accession approximate their national laws to the Union's internal market acquis in order to "narrow the gap"[23] in return for their access to the single market. This meant the development of free trade between the parties and deeper economic integration of the associated states with the EU that would have, eventually, accelerated their economic transition. From the EU's perspective, harmonisation with the EU law, "in the first instance with regard to distortion of competition,"[24] was part of complex processes that needed to be fulfiled for the purpose of preserving the general interest of the Union. In particular, the EU's main concern and focus at that time was the prevention of the "erosion" of the internal market[25] that could be ensured by functioning market economies in the candidate states. In this regard, consideration was given to the development of the candidates' capacity "to take on the obligations of membership," respectively the internal market legislation, norms and standards.

[17] European Council in Essen, *op. cit.*, p. 4
[18] Michelle Cini & Lee McGowan, *Competition Policy in the European Union*, Palgrave Macmillan, London, 1998, p. 210, Bolos Mihaela Daciana, „IP rights protection and international trade", Procedia Economics and Finance, nr 3 2012, pp. 908-913
[19] Carolyn Brezezinski, *op. cit.*, p. 1153
[20] Michelle Cini & Lee McGowan, *op. cit.*, p. 210
[21] Michelle Cini & Lee McGowan, *op. cit.*, p. 211
[22] Peter Van Elsuwege, & Merijn Chamon, *The meaning of 'association' under EU law - A study on the law and practice of EU association agreements*, European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, Brussels, 2019, p. 26, available at: http://www.europarl.europa.eu/supporting-analyses
[23] European Council in Essen, *op. cit.*, p. 4, Bolos Mihaela Daciana, „Trademarks Applications in Romania Before and After Joining the EU*", Globalization and Higher Education in Economics and Business Administration* (GEBA), 2011, pp. 287-289
[24] European Council, Conclusions of the Presidency - Copenhagen, June 21-22 1993, p. 15
[25] Pelkmans, Jacques, Gros, Daniel & Ferrer, Jorge Núñez, *Long-Run Economic Aspects of the European Union's Eastern Enlargement*, Working Documents W 109, WRR Scientific Council for Government Policy, The Hague, September 2000, p. 25

In the view of the approximation of national laws to those applicable in the EU, Poland, the Czech Republic, Slovakia and Hungary have formulated amendments to their national antimonopoly laws enacted in the early 1990s. The incorporation of these amendments into the laws on competition was due to the conclusion of the Europe agreements with the EU pursuant to which the associated countries had the obligation to harmonise their legislation with the EU acquis, including EU competition provisions and trade law, whilst the main driver behind the institutional efforts of these countries was the perspective of accession to the EU.

The European Commission has easily succeeded in persuading Poland, Hungary, the Czech Republic and Slovakia, which had already adopted antimonopoly laws and had concluded Europe agreements prior to the definition of the Copenhagen criteria, to amend antimonopoly laws in line with the EU competition model, merely after four years of their existence. In fact, that period was characterised by a stricter application of the existing EU competition rules, namely the State aid rules due to the implementation of the single market. In this context, the Council conferred on DG Competition the power to investigate mergers by adopting the Merger Regulation (No 4064 of 1989). At the same time, the gradual and voluntary approximation of national competition legislation to the EU competition law and policy had been communicated. Hence, the EU competition rules were "exported" to third countries with accession perspectives as part of the conditionality of approximation of laws in the associated countries to those applicable in the EU.[26]

On one hand, it would be wrong not to outline that the governmental elite of the CEE candidate countries did not oppose at all the obligation to take over the principles of the Union's competition policy in the context of their decision to accede to the EU. On the other hand, the post-communist governmental elite in the CEE states had to take over the obligation of adapting their national laws, rules and administrative procedures to the Union's policy in order to ensure the implementation and enforcement of the EU competition model, without having had sufficient time to build institutional and administrative capacity similar to those of the EU members, and with no prior extensive expertise or profound knowledge about the functioning of the free market economy and, consequently, of free competition.

THE 2003 REFORM OF COMPETITION POLICY PART OF THE EU'S PREPARATIONS FOR THE FIFTH ENLARGEMENT

Eventually, all the Europe agreements concluded with the CEE countries were replaced by accession treaties to the EU. Upon the fulfilment of the membership criteria, the doors to the long-awaited full membership status for the associated countries of Central and Eastern Europe were finally opened. At the Copenhagen European Council of December 2002, the EU agreed that ten candidate countries met the required conditions for joining the EU. Therefore, ten states officially acceded to the EU on 1 May 2004.

A crucial step in the development of the EU competition rules was the recast of the Regulation No 17 of 1962[27] by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, which entered into force on 1 May 2004. The adoption of Council Regulation 1/2003, called the Modernisation Regulation, marked the rapid modernisation of the EU competition policy. The new Regulation introduced a new framework for the application of art. 81 and 82 EC Treaty (art. 101 and art.102 TFEU) with the aim of creating a more effective enforcement regime across the European

[26] Claus-Dieter Ehlermann, *The contribution of EC competition policy to the single market*, In "Common Market Law Review", vol. 29, no. 257–82, 1992, p. 258

[27] *Note:* Council of the European Economic Community, *Regulation 17: First Regulation implementing Articles 85 and 86 of the Treaty*, Official Journal 013, 21/02/1962, p. 204 - 211

Union. The European Council chose deliberately 1 May 2004 as the date of entry into force of the Modernisation Regulation, namely to ensure the new EU Member States with the time needed to transpose the legal act into the national legal order.

A debate on the comprehensive reform of EU competition policy was launched with the Commission's White Paper of 1999 that suggested more options for reforming the system of enforcement of competition rules as provided for in Regulation 17/1962. The need to radically reform a system with a history of almost forty years of application without any change to the procedural rules[28] was mainly driven by rather urgent challenges, amongst which were the overloading of the Commission's DG Competition that had a scarcity of human resources needed to manage the growing caseload owed to the internal market accomplishment and the progressive integration of the market, including after several accessions. Withal, the pressure was coming from the not-so-far perspective of the future enlargement due in May 2004 that would be contributing to the increase in the potential number of cases subject to the Union's law,[29] coupled with concerns regarding the management of mergers. At that stage, the need for the modernisation and decentralisation of the competition rules in the view of ensuring an efficient operation of the policy was more than clear. Once in practice, the reform as proposed in the 1999 White Paper, would allow the Commission to attain its objective of eliminating the administrative burden caused by the centralised system of prior authorisation and concentrate on the most serious and complicated cases of Union's competition law infringements.

The next step in the reform was the European Commission's proposal for a "Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty" presented in September 2000.[30] The wide-ranging debate on the modalities of reforming the EU competition policy resulted in the adoption of Council Regulation No 1/2003. The changes to the enforcement of the EU competition policy introduced by the Regulation No 1/2003 were manifold, with a direct impact on the national competition authorities and courts. It provided for the decentralisation of the enforcement of rules on competition by empowering the competition authorities and national courts of the Members States to apply entirely the competition rules (art. 101 and 102 TFEU) that were prior applied exclusively by the European Commission.

CONCLUSIONS

In the context of its Eastern enlargement, the EU has advocated for the use of bilateral association agreements that included provisions on competition. To a certain extent, it can be stated that the EU has conditioned the associated states to adopt EU-type competition laws, thus extending its competition regime beyond the EU borders. For the countries of Central and Eastern Europe that had the overall objective to become full EU members, it turned out that the adoption of laws compatible with the internal market was a conditionality not only for accessing the EU's internal market but also for the aimed EU membership. To this end, the Europe agreements were turned into instruments by which the EU has been able to impose requirements on the associated CEE states pursuing accession. In the case of the preparation of the CEE countries for accession, the EU was

[28] European Commission, *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty*, Commission Programme No 99/027, Brussels, 28.04.1999, p. 12

[29] European Commission, *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty*, Commission Programme No 99/027, Brussels, 28.04.1999, p. 11

[30] European Commission, *Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87* ("Regulation implementing Articles 81 and 82 of the Treaty") / COM/2000/0582 final - CNS 2000/0243, Official Journal C 365 E, 19/12/2000, p. 0284 - 0296

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mostly concerned and interested in the fulfilment of the Copenhagen criteria by the associated countries in the view of maintaining the proper functioning of the internal market upon its opening. Consequently, the pre-accession strategy was conceived in a manner that would ensure the strengthening of the candidates' capacity "to cope with competitive pressure and market forces in the Union." Thus, the CEE countries had to adapt to the EU competition model and provide for the implementation and enforcement of the EU competition provisions. Nevertheless, the Europe agreements signed with Poland, the Czech Republic, Slovakia and Hungary prior to the 1993 Copenhagen European Council did not embody any explicit pre-accession reference or guidelines. Therefore, it can be stated that the Europe agreements have been practically transformed into pre-accession instruments. The first versions of the Europe agreements were initiated as an alternative to accession, and only in the aftermath of their political reorientation by the EU's political decision established at the Copenhagen European Council that the associated CEE countries could become member states once the political, economic and legislative conditions were met, did those agreements become important means for pre-accession.

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