Studies in European Economic Law and Regulation 9

Adriana Almășan
Peter Whelan *Editors*

The Consistent Application of EU Competition Law

Substantive and Procedural Challenges

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Foreword

It is a great pleasure to introduce and welcome this new book, *The Consistent Application of EU Competition Law: Substantive and Procedural Challenges*, edited by, and with contributions from, Dr Adriana Almăşan and Dr Peter Whelan. The chapters contained in this book examine the important question of how a number of the procedural and substantive challenges created by Regulation 1/2003 have been dealt with in the 10 years following that Regulation's coming into force.

Prior to Regulation 1/2003, the EU antitrust laws (Articles 101 and 102 TFEU) were enforced principally by the European Commission (the 'Commission'). In 2004, however, the Regulation transformed the enforcement landscape by abolishing the notification and exemption system and removing the Commission's exclusive right to decide on the compatibility of an agreement with Article 101(3). These steps have enabled the Commission to focus its resources on, and prioritise, more serious violations of the antitrust laws and paved the way for greater enforcement of the rules at the national level. A more decentralised system has consequently been able to emerge, involving both a network of competition authorities, the European Competition Network (ECN), comprised of the Commission and the national competition authorities (NCAs), and the courts and tribunals of the individual Member States (the national courts). Indeed, both NCAs and national courts are now playing an increasingly important part in the enforcement of Articles 101 and 102.

The changes introduced by Regulation 1/2003 have provided the opportunity for more effective enforcement of the EU antitrust laws across the EU. At the same time, however, they have created a number of significant challenges, for example, how investigations should be coordinated, and cases allocated, between the Commission and NCAs, how cases should be prioritised, how guidance on the compatibility of new business conduct with the antitrust rules can be given, how national and EU law should operate together in this sphere, how parallel proceedings in national courts should be dealt with and how it can be ensured that the various investigators and decision-takers act consistently.

The chapters in this book focus on the issue of consistency and examine the different mechanisms which exist to ensure that discrepancies in procedure and/or in the substantive interpretation of competition law do not undermine an effective,

efficient and robust competition law system. With more than 10 years of practice to analyse, they consider whether EU competition policy, the Court of Justice of the European Union, the national courts and a number of the NCAs have successfully combined to achieve consistent application of EU competition law.

This book provides a valuable and timely study of how the competition laws have been enforced since 2004 and how the various actors have sought to meet the challenges posed. It is widely researched and sets out a clear analysis of the complex issues arising. No doubt, it will provide helpful assistance to practitioners, students and researchers working in this area.

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June 2016

Alison Jones

Preface

Competition law has been a core European competence since the foundation of the European Union. Over the past 60 years, it has proven difficult to achieve the optimal balance of Member States and European Commission involvement in determining the substantive and procedural scope and application of Articles 101 and 102 TFEU. Regulation 1/2003 sought to set out to address the overburdening of the Commission in this area and to carve out a clearer role for the Member States, initiating a move towards a more decentralised and collaborative approach. Over the past 10 years, this has created more space for national actors, both courts and competition authorities, while retaining a central role for the Commission in particularly significant cases and as coordinator through the European Competition Network.

This volume, edited under the expert guidance of Almăşan and Whelan, highlights the substantive and procedural challenges that remain 10 years into this new era of EU competition law. In doing so, this volume addresses several key areas of research with great value for practitioners and academic commentators alike.

The contributions of Chiriţoiu and Rusu in Part I set out the remaining coordinating and centralising features of the system through discussion of the European Competition Network and the role of the Commission. Judge Collins, Nagy and Gherghina build on these coordinating features by discussing the role of the Court of Justice of the European Union and its harmonising influence. Relatedly, Judge Toader and Stuyck's commentary on preliminary rulings in Part IV shows what instruments may be used in order to secure the consistent interpretation of EU competition law. In contrast, in Parts III and V of the volume, Whelan, Thouvenin, Almăşan, Oppermann, Amaro, David, Papp and Kowalik-Bańczyk discuss how jurisdictional challenges and national applications of Articles 101 and 102 TFEU require further attention in order to balance this system of decentralisation and coordination.

The topics confronted by this volume are important and timely in their own right. Their combined treatment by this varied group of scholars in a single volume allows us to identify synergies, clashes and overlaps between practices that would otherwise go undetected. In addition, the inclusion of experiences of Member States that have joined the EU since the adoption of Regulation 1/2003 incorporates perspectives that are vital to the future development of EU competition law.

The expertise combined in this contribution speaks directly to our mission of advancing the critical analysis of European economic law in all its iterations. It therefore gives us great pleasure to welcome this rich volume in the *Studies in European Economic Law and Regulation* series.

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Introduction

Articles 101 and 102 TFEU contain the EU rules on competition law, and they constitute part of the internal competition law for the European Union Member States, in addition to the specific rules set forth in their domestic legislation. When there is an effect on trade between Member States, a Member State must apply EU competition law when applying national competition law. With anticompetitive agreements in particular, the application of national law cannot be any stricter than the rules contained within Article 101 TFEU. Therefore, a thorough understanding of the EU competition law rules is essential not only for the European Commission and the Court of Justice of the European Union but also for the correct interpretation and application of each Member State's competition law.

As a result of the adoption of Regulation 1/2003, these particular rules are applied in their entirety by the European Commission and the national competition authorities and courts. The decentralisation of enforcement through the involvement of national competition authorities and courts creates potential for an inconsistent application of the EU competition law rules. The spectre of inconsistency is a worry for those who wish to see an effective, efficient and robust competition law system operate within the EU. The creation and maintenance of such a system require, inter alia, certain actions, measures and procedures that aim to render the consistent interpretation of the competition provisions by all of the institutions that have application prerogatives. Indeed, certain instruments, including measures adopted by the European Commission and the jurisprudence of the Court of Justice, not to mention its preliminary rulings, have already been used to smooth the way for the uniform application of competition law. Nonetheless, challenges remain concerning the consistent application of European competition law, despite the existence of all of these instruments. Added to this situation is the fact that the procedural framework concerning the enforcement of competition law may differ across each Member State of the European Union; therefore, the uniform application of competition law across the EU encounters further challenges that stem from the national rules on procedure.

With this particular context in mind, this edited collection examines the main substantive and procedural challenges that relate to the consistent application of EU competition law. Divided into five parts, it comprises 15 detailed chapters.

Part I of the book examines in two chapters how the consistent enforcement of Articles 101 and 102 TFEU operates as a general EU competition policy. The operation of two specific mechanisms is relevant here: Regulation 1/2003, as a whole, and the European Competition Network in particular. Chapter 1, written by Dr Bogdan Chiriţoiu from the Faculty of Business Administration, University of Bucharest, examines the process of convergence within the European Competition Network that is characterised by both legislative harmonisation and the enforcement prioritisation at the level of the national competition authorities. Chapter 2 was written by Dr Cătălin Rusu of Radboud University Nijmegen and thoroughly analyses the assessment contained within the 'Commission Communication on Ten Years of Antitrust Enforcement Under Regulation 1/2003', identifying prospective priorities and challenges that are relevant to the consistent application of EU competition law.

Part II of the book comprises three chapters and discusses how the Court of Justice's jurisprudence acts as an instrument of harmonisation. Several recent landmark cases of the Court of Justice on Articles 101 and 102 TFEU are discussed in this context. These cases clearly help to reduce the potential for inconsistent application of EU competition law; they temper the substantive challenges inherent in this context. Moreover, the Court of Justice case law is often cited by the national courts and by the competition authorities; therefore, they also provide scope for impact upon national competition law. The first chapter in this part (Chap. 3, written by Judge Anthony Collins, General Court of the European Union) analyses the Court's extremely important recent review on the concept of restrictions of competition 'by object'. The second chapter (Chap. 4, written by Dr Csongor István Nagy, University of Szeged) presents the landmark cases *Allianz* and *Cartes Bancaires* in comparative assessment with the new De Minimis Notice. The third chapter (Chap. 5, Dr Simona Gherghina, Faculty of Law, University of Bucharest) evaluates the importance of the EU public procurement regulations in the interpretation of the EU competition law provisions.

Part III of the book analyses certain additional, unique jurisdictional challenges to the uniform application of the EU competition law provisions. Three chapters are presented. The first chapter in this part (Chap. 6, Dr Peter Whelan, University of Leeds) examines the extent to which EU competition law (in particular Article 101 and Regulation 1/2003) impacts upon the content and operation of a regime which imposes criminal sanctions for the violation of its cartel law. The next chapter (Chap. 7, Prof. Jean-Marc Thouvenin, Université Paris Ouest Nanterre La Défense) discusses the consistency-related challenges that may result from the private enforcement of competition law under the Brussels 1 Regulation. The final chapter of this part (Chap. 8, Dr Adriana Almăşan, University of Bucharest) focuses on the challenges concerning the applicability of Articles 101 and 102 TFEU in national and international arbitration, which are due in large part to the absence in Regulation 1/2003 of a reference to arbitral courts and to the lack of acknowledged access of arbitration to the preliminary reference process. This is clearly an important issue

that needs to be resolved in order to ensure the maximum amount of consistency in the application of the EU competition law rules.

Part IV of the book comprises two chapters and focuses on one of the most important instruments that can help to achieve the uniform application of EU competition law in cases handled by the national courts: preliminary rulings. The role that the Court of Justice has in establishing a consistent interpretation of Articles 101 and 102 TFEU by virtue of preliminary references is extremely important and deserves analysis. The first chapter in this part (Chap. 9, written by Prof. Camelia Toader, Court of Justice of the European Union and Faculty of Law, University of Bucharest) provides an overview of preliminary rulings and the role played by the Court of Justice in ensuring consistent application of the TFEU provisions to cartel and abuse of dominant position practices. Chapter 10, written by Emeritus Professor Jules Stuyck, University of Leuven (KU Leuven) and Radboud University Nijmegen, further details technical conditions pertaining to the preliminary referrals of the courts and develops a complex analysis of the special issues that can be engendered by referrals for preliminary rulings.

Finally, Part V of the book provides selective examples of how Articles 101 and 102 TFEU are effectively applied at the national level, thereby providing additional input into how problematic the issue of consistent application of EU competition law is in practice. These examples were chosen so as to include founding Member States of the EU as well as 'younger' Member States. Its five chapters present analyses of the following jurisdictions and their experiences in applying the EU competition law rules: Germany (Chap. 11, Professor Bernd Oppermann and Ahmad Chmeis, both from Leibniz University of Hanover), France (Chap. 12, Dr Rafael Amaro, Université Paris Descartes – Sorbonne Paris Cité (CEDAG)), Romania (Chap. 13, Dr Sorin David, University of Bucharest), Hungary (Chap. 15, Dr Mónika Papp, Eötvös Loránd University, Budapest) and Poland (Chap. 15, Dr Krystyna Kowalik-Bańczyk, Institute of Law Studies, Polish Academy of Sciences).

Taken together, all five parts of the book contribute towards a detailed review of the issue of consistency in the application of Articles 101 and 102 TFEU and of the major substantive and procedural challenges that can be engendered in this context.

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Contents

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Rafael Amaro is an associate professor at the Université Paris Descartes – Sorbonne Paris Cité (CEDAG). He teaches EU and French competition law, contract, tort, civil procedure and human rights law. His research interests focus mainly on the private enforcement of competition law and unfair commercial practices. Prior to his PhD (*Le contentieux privé des pratiques anticoncurrentielles*, Bruylant, 2014), he graduated from Sciences Po Paris (master in economic law, 2007) and Paris Descartes (master in private law, 2008). He was a visiting lecturer at the China University of Political Science and Law in Beijing (2010–2012), at the Sandra Day

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Bogdan M. Chiriţoiu has been a lecturer in economics and European studies at the University of Bucharest since 1999 and is member of the some of the most important Romanian think tanks (the Romanian Society of Political Science, the Network of Institutes and Schools of Public Administration in Central and Eastern Europe (NISPAcee), the Romanian Academic Society and the Aspen Institute of Romania). Dr Chiriţoiu has MA degrees in political science (Central European University, Budapest, 1997) and economic studies (London School of Economics and Political Science, 1998). He holds since 2008 a PhD in economics (international economic relations) from the Bucharest Academy of Economic Studies, with a thesis on public health insurance systems in CEE states. Dr Chiriţoiu has been the president of the Romanian Competition Council since 2009. From 2005 to 2009, he served as presidential advisor (rank of deputy minister) on economic affairs and public policy and head of the Romanian delegation to the EU Economic Policy Committee.

Ahmad Chmeis born in Beirut in 1988, studied law in Hanover and Pune (India). He is a PhD student and legal assistant at the chair for German, European and international civil and commercial law of Prof. Oppermann. Mr. Chmeis is also a scholar of the German Academic Exchange Service and the Friedrich Ebert Foundation. His main research focus is on European antitrust law and antitrust procedural law in particular. He has been teaching European law at the Leibniz University of Hanover since 2014.

Judge Anthony M. Collins A legal science graduate of Trinity College, Dublin, Anthony M. Collins practised for over two decades as a barrister-at-law and later as senior counsel at the Bar of Ireland, where he specialised in administrative and EU law. Between 1990 and 1997, he was référendaire at the Court of Justice of the European Communities. He was director of the Irish Centre for European Law from 1997 to 2000 and coeditor of the *Irish Journal of European Law* from 1992 to 2001. Since 16 September 2013, he has been a judge at the General Court of the European Union. He is a bencher of the Honorable Society of King's Inns, an adjunct professor at University College Cork and a member of the board of directors of the Irish Centre for European Law.

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Simona Gherghina is an associate professor with the Faculty of Law of the University of Bucharest, teaching public finance law, banking law and financing of public investments (the latter within the master programme of public procurement, concessions and public-private partnership of the same faculty). She is also the director of that particular master programme. Simona has published several books, articles and contributions to collective volumes on sovereign guarantees, public debt and financing of public investments and successfully participated in national and international research grant competitions, having been awarded a postdoctoral research grant on *Financing Public Investments: Between Budgetary and Legal Limitations and the Public Interest Imperative* (www.publicinvestments.ro) and also acting as a senior researcher in the Romanian-French joint research project *From Fiscal Compact to Constitution: Shaping a Legal Form for the Balanced Budget Rule* (www.fcbb.cdcip.ro). She has recently published with C. H. Beck România a monograph on the financing of public investments and currently sits as deputy editor in chief of the *Romanian Public-Private Partnership Law Review*. Simona has extensive experience as a lawyer in matters related to financing of public investments, public-private partnership projects and concessions.

Alison Jones is professor of law at King's College London and a solicitor at Freshfields Bruckhaus Deringer LLP. Prior to joining King's in 1992, Alison read law at Girton College, Cambridge, worked at Slaughter and May and completed a BCL at Christ Church, Oxford. Since joining King's, she has taught competition law (EU, UK and US), trusts, property and EU law. Alison is co-author of *EU Competition Law* (Jones and Sufrin) and a regional editor for the *Restitution Law Review* and writes two of the Centre of European Law's modules for the diploma in EU competition law. She is also director of the LLB law with the European legal studies programme.

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Part I
EU Competition Policy and the Harmonized Enforcement of Articles 101 and 102 TFEU

Chapter 1
Convergence Within the European Competition Network: Legislative Harmonization and Enforcement Priorities

Bogdan M. Chiriţoiu

1.1 Introduction

Motto: "United in diversity"[1]

On the 1st of May 2004, *Council Regulation (EC) No. 1/2003 from the 16th of December 2002 on the implementation of the rules on competition laid down in Articles 81*[2] *and 82*[3] *of the Treaty*[4] (hereinafter Regulation 1/2003) also called the Modernization Regulation[5] came into force. Regulation 1/2003 was a landmark reform, the most far-reaching review of EU antitrust procedures in more than 40 years. It modernized the procedural rules which govern how the EU antitrust rules are enforced and introduced a decentralized system of direct applicability of the EU competition rules in their entirety, thus replacing the centralized notification and authorization system established by the Council Regulation (EEC) No. 17 from

[1] The European Union's motto.

[2] Article 81(1) (now Article 101(1) TFEU) prohibits agreements which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. Agreements which fall within Article 101(1) are prohibited unless the conditions in Article 101(3) are met.

[3] Article 82 (now Article 102 TFEU) prohibits conduct by one or more undertakings which amounts to an abuse of a dominant position within the common market or in a substantial part of it and which may affect trade between Member States.

[4] By the Treaty of Lisbon, entered into force on the 1st of December 2009, the Treaty establishing the European Community was renamed the Treaty on the Functioning of the European Union and its articles have been renumbered. The Articles 81 and 82 of the Treaty establishing the European Community became Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

[5] OJ L1, 4.1.03, p1.

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the 6th of February 1962, the first Regulation implementing Articles 85 and 86 of the Treaty.[6]

Regulation 1/2003 greatly enhanced the role of the National Competition Authorities of the Member States (hereinafter NCAs) and of national courts as enforcers of the EU competition rules.[7] NCAs and national courts not only have the power to apply the EU competition rules in full: they are obliged to do so when applying their national competition laws to agreements or conduct are capable of affecting trade between Member States.

The Regulation also introduced cooperation tools and obligations with the view of ensuring efficient work sharing, effective cooperation in the handling of cases and to fostering coherent application.[8] According to Article 11(1) of Regulation 1/2003, the European Commission and the NCAs enforce in close cooperation the European antitrust rules within the European Competition Network (hereinafter the ECN).[9]

The ECN is a framework for debates on competition related aspects, exchange of experience and information, including confidential information, and also a cooperation mechanism set by the provisions of Regulation 1 (Article 11(4)) according to which NCAs have to inform the Commission of any prohibition or commitment decision relating to the application of Articles 101 and 102 TFEU and any decision withdrawing the benefit of a block exemption regulation not later than 30 days before it is adopted.

Within this network, the exchange of information, including confidential information, can take place, thus helping enforcers to detect and sanction the violations of the rules on competition. The Commission must transmit a copy of the most important documents and, at the request of the competition authorities, furnish any document necessary to an assessment of the case pursued by it.[10]

The new enforcement system enabled the Commission to take more effective action against serious infringements of the rules on competition. It also constitutes a remarkable model of cooperation of NCAs that are more or less independent and that reach a common agreement on economic and legal aspects and enforce the competition provisions of the TFEU.[11]

The 1st of May 2004 also marked a fundamental change in the history of the EU: ten new Member States joined the European Union. The modernization of EU com-

[6] OJ P 013, 21.2.1962, p. 204–211.

[7] Cf. 2009 Report on Regulation 1/2003, part 5.

[8] Communication from the Commission to the European Parliament and the Council, *"Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives"* (http://ec.europa.eu/competition/antitrust/legislation/antitrust_enforcement_10_years_en.pdf).

[9] The functioning of the ECN is regulated by the provisions of the *Commission Notice on cooperation within the Network of Competition Authorities* (OJ C 101, 27.04.2004). This Notice is based to a significant extent on a Joint Statement of the Council and the Commission on the functioning of the network of competition authorities.

[10] http://europa.eu/legislation_summaries/competition/firms/l26092_en.htm

[11] Helen Wallace, Mark A. Pollack, Alasdair R. Young, Romanian European Institute, *Elaborarea politicilor in Uniunea Europeană*, 6th edition, p. 127.

petition law enforcement has in fact taken place against the background of enlargement. The enlargement and the modernization of the law enforcement have been closely connected one to another.[12] Regulation 1/2003 formed part of the legal requirements of the candidate countries' accession to the EU.[13]

The discussion on the impact of European competition law on national competition law concentrated on the question as to how far the new Member States managed to align their legislation with that of the EU and how effectively and accurately the new Member States implemented the *acquis communautaire*.[14] This approach was concerned about the ability of these countries to meet the requirements of accession and later membership. This approach was based on controlling compliance with the conditions set by the EU.[15]

The Copenhagen European Council of December 2002 found that 10 candidate countries (Cyprus, Estonia, Hungary, Poland, the Czech Republic, Slovenia, Latvia, Lithuania, Malta and Slovakia) fulfilled the conditions necessary for joining the EU. These countries together with the existing EU Member States enjoyed the application of the provisions of Regulation 1/2003 since its entry into force. Romania through its national competition authority, i.e. the Romanian Competition Council (hereinafter the RCC), applied the mentioned provisions since its accession date, namely from the 1st of January 2007.

The present chapter will provide in its first part (Sect. 1.2) a comprehensive overview of the legislative approximation/harmonization process of the national compe-

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[12] KJ Cseres, *The Impact of Regulation 1/2003 in the New Member States*, The Competition Law Review, Volume 6 Issue 2 pp 145–182 July 2010.

[13] The legal, economic and political conditions have been first laid down in the so-called Copenhagen criteria of the 1993 Copenhagen European Council and later in more detail in the 1995 White Paper, which was drafted in order to assist the candidate countries in their preparations to meet the requirements of the internal market. The conditions that pre-accession candidates have to fulfil are specified in a Commission report entitled 'Europe and the Challenge of Enlargement'. They were made formal by the Member States at the Copenhagen European Council in June 1993, and then expanded upon by the Commission in a Communication called 'Agenda 2000', dated 16 July 1997. Agenda 2000 is an action program adopted by the Commission on the 15th of July 1997.

[14] The Community *acquis* is the body of common rights and obligations which bind all the Member States together within the European Union. It is constantly evolving and comprises: the content, principles and political objectives of the Treaties; the legislation adopted in application of the treaties and the case law of the Court of Justice; the declarations and resolutions adopted by the Union; measures relating to the common foreign and security policy; measures relating to justice and home affairs; international agreements concluded by the Community and those concluded by the Member States between themselves in the field of the Union's activities.

Applicant countries have to accept the Community *acquis* before they can join the Union. Derogations from the *acquis* are granted only in exceptional circumstances and are limited in scope. To integrate into the European Union, applicant countries will have to transpose the *acquis* into their national legislation and implement it from the moment of their accession.

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

tition legislations of the Member States with the provisions of Regulation 1/2003 (with an emphasis on investigative and decision making powers), highlighting the legislative convergence especially from the Romanian perspective. The second part (Sect. 1.3) will address the enforcement activity in the ECN, evaluating the convergence of enforcement priorities between the European Commission and the NCAs from the Member States. Additionally, the chapter will present other fields that may play a significant role in the convergence of the competition policy at European level. The chapter will finally provide concluding remarks and discuss the benefits of legislative and enforcement convergence and the critical features that should be improved.

1.2 The Legislative Approximation/Harmonization Process of the National Competition Legislation with the Provisions of Regulation 1/2003

For Romania, its efforts to be part of the European Union started with legislative harmonization in the competition field. The Romanian Competition Council (RCC) made constant endeavours to bring in line the national legislation with the European competition rules.[16] For shaping the national antitrust framework, the European antitrust provisions represented the model and the base to start from. This fact was also justified by the criteria that the Romania had to fulfil as candidate country to the European Union (the Copenhagen criteria), namely the administrative and institutional capacity to effectively implement the *acquis* and the ability to take on the obligations of membership.[17] In terms of legal and institutional convergence of Romania competitive environment with the EU acquis in the field, studies have shown a high degree of compliance of Romanian competition legislation since the period of the accession negotiation on Chapter 6-Competition, with EU accession removing some of the incompatibilities due to compulsory full harmonization of legislation in this area.[18]

The obligations of the Association Agreement between Romania and the European Union regarding the policy in the field of competition were fulfilled through the Law no. 21/1996 and the secondary legislation issued in its application.[19] The Competition Law no. 21/1996[20] is the legal act that regulates competition at national level and the Competition Council is the national authority enforcing it. From 2003 to the present, the Romanian antitrust legislation has passed through

[16] B. Chiriţoiu, European Competition Day, Rome, Italy, 2014.

[17] http://ec.europa.eu/enlargement/policy/glossary/terms/accession-criteria_en.htm

[18] Fuerea, A.; Sandu, S.; Scarlat, C.; Hurduzeu, Gh.; Păun, C.; Popescu, R.M. 2004. *Evaluarea gradului de concordanţă a legislaţiei române cu acquis-ul comunitar, la nivelul anului 2002, pe capitole de negociere*, Institutul European din România – Studii de impact (PAIS II), Bucureşti.

[19] Popescu-Cruceru A., *Economic-juridic în economia concurenţială*, Editura Economică, Bucureşti, 2006.

[20] Published in the Official Journal of Romania no. 240/03.04.2015.

several reviews envisaging the transposition of the European antitrust rules stipulated in Regulation 1/2003.

1.2.1 Brief Presentation of the Amendments Brought to the Competition Law No. 21/1996 to Align it with the Provisions of Regulation 1/2003

In the pre-accession phase, among the first important legislative improvements[21] inspired by Regulation 1/2003 was the introduction of new investigative powers, namely the possibility to request information, to carry out inspections and to take declarations. In the subsequent amendments of the national antitrust framework these investigative powers have been improved and reshaped almost identically to those of the European Commission (Articles 18, 19 and 20 of Regulation 1/2003).

The further major legislative amendments[22] of the national antitrust provisions provide for substantial developments into the procedural framework for enforcing the competition rules. Elements of novelty concern the abolition of the notification system, to insure convergence with Regulation 1/2003. Targeting the regime of the national block exemption regulations, the amendments to the Romanian competition law make reference to the conditions and criteria set by the EU regulations, for both national and cross-border agreements. Thus, the categories of agreements, decisions and concerted practices exempted and the conditions and criteria for the classification into categories are those set out in the EU Block Exemption Regulations. This amendment brought in line the Competition Law with the Article 29 of Regulation 1/2003.

With regard to sanctions, the amendments introduced the possibility for the Competition Council to take into account, while fixing the fine for violation of Articles 5 and 6 of the national law (the equivalent of Articles 101 and 102 TFEU) and/or Articles 101 and 102 TFEU, a specific type of cooperation provided during the administrative procedure as a mitigating circumstance justifying a reduction of the total fine (acknowledgment of the deed). Such cooperation covers the case where, after having received the investigation report and after having exercised its right of access to the file or during the hearing, the undertaking expressly admits to having engaged in anticompetitive behaviour. Independently from the sanctions applied in accordance with the provisions of the competition law, the amendments foresee that natural or legal persons have the right to ask for the complete remedy of damages caused to them by anticompetitive practices. This amendment was also

[21] The amendment was introduced by the Emergency Government Ordinance no. 121/2003 published in the Official Journal of Romania no. 875/10.12.2003.

[22] The Competition Law no. 21/1996, republished, was further amended in 2010 by the Emergency Government Ordinance no.75/30.6.2010, approved one year later by the Law no. 149/5.7.2011. The latter act not only approved the EGO no. 75/2010 but also brought new amendments to the Competition Law.

aimed at introducing at national level legal provisions after the model of the *settlement* procedure that the European Commission implements, but it was partially taken over.

Another important improvement brought to the legal framework consists in the assimilation, at national level, of the Article 19 of Regulation 1/2003 i.e. the legal possibility of the Romanian Competition Council to interview any natural or legal person that gives its consent to be interviewed in order to obtain information on the subject of the investigation, thus harmonizing the national competition legislation with Article 19 of Regulation 1/2003.

As mentioned before, the inspections powers introduced in 2003 have been improved by new important amendments that not only fully align this power with that of the European Commission (Article 20 of Regulation 1/2003) but also expressly introduced at national level the concept of 'legal professional privilege' in the competition procedures and the applicable procedure.[23] At Community level, the European Court of Justice recognized the concept of "legal privilege" to guarantee the right of defence of the undertakings under investigation.

The latter amendment pursued the taking over in the national legislation the minimum limits which guarantee this right in the form established at EU level having in mind that the national competition law implemented the system of parallel application by the national authority of both national and EU competition rules. The concept of "legal privilege" is expressly regulated in other Member States' competition legislations as well (Hungary, Netherland). Those amendments reflected the jurisprudence of the European Court of Justice as was that of the *Akzo* case.[24] The amendment pursued the observance of this concept as it was developed by the jurisprudence of the Community courts.

Another legal amendment envisaged the possibility to adopt commitments decisions after the model of Regulation 1/2003 (Article 9). The national procedure that was introduced enables the undertakings under investigation for possible anticompetitive practices to voluntarily assume a number of obligations so as to address certain issues that might constitute violations of the national and Community legislation in the field of competition. The initiative of presenting the commitments belongs exclusively to the undertakings investigated by the Competition Council for the possible violation of the law. The closure of an investigation by a decision accepting commitments is an exceptional situation, limited to those cases whereby through this procedure the competitive environment is restored more rapidly and efficiently than it would have been achieved by imposing fines and/or corrective measures through a decision asserting an infringement of the law. The decision for accepting commitments has a compulsory legal force. If the undertakings fail to comply with the commitments made, the Competition Council will apply penalties, comminatory fines when the implementation of the compulsory obligations is

[23] OECD – Romania Peer Review, February **2014**, Questionnaire for Competition Policy.

[24] T-125/03 and T-253/03. *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities*.

delayed or it may reopen the procedure ex-officio or upon request.[25] The improvement of the national legislation framework with the commitments decision power was also meant to reduce the duration of the investigations and the number of the Competition Council's cases pending in courts.

The power to adopt interim measures was also taken over in the national competition law. The respective provisions also clarified the conditions grounding the adoption of interim measures and assimilated the principles established in Article 8 of Regulation 1/2003 making as well a clear distinction between the interim measures for antitrust and merger cases.

Following the amendment of the Competition Law, a comprehensive process of adapting the secondary legislation was performed.[26]

As a preliminary conclusion, it may be argued that, based on the above mentioned amendments of the Romanian competition framework, there is a consistent level of harmonisation of national legislation in the antitrust field with that Community one (at least from the decision making and investigative powers' perspective).

This assessment is also sustained by the OECD and the Wold Bank, which made positive remarks within the peer-review and the functional assessment of the competition authority carried out in the period 2013–2014 concerning the investigative tools used by the Competition Council as well as the alignment to the antitrust Community rules.[27]

They pointed out that: "The Romanian competition regime has greatly benefited the Europeanisation and 'internationalization'. Competition law in Romania is firmly anchored in European enforcement standards: the framework for substantive analysis, secondary regulations, and law enforcement practices are essentially in line with the European enforcement model."[28] And also: "***The RCC has an extensive range of instruments in its toolbox***, from antitrust enforcement and merger review to actions against anticompetitive measures by public authorities such as advocacy, impact assessment opinions, informal working relationships with other authorities, and unfair competition laws. Maintaining an organization centred on industrial sectors will enable the RCC to prioritize among the various tools it has to address problems in the market, and benefit from previous experience when using new tools to address competitive problems in a sector."[29]

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[25] Romanian Competition Council, 2010 Annual Report.

[26] The secondary legislation contains: the *Guidelines on the conditions, terms and procedure applied in order to accept and evaluate the commitments for anticompetitive practices* (enforced by Order no. 724 of the 28th of December 2010 and published in the Official Journal of Romania no.11/05.01.2011) with further amendments and completions and the *Guidelines on the conditions, terms and procedure followed to adopt interim measures according to article 47 of the Competition Law no. 21/1996*, enforced by Order no. 40 of the 24th of January 2011 and published in the Official Journal of Romania no. 91/04.02.2011.

[27] The debate of the *peer-review* on the competition policy and law in Romania took place in Paris on the 27th of February 2014 in the framework of the OECD Global Forum on Competition.

[28] OECD: Competition Law and Policy in Romania, a peer review (pg. 7).

[29] Ibid, (pg. 55).

1.2.2 Harmonization of the NCAs' Antitrust Legislative Provisions Concerning the Investigative and Decision-Making Powers with Those of Regulation 1/2003

In the specialized economic and legal literature it is often argued that Regulation 1/2003 is in itself a regulation oriented towards convergence while the ECN represents its driving force.

In 2009 the European Commission published the first ECN Report[30] on the functioning of Regulation 1/2003 emphasizing that "the EC Treaty's antitrust rules have at a greater extent become the *law of the land* for the whole of the EU".[31] It also revealed a number of limited areas which merit further evaluation, such as aspects related to the investigations and procedures and the sanctions applied by NCAs.

Based on the aspects raised in the 2009 ECN Report, the ECN – as the NCAs' forum for discussions and cooperation – carried out an in-depth assessment work through a series of projects in order to improve the level of convergence of national competition legislations on specific issues of interest concerning the investigative and decision-making powers of the NCAs.

Two of these projects have been finalized in two reports, namely the Investigative Powers Report and the Decision-making Powers Report. They were made public in October 2012 and provide an overview of the different systems and procedures for antitrust investigations within the ECN.[32]

Furthermore, the ECN has also endorsed and published a set of Recommendations on key investigative and decision-making powers.[33] These Recommendations were intended to be used as advocacy tools vis-à-vis policymakers and they set out the ECN's position on the powers that authorities in the Network should have in their competition toolbox.[34] The ECN's 7 recommendations showed a strong consensus on the tools needed for enforcement[35]:

- investigative powers, enforcement measures and sanctions in the context of inspections and requests for information;
- the power to collect digital evidence, including by forensic means;
- assistance in inspections conducted under Articles 22(1) of Regulation 1/2003;

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[30] Commission staff working paper accompanying the Communication from the Commission to the European Parliament and Council – Report on the functioning of Regulation 1/2003 {COM(2009)206 final}/* SEC/2009/0574 final */(http://ec.europa.eu/competition/antitrust/legislation/regulations.html).

[31] Press release IP/09/683*: Commission adopts report on functioning of key antitrust Regulation* (http://europa.eu/rapid/press-release_IP-09-683_en.htm?locale=en).

[32] ECN, Investigative Powers Report (http://ec.europa.eu/competition/ecn/documents.html).

[33] Communication from the Commission to the European Parliament and the Council *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives* (http://ec.europa.eu/competition/antitrust/legislation/regulations.html).

[34] ECN Decision Making Report (http://ec.europa.eu/competition/ecn/documents.html).

[35] Alexander Italianer, *Completing Convergence*, speech European Competition Day, Rome 2014.