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***The Assessment of the Effect on Trade by the National Competition Authorities of the  
“New” Member States: Another Legal Partition of the Internal Market?***

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**Abstract (248 words)**

Under Article 3(1) Regulation 1/2003, the national competition authorities (NCAs) of the EU Member States have to apply Articles 101-102 TFEU *vis a vis* anti-competitive conducts which have an effect on intra-community trade. Under Article 11 Reg. 1/2003, NCAs have to notify the EU Commission about the opening of the investigations and the envisaged decisions based on Articles 101-102 TFEU, while such obligation does not exist in relation to decisions adopted under the national competition law. During the last decade, the NCAs of the “new” EU Member States have notified a lower number of envisaged decisions in comparison to the fellow authorities of the “old” EU Member States. The lower number of notifications has been explained by the institutional constraints of the individual NCAs. Contrary to such perception, the paper shows that the NCAs of the “new” EU Member States have not been “less active” in terms of enforcement, but they have adopted the largest part of their decisions under the national competition rules. By analysing the application of the effect on trade assessment by the selected NCAs of the “new” EU Member States, the paper reveals significant divergences in the assessment of the effect on trade by the NCAs of the selected jurisdictions; divergence which undermines the functioning of the decentralized system of the EU competition law enforcement. The paper calls for a reform of Article 3(1) Reg. 1/2003, supplementing the effect on trade criterion with clearer quantitative thresholds similar to those applied under the EU Merger Regulation.

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## 1. Introduction

Regulation 1/2003 has recently celebrated its tenth anniversary.<sup>1</sup> The latter has been considered as a “major success, beyond expectations”.<sup>2</sup> By empowering national courts and national competition authorities (NCAs) to directly enforce Articles 101-102 of the Treaty of the Functioning of the European Union (TFEU),<sup>3</sup> Reg. 1/2003 has substantially increased the degree of enforcement of EU competition rules: nowadays, most of the decisions sanctioning breaches of Articles 101-102 TFEU are adopted by the NCAs, rather than by the EU Commission.<sup>4</sup>

During the last decade, all EU Member States have brought substantive competition rules in line with Articles 101-102 TFEU, either “voluntarily”<sup>5</sup> or in the context of the EU accession process.<sup>6</sup> Therefore, the national competition laws of EU Member States sanction anti-competitive conduct under provisions that follow closely the wording of Articles 101-102 TFEU. Under Article 3(1) Reg. 1/2003, a NCA must apply Articles 101-102 TFEU when the anti-competitive practice “may affect trade between Member States”. Under Article 11 Reg. 1/2003, the NCA has to notify to the EU Commission the opening of a new investigation and the envisaged decision based on Articles 101-102 TFEU. The latter decision is discussed within the European Competition Network (ECN)<sup>7</sup> before being formally adopted by the notifying NCA. On the contrary, such obligation does not exist in relation to decisions based exclusively on national competition law.

As discussed in section 2, the concept of intra-community trade effect has been “broadly” interpreted by the European Court of Justice (ECJ). However, a NCA still enjoys a margin of discretion in applying such jurisdictional criterion in individual cases; interpretation which has important procedural repercussions. First of all, if the NCA followed a “narrow” interpretation of the effect on trade it would exclude the application of EU competition rules. Since the NCA would adopt the infringement decision under national competition

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<sup>1</sup> Council Reg. (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Art. 81 and 82 of the Treaty (Text with EEA relevance). OJ L 1, 4.1.2003, p. 1–25.

<sup>2</sup> Wils, “Ten Years of Reg. 1/2003”, 4, 4, *Journal of European Competition Law and Practice* (2013), at 295.

<sup>3</sup> *Supra*, Art. 3(1) Reg. 1/2003.

<sup>4</sup> Between 1.5.2004 and 30.6.2013, the EU Commission adopted 122 decisions under Art. 101-102 TFEU. On the other hand, the 28 NCAs of the EU Member States have adopted 665 decisions sanctioning breaches of Art. 101-102 TFEU. European Commission, *Communication to the European Parliament and the Council – Ten Years of Antitrust Enforcement under Reg. 1/2003: Achievements and Future Perspectives*. Published in Brussels on 9.7.2014, COM (2014) 453. Page 4. The text of the Communication is available at:

[http://ec.europa.eu/competition/antitrust/legislation/antitrust\\_enforcement\\_10\\_years\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/antitrust_enforcement_10_years_en.pdf) (last access on 4.5.2015).

<sup>5</sup> Cseres, “Comparing laws in the Enforcement of the EU and National Competition Laws”, 3, 1, *European Journal of Legal Studies* (2010), 7-44.

<sup>6</sup> See, in particular, Cseres, “Multi-Jurisdictional Competition Law Enforcement: the Interface between European Competition Law and the Competition Laws of the New Member States”, 3, 2, *European Competition Journal* (2007), 465-502.

<sup>7</sup> For a recent analysis of the ECN internal dynamics, see:

Monti, “Independence, Interdependence and Legitimacy: the EU Commission, National Competition Authorities and the European Competition Network”. EUI working paper, LAW 2014/01 (2014). The text of the working paper is available at: [http://cadmus.eui.eu/bitstream/handle/1814/29218/LAW\\_2014\\_01.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/29218/LAW_2014_01.pdf?sequence=1) (last access on 4.5.2015).

law, it would not be notified to the EU Commission under Article 11 Reg. 1/2003. As a result, the EU Commission and the ECN would be unable to monitor the enforcement activities of the NCA. Secondly, NCAs may adopt under national competition law types of decisions which are not possible under EU competition rules. For instance, in some jurisdictions the national competition law authorizes the NCA to adopt decisions stating that an infringement has been ceased by the parties,<sup>8</sup> or to adopt non-infringement decisions. The latter type of decisions could not be by the NCA under Articles 101-102 TFEU due to the *Tele2 Polska* case law.<sup>9</sup> Thirdly, some NCAs might sanction under national competition law certain anti-competitive conducts which do not fall within the enforcement priorities of the EU Commission. For instance, as demonstrated in a previous study conducted by the authors, the NCAs of the “new” EU Member States and candidate countries often sanction exploitative abuses of dominance under the national equivalent of Article 102 TFEU (e.g. excessive pricing and unfair contractual clauses).<sup>10</sup> Such decisions are not in line with the EU Commission’s focus on exclusionary conducts,<sup>11</sup> and may be viewed as undermining the consistent enforcement of competition law within the EU internal market. Fourthly, when adopting a decision under national competition law, the NCA would not be bound by the procedural standards applicable under EU competition law.<sup>12</sup> For instance, in the countries which do not recognize the principle of legal privilege in the national competition law,<sup>13</sup> the *AKZO* case law would be applicable only to the

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<sup>8</sup> Under Art. 11 of the 2007 Polish Competition Act, for instance, the NCA can adopt a decision finding the infringement and also stating that the anti-competitive behaviour has been ceased. However, where the proceedings are opened under Art. 101-102 TFEU the Polish NCA consistently holds that under Art. 5 Reg. 1/2003 it has no power to issue an infringement decision containing a declaration that the infringement had been discontinued. In such circumstances, it issues the decision only under Art. 11 of the Polish Competition Act. The proceedings under EU competition law, on the other hand, are discontinued. Therefore, despite finding that a given behaviour restricted competition for the specified period of time and concluding that intra-community trade to be affected, the Polish NCA sanctions the infringement only under Polish competition law. Such interpretation has further consequences: the draft of such decision is not notified to the EU Commission under Art. 11(4) Reg. 1/2003.

To this regard, see the following decisions of the Polish NCA: 29 December 2006, DOK 166/2006; 16 April 2007, RWA-10/2007; 15 February 2008, RWA-4/2008; 29 August 2008, RWA-27/2008; 10 June 2009, RWA 6/2009; 21 July 2009, RWA 10/2009. The decisions of the Polish NCA are available at: [http://www.uokik.gov.pl/decyzje\\_prezesa\\_uokik3.php](http://www.uokik.gov.pl/decyzje_prezesa_uokik3.php) (last access 1.4.2015).

<sup>9</sup> In *Tele 2 Polska*, the ECJ ruled that under Art. 5 Reg.1/2003 the NCAs cannot adopt non-infringement decisions in relation to Art. 101-102 TFEU. Such power is reserved to the EU Commission under Art. 10 Reg. 1/2003.

Case C-375/09, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o.*, EU:C:2011:270.

<sup>10</sup> See:

- Svetlicinii, Botta, “Article 102 TFEU as a Tool of Market Regulation”, 8, 3, *European Competition Journal* (2012), 473-496.
- Svetlicinii, “Abuse of Dominance in South Eastern Europe: Enforcement Practices of the National Competition Authorities in Bosnia & Herzegovina, Croatia, Macedonia and Serbia”, 8, *Mediterranean Competition Bulletin* (2012), 4-26.

<sup>11</sup> According to the 2009 Guidance Paper, the EU Commission relies on Article 102 TFEU to sanction exclusionary rather than exploitative abuses of dominance.

European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*. OJ C 45, 24.2.2009, p. 7–20.

<sup>12</sup> For a comment as to divergent procedural standards in EU competition law and national competition laws see, Bernatt, “Convergence of Procedural Standards in the European Competition Proceedings”, 8, 3, *The Competition Law Review* (2012), 255-283.

<sup>13</sup> For example, Polish Competition Law does not regulate the issue legal privilege and provides only for a reference to the Competition Procedure Act. Such reference results in a number of interpretational problems.

*Ibid.*, at 265.

investigations conducted by the NCA under Articles 101-102 TFEU.<sup>14</sup> Finally, the choice of the legal basis might have repercussions on private enforcement as well. The recently adopted Damages Directive harmonizes the national procedural rules relevant for private enforcement of EU competition rules, not the damages actions based on national competition law.<sup>15</sup> Therefore, in a legal action that “followed” a decision of a NCA based on national competition law, the plaintiff would rely on the national procedural rules not harmonized by the Damages Directive.

During the first decade of the Reg. 1/2003, the NCAs of the “old” EU Member States have notified to the EU Commission a larger number of the envisaged decisions under Articles 101-102 TFEU in comparison to the NCAs of the “new” EU Member States.<sup>16</sup> According to the EU Commission, the institutional setting, the resources and the degree of independence from the executive branch have an impact on the number of cases investigated by each NCA, and consequently on the number of notifications.<sup>17</sup> The empirical data collected for the purpose of the present study (see Annex I) provides a different picture: during the last decade, the NCAs of the “new” EU Member States have adopted a far larger number of decisions under national competition law in comparison to the decisions notified to the EU Commission under Reg. 1/2003. Therefore, rather than being “less active”, the NCAs of the “new” EU Member States have “actively” sanctioned competition law infringements under national competition laws. The lower number of notifications might thus be due to a “narrow” interpretation of the effect on trade concept by the NCAs of the “new” EU Member States, which would explain why the application of EU competition rules has been excluded in the majority of the cases.

The paper aims at verifying this hypothesis by analyzing the assessment of the effect on trade by the NCAs of selected “new” EU Member States (Bulgaria, Czech Republic, Estonia, Poland, Romania, and Slovakia). These countries have been selected as representatives of the different patterns of assessment of the effect on trade by the NCAs of the Member States that joined the EU in 2004 and 2007. For each selected jurisdiction, the paper analyzes the NCA’s decisions where the competition authority discusses the

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<sup>14</sup> In *AKZO*, the ECJ ruled that the EU Commission cannot have access to the communications between the undertaking subject to the investigations and its external lawyer. On the other hand, the legal privilege does not exist in relation to the communications with the in-house lawyer.

C-550/07, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission*, EU:C:2010:512.

<sup>15</sup> The scope of application of Directive 2014/104/EU is limited to private enforcement actions under Art. 101-102 TFEU. However, Member States may decide to harmonize procedural rules applicable to national competition law in the light of the provisions of the Directive as well. Since the period of transposition of the Directive expires at the end of 2016, it is unclear at the moment which Member States will follow this option, and which ones will keep two sets of procedural rules in force.

Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19. Para. 10, Preamble.

<sup>16</sup> Statistics on the number of opened investigations and envisaged decisions notified by the NCA of each Member State to the European Commission under Art. 11 Reg. 1/2003 between 1.5.2004 and 31.3.2015 are available at:

<http://ec.europa.eu/competition/ecn/statistics.html#2> (last access on 4.5.2015).

<sup>17</sup> European Commission, *Staff Working Document - Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues*. Published in Brussels on 9.7.2014, COM (2014) 453. The text of the document is available at: [http://ec.europa.eu/competition/antitrust/legislation/swd\\_2014\\_231\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/swd_2014_231_en.pdf) (last access 4.5.2015).

effect on trade of the anti-competitive conduct, in order to determine the application of EU competition rules in a given case. In particular, the paper analyzes whether the assessment carried out by the NCAs is compatible with the ECJ case law and the EU Commission Notice on effect on trade discussed in section 2.<sup>18</sup> The literature in this field has focused primarily on the dynamics of cooperation and case allocation within the ECN.<sup>19</sup> On the other hand, limited attention has been paid to the application of the effect on trade assessment.<sup>20</sup> The paper aims at filling the gap in the literature, by providing a critical assessment of the decentralized system of EU competition law enforcement.

## 2. The “broad” interpretation of intra-community trade effect under ECJ case law and the 2004 EU Commission Notice

In its case law, the ECJ has recognized the concept of intra-community trade effect as the jurisdictional criterion to set the “boundary” between the application of national and EU competition law.<sup>21</sup> Since its early case law, the ECJ has elaborated a “broad” interpretation of the effect on trade concept, which has significantly expanded the scope of application of EU competition law. In *Société Technique Minière*, the ECJ ruled for the first time that an agreement should be assessed under Article 101 TFEU when it had “an influence, direct or indirect, actual or potential on the patterns of trade between Member States”.<sup>22</sup> In its subsequent case law, the ECJ has further developed various elements of the *Société Technique Minière* formula. First of all, the ECJ has broadly interpreted the concept of “indirect” effect on intra-community trade caused by an anti-competitive conduct. In *Windsurfing International*, for instance, the ECJ ruled that the licensing agreement concluded by Windsurfing with a number of German sailboard manufacturers had an impact on intra-community trade, even though the agreement was limited to the supply of the German market<sup>23</sup> while the manufacturers were free to sell the sailboards in other EU Member States.<sup>24</sup> According to the Court, an anti-competitive agreement could have an indirect impact on intra-community trade both when

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<sup>18</sup> European Commission Notice, *Guidelines on the Effect on Trade Concept Contained in Art. 81 and 82 of the Treaty*. OJ C 101/81, 27.4.2004.

<sup>19</sup> See for instance:

- Brammers, “Concurrent Jurisdiction under Reg. 1/2003 and the Issue of Case Allocation”, 42, *Common Market Law Review* (2005), 1383-1424.

- Dekeyser, Jaspers, “A New Era of ECN Cooperation”, 30, 1, *World Competition* (2007), 3-24.

- Wilks, “Agencies, Networks, Discourses and the Trajectory of European Competition Enforcement”, 3, 2, *European Competition Journal* (2007), 437-464.

<sup>20</sup> Burnely, “Interstate Trade Revisited – the Jurisdictional Criterion for Art. 81 and 82 EC”, 23, 2, *European Competition Law Review* (2002), 217-226.

<sup>21</sup> Joined cases C-295/04 to C-298/04, *Vincenzo Manfredi v. Lloyd Adriatico*, EU:C:2006:461.

<sup>22</sup> Case 56/65, *Société Technique Minière v. Maschinenbau Ulm GmbH*, EU:C:1966:38.

<sup>23</sup> Case 193/83, *Windsurfing International Inc. v. Commission*, EU:C:1986:75. Para. 20-22.

<sup>24</sup> Same logic was followed by the ECJ in *Béguelin* in relation to an exclusive distribution agreement between French distributor and a non-EU supplier.

Case 22/71, *Béguelin Import Co. v. S.A.G.L. Import Export*, EU:C:1971:113.

it restricted imports,<sup>25</sup> and when it promoted trade with other Member States.<sup>26</sup> Secondly, the ECJ has also broadly interpreted the concept of “potential” effect on intra-community trade: an anti-competitive agreement concluded by a group of undertakings active in a single EU Member State could “potentially” discourage new entrants in the national market,<sup>27</sup> or restrict imports from other EU Member States. In *British Sugar*, for instance, the ECJ ruled that the intra-community trade condition was satisfied since sugar was “susceptible to imports” within the EU internal market, although there was no evidence that sugar was effectively traded between UK and other Member States.<sup>28</sup> Finally, the ECJ has lowered the burden of proof faced by the EU Commission to verify the effect on intra-community trade: “...it is not necessary for the Commission to demonstrate that an agreement actually had an appreciable effect on trade between Member States, but it is sufficient to show that the agreement is capable of affecting such trade.”<sup>29</sup>

Most of these judgements were delivered by the ECJ before the decentralization of EU competition law enforcement brought by Reg. 1/2003, when few Member States had a national competition law in force (i.e. Germany, France and UK).<sup>30</sup> At that time, Articles 101-102 TFEU remained the only rules sanctioning anti-competitive conducts in the majority of the EU Member States. The ECJ’s “broad” interpretation was criticized for the first time by Advocate General (AG) Trabucchi in *Papiers Peints*.<sup>31</sup> The AG argued that the Court should re-consider its case law on intra-community trade effect; the AG suggested that EU competition rules should be applicable only when the effect of the anti-competitive conduct was “...significant at Community level”.<sup>32</sup> In its ruling, however, the Court disregarded the AG suggestion.<sup>33</sup> The Court has never re-considered its case law on effect on trade, restating the *Société Technique Minière* formula even in the judgements ruled after the entry into force of Reg. 1/2003.<sup>34</sup>

In 2004, the EU Commission published its Notice on the concept of effect on trade.<sup>35</sup> This soft law document was addressed to NCAs and national courts,<sup>36</sup> which were required under Reg. 1/2003 to assess “in each case” whether the anti-competitive conduct had an effect on intra-community trade, which would trigger application of the EU competition rules.<sup>37</sup> The Notice attempted to systematize the preceding ECJ

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<sup>25</sup> Case 246/86, *SC Belasco and others v Commission*, EU:C:1989:301. Para. 34.

<sup>26</sup> Case C-238/05, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios*, EU:C:2006:734. Para. 38.

<sup>27</sup> Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P, *Erste Group Bank AG and others v. Commission*, EU:C:2009:576. Para. 38.

<sup>28</sup> Case C-359/01, *British Sugar plc v. Commission*, EU:C:2004:255. Para. 29.

<sup>29</sup> *Ibid*, para. 31.

<sup>30</sup> Gerber, *Law and Competition in Twentieth-Century Europe: Protecting Prometheus* (Oxford University Press, Oxford, 2001). Chapter VI.

<sup>31</sup> Opinion of AG Trabucchi delivered on 22nd October 1975 in Case 73/74, *Groupement des fabricants de papiers peints de Belgique and others v Commission*. EU:C:1975:130.

<sup>32</sup> *Ibid*, page 1523.

<sup>33</sup> Case 73/74, *Groupement des fabricants de papiers peints de Belgique and others v Commission*, EU:C:1975:160. Para. 22-34.

<sup>34</sup> *Supra*, *Asnef-Equifax* (2006), *Erste Group* (2009), *Manfredi* (2006).

<sup>35</sup> *Supra*, 2004 European Commission Notice.

<sup>36</sup> *Supra*, 2004 European Commission Notice, para. 9.

<sup>37</sup> *Supra*, 2004 European Commission Notice, para. 12.

case law, referring to the Court's jurisprudence on the "indirect" and "potential" effect on trade.<sup>38</sup> In addition, the EU Commission put forward quantitative criteria for the assessment of the "appreciability" of the effect on intra-community trade. According to the Notice, an agreement did not have an effect on intra-community trade when two cumulative conditions were satisfied: 1) the aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5 %; 2) in the case of horizontal agreements, the aggregate annual Community turnover of the undertakings concerned in the products covered by the agreement does not exceed 40 million euro.<sup>39</sup>

The Notice failed to provide a clear guidance to the NCAs due to a number of reasons. First of all, the Notice is a soft law instrument that does not legally bind the NCAs. Consequently, the NCAs still enjoy a margin of discretion in assessing the intra-community trade effect in their decisions. Secondly, the quantitative criteria proposed by the 2004 Notice overlapped with the market share thresholds mentioned by the 2001 *De Minimis* Notice.<sup>40</sup> Finally, the Notice codified the ECJ "broad" interpretation concerning effect on trade; interpretation which does not fit anymore with the high degree of integration achieved within the EU internal market.<sup>41</sup> If the NCAs systematically referred to this jurisprudence, they would adopt every decision under EU rather than national competition rules.

As discussed in the following section, the lack of clear guidance provided by the 2004 Notice had an impact on the assessment of the effect on trade carried out by the NCAs of the selected jurisdictions in their decisions. While some authorities have constantly referred to the 2004 Notice and to the relevant ECJ case law, other NCAs have not included the effect on trade assessment in the individual infringement decisions. Some NCAs have interpreted the effect on trade "narrowly" when compared to the ECJ case law and Commission Notice, by thus limiting the application of EU competition rules.

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<sup>38</sup> *Supra*, 2004 European Commission Notice, para. 34-43.

<sup>39</sup> *Supra*, 2004 European Commission Notice, para. 52.

<sup>40</sup> According to *De Minimis* Notice, an agreement does not restrict competition when the aggregate market share of the parties is below 10% for a horizontal agreement and below 15% of the relevant market for a vertical agreement. Agreements which do not satisfy these thresholds do not have an appreciable impact "on intra-Community trade or on competition".

European Commission, *Notice on Agreements of Minor Importance which do not Appreciably Restrict Competition under Art. 81(1) of the Treaty (de minimis)*. OJ C-368/13, 22.12.2001. Para. 7.

<sup>41</sup> *Supra*, Burnley (2002).

### 3. The application of the concept of intra-community trade effect by the NCAs of the new EU Member States

#### 3.1. Bulgaria: too small to affect intra-EU trade?

Between 1<sup>st</sup> January 2007 and 31<sup>st</sup> March 2015 Bulgaria has notified to the EU Commission 20 cases of open investigations and 7 envisaged infringement decisions based on Articles 101-102 TFEU.<sup>42</sup> While these numbers appear to be low, it should be noted that Bulgaria has notified more investigations than some Member States that joined the EU in 2004.<sup>43</sup> At the same time, Bulgarian enforcement record falls far behind that of Romania, which also acceded to the EU in 2007 and has notified twice as many investigations and four times more envisaged infringement decisions than the Bulgarian NCA.<sup>44</sup> As shown in Annex I, the ratio of the EU competition law cases in relation to the total number of the decisions of the Bulgarian NCA (KZK)<sup>45</sup> adopted under national competition rules has remained low, ranging from 1,8% in 2007 to 36% in 2012.

The Bulgarian enforcement record encounters examples of the “narrow” interpretation of the intra-community trade effect. For instance, in 2010 the KZK sanctioned CEZ Distribution Bulgaria for imposing unfavourable trading conditions on its customers. In that case the KZK noted that since the alleged abuse concerned only the territory of Western Bulgaria, where *CEZ Distribution* was licensed to provide its services, it did not affect the import/export of electricity. Since the abusive conduct did not have any cross-border effect, Article 102 TFEU was considered inapplicable.<sup>46</sup> Even in cases involving products effectively imported from other EU Member States, such as supply and distribution of medical reagents, the KZK concluded that the alleged practices could affect only the national market, but they did not isolate Bulgaria from the rest of the EU internal market.<sup>47</sup> Consequently, the practice did not affect intra-community trade and EU competition rules were not applicable.

The KZK has also excluded the application of EU competition rules in cases where the relevant geographic market had only local dimension. For example, the KZK excluded the application of the EU

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<sup>42</sup> *Supra*, EU Commission statistics on cases notified under Art. 11 Reg.1/2003.

<sup>43</sup> Such as Cyprus (14/6), Czech Republic (18/9), Estonia (8/3) and Malta (5/3).

*Supra*, EU Commission statistics on cases notified under Art. 11 Reg.1/2003.

<sup>44</sup> Romania’s contribution is 49 and 30 respectively.

*Supra*, EU Commission statistics on cases notified under Art. 11 Reg.1/2003.

<sup>45</sup> In Bulgaria the Law on Protection of Competition (Official Gazette No. 102 of 28 November 2008) is enforced by the Commission for Protection of Competition (*Комисия за защита на конкуренцията*) (KZK). The KZK decisions are publicly available in the electronic registry accessible at <http://reg.cpc.bg/> (last access on 4.5.2015).

<sup>46</sup> A similar conclusion was reached by the KZK in another investigation against *CEZ Distribution* concerning the obligations of the former to purchase the electricity installations from the owners of the residential buildings and other types of premises connected to *CEZ Distribution* network. In that case the Bulgarian NCA stated that the alleged abuses concerns only part of the national market (covered by *CEZ Distribution* license) and therefore cannot have an appreciable effect on the trade between Member States. See KZK Decision No. 1392 dated 27.11.2012.

<sup>47</sup> KZK Decision No. 1197 dated 16.10.2012.

competition rules in a case involving the usage of ski lifts in the winter resort of Bansko.<sup>48</sup> Similarly, in another case concerning abuse of dominance in the market for purchase of electricity at regulated prices the KZK stated that since the alleged infringement affected only an insignificant segment of the national market and was not capable of isolating national market from the rest of the EU internal market there were no grounds for application of Article 102 TFEU.<sup>49</sup> Even in cases where the relevant geographic market was determined as national, the KZK has on several occasions declared EU competition rules inapplicable due to the absence of the “effect on trade”. For example, in a case concerning the alleged role of the Bulgarian Banking Association in fixing the rates for consumer credit the KZK concluded that although the geographic market had a national dimension, the anti-competitive practices would not foreclose actual or potential competitors from other Member States from the Bulgarian banking market.<sup>50</sup> As a result, Article 101 TFEU was held inapplicable in the given case.

On several occasions the KZK has excluded the application of EU competition rules because the anti-competitive conduct did not have an “appreciable” effect on intra-community trade. In *Bulgargaz* case,<sup>51</sup> the KZK excluded the application of Article 102 TFEU since the the Bulgarian consumption of natural gas was 0,5%-0,6% of the overall EU consumption. Therefore, the abuse of dominance by Bulgargaz did not have an appreciable effect on the trade between EU Member States. Similarly, in a case concerning an alleged abuse of dominance in the aviation fuels market the KZK looked at Bulgaria’s share in total EU production of jet A-1 fuel and at the number of passengers in Bulgarian airports.<sup>52</sup> Since Bulgarian airports accounted for only 0.8% of the total number of air passengers in the EU, in the view of the KZK the conduct in question did not have an appreciable effect on intra-community trade.

The cases discussed above well represent the ”narrow” interpretation of the effect on trade concept followed by the KZK. Namely, the KZK has excluded application of EU competition rules *vis a vis* anti-competitive conducts which had a local or national dimension, without considering the ”potential” effect on trade in terms of entry barriers. Moreover, in a number of cases the KZK has considered the effect on intra-community trade ”not appreciable” based on the share of the Bulgarian market within the EU internal market. On several occasions the KZK concluded that the effect on trade was not appreciable since the Bulgarian market was ”too small” to affect the intra-community trade. The KZK ”narrow” interpretation is not in line with the ECJ ”broad” interpretation the concept of effect on trade. This restrictive interpretation explains why the KZK has adopted the majority of its decisions under the national competition rules, which

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<sup>48</sup> KZK Decision No. 1236 dated 23.10.2012.

<sup>49</sup> KZK Decision No. 1126 dated 02.10.2012.

<sup>50</sup> KZK Decision No. 622 dated 03.06.2010.

See Svetlicinii, “The Bulgarian Competition Authority finds no cartel on the market for banking services (Association of Banks in Bulgaria)”, 3 June 2010, *e-Competitions Bulletin* June 2010, Art. N° 31625.

<sup>51</sup> KZK Decision No. 546 dated 28.04.2011.

<sup>52</sup> KZK Decision No. 889 dated 26.07.2012.

effectively exempted it from the the duty of notification of the envisaged decisions to the EU Commission under Article 11 Reg. 1/2003.

### 3.2. Czech Republic: limited enforcement record of the competition rules

The official EU statistics show that Czech Republic's record in the enforcement of EU competition rules is limited. In the period between 1<sup>st</sup> May 2004 and 31<sup>st</sup> March 2015, Czech Republic notified to the EU Commission 18 investigations and 9 envisaged decisions regarding violation of EU competition rules.<sup>53</sup> At the same time, as indicated in Annex I, no infringement decision concerning Articles 101-102 TFEU was issued between 2011 and 2013. These numbers reflect the limited enforcement record of the Czech NCA (UOHS).<sup>54</sup> In the past years, the UOHS delivered on average 4-5 infringement decisions per year even under national competition law.<sup>55</sup>

The UOHS applied Article 102 TFEU to the abuses of dominance by the incumbent operators in the railway, gas and telecom industries; markets which had a national geographic dimension.<sup>56</sup> For example, in *Sokolovská uhelná* case the UOHS has relied on EU competition rules to sanction anti-competitive conduct that directly restricted the export of lignite fuel goods produced in Czech Republic towards other EU Member States.<sup>57</sup> In addition, the UOHS has prosecuted under Article 101 TFEU a market sharing agreement between two soft drink producers, which split Czech Republic and Slovakia into separate geographic markets.<sup>58</sup> In these cases, the UOHS has referred to ECJ case law concerning intra-community trade effect. In addition, in *Sokolovská uhelná* the UOHS referred to the market share and turnover thresholds mentioned by the 2004 EU Commission Notice to assess whether the anti-competitive conduct had an appreciable effect on trade.

The difference in the number of decisions adopted by the UOHS under EU and national competition law is lower in comparison to other selected jurisdictions (e.g. Poland and Bulgaria), due to the overall low

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<sup>53</sup> *Supra*, EU Commission statistics on cases notified under Art. 11 Reg.1/2003.

<sup>54</sup> The UOHS (*Úřad pro ochranu hospodářské soutěže*) is the central authority of Czech state administration responsible for creating conditions that favour and protect competition, supervision over public procurement and consultation and monitoring in relation to the provision of state aid, see <http://www.uohs.cz/>. There are two administrative instances in the Czech competition proceedings. Czech competition law is regulated in the Act No. 143/2001 Coll. of 4 April 2001 on the Protection of Competition and on Amendment to Certain Acts. The UOHS decisions are available at <http://www.uohs.cz/cs/hospodarska-soutez/sbirky-rozhodnuti.html> (last access on 4.5.2015).

<sup>55</sup> See Annex I.

<sup>56</sup> See Decision of the UOHS of 14<sup>th</sup> June 2008 in case of *Česke drahy, a.s.*; Decision of the UOHS of 10<sup>th</sup> August 2006 in case of *RWE Transgas*; Decision of the UOHS of 20 April 2005 in case of *Český Telekom*.

<sup>57</sup> In 2010, the UOHS found that *Sokolovská uhelná* concluded with its distributors an anti-competitive agreement between 1997 and 2007, whereby the distributors could not export brown-coal, brown energy coal and graded coal towards other EU Member States. See UOHS decision of 8<sup>th</sup> January 2010 in case of *Sokolovská uhelná, právní nástupce, a.s.*

<sup>58</sup> The UOHS found that *Karlovarské minerální vody (KVM)* and its subsidiary *HBSW*, both producers and distributors of soft drinks, had concluded an anti-competitive agreement, whereby they agreed to share their customers and markets. See UOHS decision of 23 December 2009 in case of *Karlovarské minerální vody, a.s.*

number of decisions adopted by the UOHS. Therefore, the low number of envisaged decisions notified to the EU Commission cannot be explained by a “narrow” interpretation of the intra-community trade effect by the NCA, but rather by the limited enforcement record of the UOHS. The case of Czech Republic, therefore, fits with the common perception that the NCAs of the “new” EU Member States are “less active” than the NCAs of the “old” EU Member States, and thus they notify a lower number of investigations and envisaged decisions to the EU Commission. However, the study will further demonstrate that the case of Czech Republic is more an exception, rather than the general trend among the “new” EU Member States.

### **3.3. Estonia: the complexity of the procedural framework**

The official EU statistics signal the negligible contribution of the Estonian NCA (EKA)<sup>59</sup> to the enforcement of EU competition rules. As of 31<sup>st</sup> March 2015 Estonia has notified only 8 investigations and 3 envisaged decisions under Reg. 1/2003.<sup>60</sup> Among the Member States that joined the EU in 2004 only Malta has notified a lower number of investigations to the EU Commission.<sup>61</sup>

For the purpose of the present study, we have been able to identify only one infringement decision where the EKA has conducted an assessment of the effect on intra-community trade, which led to the application of Article 102 TFEU in parallel with its national equivalent. The case dates back to 2008 and concerns the market for harbour tugboat services.<sup>62</sup> The EKA established an abuse of dominant position in the form of making the provision of harbour tugboat services conditional on whether all the tugboats used for providing the service belonged to the dominant undertaking.<sup>63</sup> The EKA concluded that the abusive conduct had an effect on intra-community trade since the tugboat services were provided both to Estonian and foreign ships. The EKA referred to the 2004 EU Commission Notice, concluding that the abusive conduct had an appreciable effect on trade due to the large market share of the dominant company.

As discussed in a previous study, the scarce enforcement record of the EKA is largely due to a number of procedural aspects that characterize the Estonian competition law system.<sup>64</sup> First of all, despite profound harmonization of the national competition rules with the EU *acquis*, the Estonian legislator has opted for a

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<sup>59</sup> The Estonian Competition Authority (*Konkurentsiamet*) is charged with the enforcement of the Competition Act (*Konkurentsiseadus*), passed 5.06.2001, RT I 2001, 56, 332, entry into force 1.10.2001. Estonian NCA also acts as a regulatory authority for energy markets (electricity, natural gas, district heating, liquid fuels), railways and postal communications. Information about EKA enforcement activities can be found in EKA annual reports, available at <http://www.konkurentsiamet.ee/> (last access on 4.5.2015).

<sup>60</sup> *Supra*, EU Commission statistics on cases notified under Art. 11 Reg.1/2003.

<sup>61</sup> According to the ECN data, Malta has notified 5 investigations.

*Supra*, EU Commission statistics on cases notified under Art. 11 Reg.1/2003.

<sup>62</sup> EKA Decision No. 3.1-8/08-01 1L dated 05.03.2008.

<sup>63</sup> See Käis, “The Estonian Competition Authority holds an injunction in a case concerning abuse of dominance on the basis of Art. 102 TFEU and national provisions (PKL)”, 5 March 2008, *e-Competitions Bulletin*, Art. N° 21231.

<sup>64</sup> See Svetlicinii, “Enforcement of EU Competition Rules in Estonia: Substantive Convergence and Procedural Divergence”, 7, 9 *Yearbook of Antitrust and Regulatory Studies* (2014), 67-85.

diversified procedural framework for the enforcement of the competition law. Public enforcement of antitrust rules is thus carried out through (1) administrative, (2) misdemeanour or (3) criminal proceedings by the EKA and by the public prosecutors through courts. As a result, the choice of proceedings and thus the available remedies and sanctions will depend on the type of the alleged infringement and the discretion of the enforcement authorities. The practitioners note that this procedural diversity makes the outcomes of Estonian antitrust investigations and prosecutions less predictable.<sup>65</sup> Second, in an attempt to optimize the usage of State resources, the Estonian Government has progressively reformed the competences of the EKA, combining under the responsibility of a single administrative authority the functions of competition protection and market regulation. The EKA has been responsible for antitrust enforcement, merger control, state aid control, the enforcement of unfair competition rules, and regulation of network industries (i.e. energy, transport and telecommunications markets). As a result, the limited human and financial resources have been stretched over a wide variety of tasks. Finally, the virtually non-existent private enforcement of competition rules and insufficient public attention *vis-à-vis* competition matters further reduced the chances for EU competition rules to fall into the ambit of judicial proceedings in Estonia.<sup>66</sup>

The Estonian situation is by no means unique. The divergence in procedural rules and institutional settings have been mentioned as important influencing factors that affect the enforcement of EU competition rules in various “new” EU Member States.<sup>67</sup> In Estonia, however, these factors have led to a virtually complete exclusion of EU competition rules from the domestic legal system. After a decade of decentralized EU competition law enforcement, Estonian judges, public officials, undertakings and their legal counsel have little or no direct contact with EU competition rules. Although a number of recent legislative amendments have been introduced to increase the EKA’s powers,<sup>68</sup> it seems unlikely that the enforcement of EU competition law will increase in Estonia in the near future.

### **3.4. Poland: procedural loopholes or discretion of the National Competition Authority?**

The official statistics show that Poland has notified to the EU Commission 29 investigations and 13 envisaged decisions based on Articles 101-102 TFEU.<sup>69</sup> The relatively low number of notifications is surprising, taking in consideration the size of the Polish economy and the enforcement record of the Polish

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<sup>65</sup> See Tamm, Paas, “Estonia Chapter – Enforcement of Competition Law 2009”, *International Comparative Legal Guide*, available at <http://www.iclg.co.uk/practice-areas/enforcement-of-competition-law/enforcement-2009/estonia> (last access 4.5.2015).

<sup>66</sup> See Sein, “Private Enforcement of Competition Law – the Case of Estonia”, 6, 8, *Yearbook of Antitrust and Regulatory Studies* (2013), 129-139.

<sup>67</sup> See Cseres, “The Impact of Reg. 1/2003 in the New Member States”, 6, 2, *Competition Law Review* (2010), 145-182.

<sup>68</sup> See Paas-Mohando, “Estonia: general – legislative amendments”, 34, 11, *European Competition Law Review* (2013), 150-151.

<sup>69</sup> *Supra*, EU Commission statistics on cases notified under Art. 11 Reg.1/2003.

NCA (UOKiK).<sup>70</sup> What is even more surprising is that the number of infringement decisions adopted by the UOKiK under Articles 101-102 TFEU seems to have decreased during the last years. For example, in 2014 the UOKiK did not adopt a single decision based on EU competition rules. As shown in Annex I, the ratio of infringement decisions adopted by the UOKiK under Articles 101-102 TFEU remains very low in proportion to the overall number of decisions adopted by the authority between 2007 and 2013.<sup>71</sup>

In the infringement decisions based on Articles 101-102 TFEU, the UOKiK recognized an effect on intra-community trade in relation to cartel agreements which covered the entire territory of the country,<sup>72</sup> or in relation to dominant companies which operated in markets of a national geographic dimension (e.g. telecom market).<sup>73</sup> In a number of cases the UOKiK based its infringement decisions on EU competition rules since the anti-competitive practice could discourage foreign operators from investing in Poland.<sup>74</sup> Finally, the UOKiK concluded that the conduct had an impact on intra-community trade when it involved foreign undertakings<sup>75</sup>. In these decisions, the UOKiK has referred to the ECJ case law and the EU Commission Notice on intra-community trade effect.<sup>76</sup>

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<sup>70</sup> The Polish Competition Authority (*Urząd Ochrony Konkurencji i Konsumentów*) was established in 1990 as part of market economy reforms. It employs more than 400 officers both in its head office in Warsaw and in its local offices in 9 major Polish cities. For further information, see <http://www.uokik.gov.pl/> (last access 4.5.2015). Polish Competition Law is regulated by the Act of 16 February 2007 on competition and consumer protection, Journal of Laws of 2007, No. 50, item 331.

The UOKiK's decisions are available at [http://www.uokik.gov.pl/decyzje\\_prezesa\\_uokik3.php](http://www.uokik.gov.pl/decyzje_prezesa_uokik3.php) (last access on 4.5.2015).

<sup>71</sup> Such low number may be partially explained by the fact that most of the UOKiK's decisions are issued by its local offices and concern practices related to regional and local markets.

<sup>72</sup> For instance, in the decision of 23 November 2011, DOK-8/2011 the UOKiK found the violation of Art. 101 TFEU by Polish mobile network operators who jointly settled the way of dealing with the undertaking that in answer to tender offer by the President of the Office of Electronic Communications was willing to provide services of reception of the TV broadcast on mobile phones in the digital technology (DVB-H). According to the UOKiK the agreement created obstacles for the development of the wholesale DVB-H television market in Poland.

<sup>73</sup> In 2006, the UOKiK found violation of Art. 102 TFEU and its national equivalent by Polish incumbent telecom operator Telekomunikacja Polska (TP). In its decision, the UOKiK put forward a number of reasons to justify the application of Art. 102 TFEU. First of all, TP abusive conduct took place on the whole territory of Poland. Secondly, since TP had 90% market share in Poland, its conduct could affect trade with other EU Member States. Thirdly, the UOKiK held that TP practice might have discouraged new entrants on Polish markets and significantly limit incentives for Polish operators to enter into cooperation with foreign telecom providers. In 2007, TP was sanctioned again due to abuse of dominance; the UOKiK followed a similar reasoning to justify the adoption of its decision under Art. 102 TFEU.

UOKiK decision of 5th June 2006, DOK-53/2006 in case of *Telekomunikacja Polska S.A.*

UOKiK decision of 20th December 2007, DOK-98/07 in case of *Telekomunikacja Polska S.A.*

<sup>74</sup> In the decision of 8<sup>th</sup> December 2009, DOK-7/2009, the UOKiK found a violation of Art. 101 TFEU by cement producers that restricted competition on the construction market by sharing the national market for grey cement, when agreeing on freezing the market shares of each company, as well as by fixing minimum prices of the cement, the timetables, the amounts and the order of applying the increases in prices for cement.

In the decision of 29<sup>th</sup> August 2008, DOK-6/2008, the UOKiK found the violation of Art. 81 EC by ZAiKS Authors' Association and Association of Polish Filmmakers that restricted competition by fixing uniform charges for using audiovisual works and refused to negotiate their rates. The UOKiK concluded that the agreement had an impact on intra-community trade since it could affect the rights of foreign copyright owners.

<sup>75</sup> In the decision of 29<sup>th</sup> December 2006, DAR-15/06, the UOKiK found a violation of Art. 101 TFEU by banks that restricted competition in the market for acquiring services by means of the joint setting of interchange fee rates, separately in Visa and MasterCard systems.

<sup>76</sup> For a discussion in this respect see: Kowalik-Bańczyk, „Pojęcie wpływu na handel w decyzjach Prezesa UOKiK”, 5, *Europejski Przegląd Sądowy* (2009), at 34.

The assessment of the intra-community trade effect by the UOKiK, however, has not been always coherent; a number of cases have been decided by UOKiK under national competition rules although they might have had a “potential” and “indirect” effect on intra-community trade. In 2008, the UOKiK sanctioned the abuse of dominance by State Forests National Forest Holding (LP), a monopolist producer of wood in Poland and substantial player at the EU level.<sup>77</sup> The UOKiK did not rely in its decision on Article 102 TFEU, even though LP’s activities covered the entire country. In its decision, the UOKiK did not assess whether LP’s abusive conduct translated into a raise of prices of the furniture produced in Poland and exported to other Member States.<sup>78</sup> Another area where the UOKiK practice of effect on trade assessment differs from other NCAs surveyed in the present work concerns bid-rigging cartels. As discussed in the following sections, in sanctioning bid rigging cartels the NCAs of other “new” EU Member States (i.e. Romania and Slovakia) have relied on EU competition rules, since public tenders are open to undertakings from other EU Member States. A bid-rigging cartel has thus a clear “potential” negative effect on intra-community trade. In 2014, however, the UOKiK sanctioned two bid-rigging cartels under national competition law, without assessing in its decision the “potential” impact of the cartel on intra-community trade.<sup>79</sup>

The low number of UOKiK decisions adopted under Articles 101-102 TFEU may be explained by the procedural practices followed by the UOKiK. The UOKiK opens investigations for a breach of Articles 101-102 TFEU only when the alleged infringement has an “obvious” cross-border dimension. In such case, the UOKiK will rely in its final infringement decision on EU competition rules in conjunction with national competition rules. In cases initially investigated under national competition law the UOKiK does not assess in its final decision the impact of the conduct on intra-community trade, and thus whether the decision should be also based on EU competition rules. Since Polish competition rules “mirror” Articles 101-102 TFEU, undertakings subject to investigations usually do not have an incentive to challenge the legal basis relied by the UOKiK. The only exception from this point of view is represented by *Polifarb* case, Polish producer of paints and varnishes.<sup>80</sup> In the course of the proceedings, Saint-Gobain Dystrybucja Budowlana argued that the UOKiK should investigate the resale price maintenance clause included by Polifarb in the distribution agreements concluded with a number of wholesalers under Article 101 TFEU, due to the national dimension of the network of distribution agreements and thus its impact on intra-community trade.<sup>81</sup> In its final decision, however, the UOKiK rejected the arguments put forward by St. Gobain.<sup>82</sup> The

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<sup>77</sup> The UOKiK decision of 29 December 2008, DOK 9/2008 in case of *Lasy Państwowe*.

<sup>78</sup> Polish furniture industry successfully sells its products outside of Poland.

<sup>79</sup> In the decisions of 31<sup>st</sup> December 2014, DOK-10/2014 and DOK-11/2014, the UOKiK found a collusion among the bidders in a public tender for the modernization of the rail line between Warsaw Chopin Airport and Radom.

<sup>80</sup> UOKiK decision of 18<sup>th</sup> September 2006, DOK-107/2006 in case of *Polifarb Cieszyn – Wrocław S.A., Praktiker Polska Sp. z o.o., OBI Centrala Systemowa Sp. z o.o., Castorama Polska Sp. z o.o., Leroy Merlin Polska Sp. z o.o., NOMI S.A., Saint – Gobain Dystrybucja Budowlana Sp. z o.o. and MGI Polska Sp. z o.o.*

<sup>81</sup> *Ibid.*

NCA observed that paints and varnishes produced in Poland were cheaper than similar imported products, due to the lower quality of the ingredients used and lower transportation costs; imported paints and varnishes thus did not compete with those ones produced in Poland. Consequently, the resale price maintenance concluded by Polifarb with its wholesalers did not have an impact on intra-community trade.

The *Polifarb* case represents the “narrow” interpretation followed by the UOKiK in relation to the concept of intra-community trade effect. Such interpretation does not fit with the “potential” and “indirect” effect on intra-community trade mentioned in ECJ case law. The analysis of the UOKiK practice reveals that the NCAs of the “new” EU Member States may be inclined to rely on EU competition rules as legal basis in their decisions only when the effect on trade is “obvious”. In such cases, the UOKiK referred to the EU Commission Notice and to the ECJ jurisprudence. On the other hand, the majority of decisions adopted under national law do not contain any discussion on why the intra-community trade condition was not satisfied.

### **3.5. Romania: setting an example for “new” Member States**

As shown in Annex I, among the selected jurisdictions Romania has the highest ratio of EU competition law cases in relation to the overall number of decisions adopted by the Romanian NCA (CC).<sup>83</sup> In the period 2007-2013, the CC relied on Articles 101-102 TFEU in 31% of its infringement decisions. Such ratio is “high” not only in comparison to the other selected jurisdictions, but also when compared to the NCAs of the “old” EU Member States.<sup>84</sup>

The number of infringement decisions adopted by the CC under EU competition rules has increased during the last years, starting with the 2010 CC decision in the case concerning the agreement among private pension funds managers to allocate their customers.<sup>85</sup> In its decision, the CC recognized that the agreement had an impact on intra-community trade due to a number of reasons: (1) horizontal agreements covering the entire territory of a Member State are usually susceptible to affect trade between Member States; (2) any entity authorized as pension fund manager in the EU could carry out its activity in Romania; (3) private

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<sup>82</sup> *Ibid.*

<sup>83</sup> Romanian competition law (Law on competition No. 21/1996, re-published in the Official Gazette No. 742 of 16 August 2005) is enforced by the Competition Council (*Consiliul Concurenței*). The decisions of the Competition Council are available at <http://www.consiliulconcurenței.ro/> (last accessed on 4.5.2015).

<sup>84</sup> According to the 2009 EU Commission report on the functioning of Reg.1/2003, the ratio of EU/total number of decisions adopted by the NCAs of the EU Member States was the following: Italy (50%); France (40%); Belgium, Denmark, Netherlands (30%); Greece, Portugal (25%); Hungary, Slovenia (20%).

European Commission, *Staff working paper accompanying the Communication from the Commission to the European Parliament and Council - Report on the functioning of Reg. 1/2003*. Published in Brussels on 29.04.2009. COM(2009)206 final, para 148.

<sup>85</sup> CC Decision No. 39 dated 07.09.2010.

pension funds active in Romania could attract contributions from participants in other Member States; (4) Romanian private pension funds were allowed to invest in the instruments traded in other Member States.<sup>86</sup>

The CC has relied on these general criteria to justify the application of Article 101 TFEU in a number of cases. First of all, the CC concluded that a bid-rigging cartel could inhibit the participation of foreign undertakings in a tender procedure, by thus having a “potential” negative effect on intra-community trade. The CC achieved such conclusion in sanctioning bid-rigging cartels affecting both tenders organized by central government authorities,<sup>87</sup> and in relation to tenders organized by local public authorities.<sup>88</sup> Secondly, the CC has also relied on Article 101 TFEU to sanction distribution agreements which prohibited parallel trade, and thus partitioned the EU internal market.<sup>89</sup> Finally, the CC has also recognized the existence of a “potential” effect on intra-community trade that justified the application of Article 101 TFEU in *National Union of Bailiffs (UNEJ)* case.<sup>90</sup> The CC found that UNEJ breached Article 101 TFEU by increasing its membership fees, and by extending the list of eligible execution costs. According to the CC, since only members of the UNEJ could exercise the profession of bailiff in Romania, by raising its membership fees the UNEJ introduced an entry barrier in the market since qualified citizens from other EU countries were less likely to engage in bailiff profession in Romania.

The appreciability of the “effect on trade” has also played a role in the CC’s assessment. An interesting example to this regard is represented by the 2013 CC decision sanctioning a German manufacturer of dental products and its Romanian distributors due to resale price maintenance clause.<sup>91</sup> While the geographic dimension of the affected market was determined as national, the NCA noted that Romania represented a substantial part of the EU internal market. The CC established the existence of cross-border trade between two Member States (i.e. Germany and Romania). The appreciable effect on cross-border trade was established on the basis of the aggregate market shares of the parties in the relevant market (10-20% for the suppliers and 40-50% for the distributors) and their turnover, which exceed 40 million euros. In this decision, the CC referred to the quantitative criteria mentioned by the EU Commission in its 2004 Notice.

The cases discussed in this section demonstrate that the CC has adopted a number of infringement decisions under Articles 101-102 TFEU after having assessed the effect on intra-community trade in light of

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<sup>86</sup> See Peli, Lupeanu, “The Romanian Competition Council fines for client sharing agreements 14 administrators of mandatory pensions funds, applying for the first time both Art. 101(1) TFEU and national mirror provision (Pension Funds administrators case)”, 7 September 2010, *e-Competitions Bulletin*, Art. N° 32663.

<sup>87</sup> In 2013, the CC prosecuted one Romanian, one German and two Swiss undertakings for bid rigging practices implemented in the course of the public procurement proceedings carried out by the Ministry of National Defence. See CC Decision No. 22 dated 29.11.2013.

<sup>88</sup> In a 2012 bid rigging case concerning acquisition of gas installations repair services, the CC confirmed the applicability of EU competition rules while the relevant geographic market was limited to three municipalities where the specified installations were located.

See CC Decision No. 72 dated 14.11.2012

<sup>89</sup> See CC Decision No. 51 dated 28.10.2011 and CC Decision No. 52 dated 28.10.2011.

<sup>90</sup> See CC Decision No. 58 dated 18.10.2012.

<sup>91</sup> CC Decision No. 58 dated 23.12.2013.

the ECJ case law and the EU Commission 2004 Notice. As argued in a previous study,<sup>92</sup> the high ratio of EU competition law cases in relation to the total number of infringement decisions adopted by the CC may be explained by the fact that the CC has prioritized the investigations of high impact cases (i.e. cartels), which are more likely to affect cross-border trade. Another important reason is the willingness of the CC to submit its investigations and preliminary findings to the “quality control” of the EU Commission and the ECN. In October 2014, Mr. Bogdan Chirițoiu, President of the Romanian NCA, made the following statement concerning application of the EU competition rules by the CC: “...for me, from a managerial perspective, it matters if there is a breach of the TFEU, in such case the EU Commission must also see the file, which gives me some comfort that what we do here receives an implicit endorsement on the performance and quality standards that are found in most EU Member States... The fact that we are a ‘new’ Member State makes me unsure of our administrative capacity in comparison with the founding Members of the EU, which makes me to prefer having this additional quality control - the opinion of the EU Commission.”<sup>93</sup> This statement represents the approach of the Romanian NCA, which does not shy away from applying Articles 101-102 TFEU in order to receive feedback from the EU Commission to ensure the high quality of its assessment. However, this study has shown that this approach is not shared by all NCAs of the “new” EU Member States.

### 3.6. Slovakia: safeguarding competition and foreign competitors

As shown in Annex 1, the Slovak NCA (PMU)<sup>94</sup> has adopted a larger number of decisions under Articles 101-102 TFEU in comparison to many other “new” EU Member States. In 2005, the PMU sanctioned under Article 101 TFEU a bid-rigging cartel involving a number of companies that participated in the public tender for the construction of the highway Mengusovce-Jánovce.<sup>95</sup> According to the PMU, trade between EU Member States was affected due to the nature of the tender: not only the tender was formally open to foreign

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<sup>92</sup> Svetlicinii, “Enforcement of the EU Competition Rules in Romania: Application of the 'Effect on Trade' Concept in the Enforcement Practice of the Romanian Competition Council”, 1-2 *Romanian Competition Journal* (2014) 11-23.

<sup>93</sup> Extracts from the statement are available at: Chirițoiu, Almășan, *Noi suntem vinovați de aplicarea celor două articole din TFUE*. Available at <http://www.juridice.ro/341988/bogdan-chiritoiu-adriana-almasan-noi-suntem-vinovati-de-aplicarea-celor-doua-articole-din-tfue.html> (last accessed on 4.5.2015).

<sup>94</sup> The Slovak Competition Authority (*Protimonopolný úrad*) (PMU) has two instances. The 1st instance decision delivered by the Restrictive Agreements Division may be appealed to the Council of the PMU, which then issues the 2nd instance decision. In case of an appeal, the Council reviews the procedure of the first-instance body, deals with objections and collects new evidence, if necessary. The Council may uphold, change, annul the first-instance decision and return the matter to the first-instance body for further proceedings or terminate the proceedings due to procedural irregularities. For further information on the proceedings followed by the PMU see: <http://www.antimon.gov.sk/antimonopoly-office-slovak-republic/> (last access on 4.5.2015). The Slovak competition law is regulated by the Act No. 136/2001 on Protection of 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.

The PMU's decisions are available at: <http://www.antimon.gov.sk/2586-en/cases-in-slovak/> (last access on 4.5.2015).

<sup>95</sup> Decision of the PMU Division of 23<sup>rd</sup> December 2005, 2005/KH/1/1/137 in case of *Strabag, Doprastav, Betamont, Inžinierske stavby, Skanska, Mota-Engil and Engenharia e Construcão*.

operators, but bidders from the Czech Republic and Portugal effectively participated in tender proceedings. During the second instance proceedings, the undertakings argued that the PMU had incorrectly considered the intra-community trade effect as an aggravating factor to calculate the amount of the fine.<sup>96</sup> The PMU Council, however, rejected these arguments.

Another interesting line of arguments can be observed in the 2009 PMU decision in *Slovenská sporiteľňa* case. The PMU sanctioned three Slovak banks under Article 101 TFEU for having excluded a Czech bank interested to enter into the Slovak market from the market of cashless foreign exchange operations.<sup>97</sup> The respondents argued that the Czech bank lacked a license to operate in the Slovak banking market, and thus the conduct did not have an impact on intra-community trade. This argument was subsequently rejected by the ECJ in a preliminary ruling.<sup>98</sup> In the second instance proceedings, the PMU Council rejected the argument that the conduct did not affect the intra-community trade since the conduct took place only within the territory of Slovakia.<sup>99</sup>

The PMU has also sanctioned under Article 101 TFEU a cartel of detergent producers from Slovakia, Austria and Switzerland; a cross-border cartel that had a direct effect on intra-community trade.<sup>100</sup> In addition, the rules adopted by the Slovak Bar Association to limit the scope of advertisement by lawyers were also sanctioned by the PMU under Article 101 TFEU, since such rules could affect foreign legal services providers.<sup>101</sup>

Finally, similarly to UOKiK and UOHS, the PMU has sanctioned abuses of dominance carried out by incumbents in the telecom<sup>102</sup> and railway industries under Article 102 TFEU. In 2006, the PMU sanctioned Slovak Railways for having excluded a competitor from the market of rail cargo transportation.<sup>103</sup> The PMU found that by excluding foreign providers the dominant undertaking had undermined the liberalization of rail cargo transportation market in Slovakia,. In the second instance decision the PMU Council rejected the defendants' argument that the intra-community had not been affected since the conduct did not have cross-border effect, by observing that Slovak Railways had excluded a competitor from another EU Member State from entering into the Slovak market.<sup>104</sup>

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<sup>96</sup> Decision of PMU Council of 16<sup>th</sup> October 2006, 2006/KH/R/2/116.

<sup>97</sup> Decision of the PMU Division of 9<sup>th</sup> June 2009, 2009/KH/1/1/030 in case of *Slovenská sporiteľňa, Všeobecná úverová banka and Československá obchodná banka*.

<sup>98</sup> C-68/12 *Protimonopolný úrad Slovenskej republiky v. Slovenská sporiteľňa*, EU:C:2013:71.

<sup>99</sup> PMU Council in the decision of 19<sup>th</sup> November 2009, 2009/KH/R/2/054.

<sup>100</sup> The PMU Division decision of 29 October 2010, 2011/KH/1/1/055 in case of Procter & Gamble Switzerland, Procter & Gamble Slovakia, Henkel Central Eastern Europe Gesellschaft Austria and Henkel Slovensko Slovakia. The decision was not appealed.

<sup>101</sup> The PMU Division decision of 13 February 2012, 2012/KH/1/1/007.

<sup>102</sup> See the PMU decision sanctioning Slovak telekom for abuse of dominance under Art. 102 TFEU. PMU Division decision of 21 December 2007, 2007/DZ/2/1/111.

<sup>103</sup> The PMU Division decision of 3 July 2006, 2006/DZ/2/1/067 in case of *Železničná spoločnosť*.

<sup>104</sup> PMU Council decision of 22 December 2006, 2006/DZ/R/2/144.

The cases discussed in this section demonstrate that the PMU has successfully prosecuted anti-competitive practices with cross-border effect that foreclosed foreign competitors from the Slovak market. The analysed decisions suggest that the PMU relies on EU competition law when the effect on trade between Member States is “actual” (rather than “indirect”), even if the territorial reach of anti-competitive practice remains limited to the Slovak territory. The PMU’s decisions contain references both to EU Commission Notice and to ECJ case law.

## **4. Conclusions**

### **4.1. Summary of the main findings**

Reg. 1/2003 is generally considered a major success in the evolution of EU competition policy: “...the EU competition rules have to a large extent become the “law of the land” for the whole of the EU”!<sup>105</sup> However, the degree of enforcement of EU competition rules varies among the Member States. In particular, the NCAs of the “new” EU Member States have been perceived as “less active” in comparison to the fellow authorities of the “old” EU Member States due to the lack of resources and independence from the executive branch. Among the six “new” EU Member States analysed in the present study, this hypothesis has been confirmed only in relation to the Czech and Estonian NCAs, which have adopted a low number of infringement decisions both under national and EU competition rules. On the other hand, the review of the enforcement record of the selected NCAs of the “new” EU Member States indicates that these are not “less active” in competition enforcement, but they have adopted the majority of their infringement decisions under national competition laws.

The NCAs’ decisions analysed in the paper indicate that some NCAs (i.e. Bulgaria, Poland) in a number of cases have exhibited a “narrow” interpretation of the effect on trade concept, which has excluded application of the EU competition rules. First, some NCAs have not considered cartels extending over the entire territory of the Member State as affecting the intra-community trade. Secondly, these NCAs have often overlooked the “potential” impact on intra-community trade on new entrants in the market. Thirdly, these NCAs have narrowly interpreted the concept of “appreciable” effect on trade, excluding the application of Articles 101-102 TFEU due to the “small” size of the national market in comparison to the overall EU internal market. Not all the NCAs analysed in this study have followed the same enforcement pattern. The Romanian and Slovak NCAs have adopted a larger number of decisions under Articles 101-102 TFEU in comparison to the other selected jurisdictions, assessing the intra-community trade effect in line with the ECJ case law and the 2004 EU Commission Notice.

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<sup>105</sup> *Supra*, EU Commission Staff Working Paper on Reg.1/2003, page 3.

The study has focused on the enforcement practice by the NCAs of the selected “new” EU Member States due to the lower number of the investigations and envisaged decisions notified to the EU Commission in comparison to the NCAs of the “old” EU Member States. Further empirical study on a broader number of jurisdictions remains a research *desiderata*. In particular, it would be useful to understand whether the “narrow” interpretation of the concept of intra-community trade effect is also present in the enforcement practice of the NCAs of “old” Member States.

#### **4.2. Policy recommendations – setting the boundary between national and EU competition law**

According to Wils, Article 3 represented one of the most contentious aspects in the negotiations of Reg. 1/2003.<sup>106</sup> The introduction of the effect on trade concept as jurisdictional criterion represented a political compromise between the EU Commission, being in favour of decentralization of EU competition law enforcement in order to reduce its workload, and those Member States (e.g. Germany) that considered that the decentralization could hamper the consistency of EU competition law enforcement.<sup>107</sup> Rather than introducing clear jurisdictional criteria in Art. 3 Reg. 1/2003, the EU Commission left to the NCAs the duty to assess the concept of trade in individual decision. Each NCA enjoys a margin of discretion in applying the concept of intra-community trade in individual cases. The study has shown this discretion has resulted in divergent and inconsistent application of the effect on trade assessment by NCAs of the selected jurisdictions.

The concept of effect on trade is contained in Articles 101-102 TFEU, and thus will remain the applicable jurisdictional criterion that defines the scope of application of EU competition rules. In addition, as discussed in section 2, the ECJ has not revised its “broad” interpretation of the concept of effect on trade even after the entry into force of Reg. 1/2003. In order to provide a clearer guidance to the NCAs in relation to the assessment of the intra-community trade, Article 3 Regulation 1/2003 should be amended. The effect on trade could be “presumed” if the anti-competitive conduct satisfied certain “quantitative jurisdictional criteria”. Under the EU Merger Regulation, for instance, a concentration has “Community dimension” when it satisfies certain thresholds of notification based on the annual turnover of the undertakings involved in the transaction.<sup>108</sup> Similarly, the Commission 2004 Notice included quantitative thresholds to explain when an anti-competitive conduct has an “appreciable” effect on trade. If these quantitative thresholds were included in Article 3 Reg. 1/2003, they would become binding for the NCAs. Due to the different size of the EU

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<sup>106</sup> *Supra*, Wils (2014), page 296.

<sup>107</sup> European Commission, *White Paper on Modernisation of the Rules Implementing Art. 85 and 86 of the EC Treaty*. Published in Brussels on 28.4.1999, Commission program n. 99/027, para. 58-62. The text of the White Paper is available at: [http://europa.eu/documents/comm/white\\_papers/pdf/com99\\_101\\_en.pdf](http://europa.eu/documents/comm/white_papers/pdf/com99_101_en.pdf) (last accessed on 4.5.2015).

<sup>108</sup> Council Reg. (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings OJ L 24, 29.1.2004, p. 1–22. Art. 1.

Member States, the quantitative criteria could include a reference to the turnover and to the market share of the undertakings, as possible alternatives.<sup>109</sup> Finally, Article 3 Reg. 1/2003 should require every NCA to conduct an analysis of the effect on trade in its decision. As discussed in section 3, not all the NCAs of the selected jurisdictions have systematically conducted such analysis in their decisions. If included in the text of the decision, the NCA's assessment could be subject to judicial review; national courts could thus assess whether the NCA had properly assessed the effect on trade in the light of the ECJ case law, and thus whether it relied on the appropriate legal basis in its decision.

The introduction of quantitative thresholds was excluded by the EU Commission in its 1999 White Paper on the modernization of EU competition rules.<sup>110</sup> In view of the findings of this study on the diverging application of the effect on trade assessment by the selected NCAs, nevertheless, this option should be reconsidered. In conclusion, there are many good reasons to celebrate the 10<sup>th</sup> anniversary of Reg. 1/2003. However, the degree of coherence within the decentralized system of EU competition law enforcement could certainly be improved by refining the effect on trade as main jurisdictional criterion to set the boundary between the EU and national competition law.

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<sup>109</sup> The reference both to turnover and market share thresholds would be required in view of the different size of the economies of the EU Member States. For instance, in "small" EU Member States, a cartel among a group of undertakings operating in a relevant market which has a national geographic dimension might concern a substantial share of the market, though it might not satisfy a turnover threshold.

<sup>110</sup> *Supra*, 1999 White Paper, para. 62.

## ANNEX I

The annex contains the number of final decisions adopted by the NCAs of the selected jurisdictions under EU competition law (EU) and national competition law (NC). The statistics includes commitment decisions and decisions where no infringement has been found by the authority. The period 2007-2013 has been taken in consideration in the table since all the selected jurisdictions are EU Member States since 2007. The data have been extracted from the NCAs annual reports available on the web-sites authorities.<sup>111</sup> The ratio refers to the number of decisions adopted by each NCA under EU competition law in comparison to the total number of decisions adopted by each NCA in the period 2007-2013. For the Czech Republic and Estonia, the ratio refers to the period 2009-2013, due to the lack of available data for years 2007 and 2008. In case of Czech Republic, only the first instance decisions have been considered. In case of Slovakia, the total number of decisions issued both in first and second instance have been included.

	2007		2008		2009		2010		2011		2012		2013		Ratio
	EU	NC	EU	NC	EU	NC									
<b>BG</b>	1	55	3	41	1	43	5	42	2	36	8	22	6	26	26/291 = <b>8.93%</b>
<b>CZ</b>	N/A	N/A	N/A	N/A	1	15	1	5	0	4	0	4	0	5	2/33= <b>6%</b>
<b>EE</b>	N/A	N/A	1	N/A	0	1	0	0	0	4	0	1	0	2	0/8= <b>0%</b>
<b>PL</b>	2	107	2	104	1	107	1	103	1	102	1	93	1	93	9/709= <b>1,26%</b>
<b>RO</b>	0	1	0	5	0	4	3	13	5	15	11	11	8	11	27/87= <b>31%</b>
<b>SK</b>	3	18	2	11	4	21	2	10	2	11	3	10	1	7	17/88= <b>19%</b>

<sup>111</sup> - Bulgaria: <http://www.cpc.bg/General/Publications.aspx> (last accessed 4.5.2015).

- Czech Republic.: <http://www.uohs.cz/en/information-centre/annual-reports.html> (last accessed 4.5.2015).

- Estonia: <http://www.konkurentsiamet.ee/> (last accessed 4.5.2015).

- Poland: [http://www.uokik.gov.pl/reports\\_on\\_activities.php](http://www.uokik.gov.pl/reports_on_activities.php) (last accessed 4.5.2015).

- Romania: <http://www.consiliulconcurentei.ro/en/publications/annual-reports.html> (last accessed 4.5.2015).

- Slovakia: <http://www.antimon.gov.sk/annual-reports/> (last accessed 4.5.2015).