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Semantic Dissonance and  
Skewed Agencification**



# Competition Law Enforcement in Post-Socialist EU Member States: The Legacy of Authoritarian Legal Culture, Semantic Dissonance and Skewed Agencification

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### **Abstract**

This paper argues that more than thirty years after democratic and economic transition, the legacy of authoritarian legal culture in post-socialist EU Member States limits the effectiveness of competition law enforcement. Concentrating on Croatia but mindful of the experience of other Central and East European countries that acceded to the EU in 2004 and 2007, we show examples of post-accession case law illustrative of excessive judicial formalism and disassociation between the legal norm and its socio-economic context in judicial interpretation. Also, we explain how the excessively stringent legal standard of proof for cartel agreements, established by Croatian courts post-accession, indicates an incomplete semantic alignment with EU competition rules. Furthermore, we discuss the difference in legal cultures between the judiciary and the competition authority by using the notion of “skewed agencification” and show how slow reception of EU competition law standards by the judiciary adversely impacts the enforcement of competition rules.

### **Key words**

competition law, legal culture, judiciary, post-socialist countries, Central and Eastern Europe, Croatia

### **JEL classification**

K21, K40, K42, L4

## 1. INTRODUCTION

Kovacic considered that the “progression toward market processes in nations once committed to comprehensive central economic planning” was “one of the most extraordinary events of our time”.<sup>1</sup> Starting in the 1990s, the transition from a socialist system to a market economy in Central and Eastern Europe necessitated a comprehensive change of national laws and an institutional overhaul, including the introduction of competition rules and institutions.<sup>2</sup> For a large group of former socialist countries, the transition was shaped by the process of EU rapprochement, which ended in 2004 (for the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia), and in 2007 (for Bulgaria and Romania), when those countries became EU Member States.<sup>3</sup> Due to various reasons, including a belligerent break-up of Yugoslavia, Croatia went through the same process at a later point in time, obtaining EU membership status in 2013.<sup>4</sup>

Although the Central and Eastern European countries (CEECs) that acceded to the EU in 2004, 2007 and 2013 are different in various aspects, their shared ex-socialist legacy<sup>5</sup> and common Central European legal culture<sup>6</sup> allow us to address them as a group when discussing challenges to the post-accession development of their competition law systems. Indeed, these countries seemingly share some common challenges with the institution of competition law and the enforcement building process.<sup>7</sup>

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<sup>1</sup> William Kovacic, “Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement,” 77 *Chicago-Kent Law Review* (2001), 265.

<sup>2</sup> See e.g. Russell Pittman, „Some Critical Provisions in the Antimonopoly Laws of Central and Eastern Europe“ 26 *The International Lawyer* (1992), 485, Robert H Lande, „Creating Competition Policy for Transition Economies: Introduction“, 23 *Brooklyn Journal of International Law* (1997), 339; Russell Pittman, „Competition law in central and eastern Europe: five years later“, 43 *Antitrust Bulletin* (1998), 179; William E Kovacic, „The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries“, 11(3) *American University International Law Journal of Law and Policy* (1996), 437. Some countries in Central and Eastern Europe, such as Yugoslavia, Hungary and Poland, already had competition legislation which was reformed after the transition, see Tibor Varady, “The Emergence of Competition Law in (Former) Socialist Countries,” 47(2) *American Journal of Comparative Law* (1999), 229-275.

<sup>3</sup> See e.g. Kati Cseres, „The Interface Between EC Competition Law and the Competition Laws of the New Member States: Implementation or Innovation?“ (20 October 2006), *Amsterdam Center for Law & Economics Working Paper* No 2006-06; Emmert, F. „Introducing EU competition law and policy in Central and Eastern Europe: requirement in theory and problems in practice“, 27 *Fordham Int’ L.J.* (2003), 649-651; Geradin, D. D. Henry, Competition Law in the New Member States - Where Do We Come From? Where Do We Go?, in Geradin, D. D. Henry (eds.) *Modernisation and enlargement: two major challenges for EC Competition law*, Intersentia, 2005; Hölscher, J. J. Stephan, „Competition Policy in Central East Europe in the light of EU Accession“, 42 *Journal of Common Market Studies* (2004), 321-45.

<sup>4</sup> Croatia’s Accession Treaty, OJ L 112, 24.4.2012, p. 10–110.

<sup>5</sup> As Ivančan & Petrić explain, “The common thread that the majority of [the Central and Eastern European countries, both Member States and candidate countries] share is their legal culture, with each of them dominated in a similar way by the post-communist legacy.” Antonija Ivančan, Davor Petrić, “Are Croatian Courts Prepared for the Interpretive Obligation?” 44 *Review of Central and East European Law* (2019), 493-526, at 508.

<sup>6</sup> Describing the Central European legal culture from the point of legal education, legal scholarship and adjudication, while mainly using examples from Poland and pointing to strong influences of German legal tradition, Manko notes that its features include positivism and abstraction in legal education, textual positivism and dogmatism in legal scholarship, formalistic and dogmatic approach in adjudication accompanied with impersonal style. Rafal Manko, “The Culture of Private Law in Central Europe after Enlargement: A Polish Perspective,” 11(5) *European Law Journal* (2005), 527-548, at 528.

<sup>7</sup> For single-jurisdiction studies see, on Poland, Marek Martyniszyn and Maciej Bernatt, “Implementing a Competition Law System: Three Decades of Polish Experience”, 8 *Journal of Antitrust Enforcement* (2020), 165, and on Croatia, Jasminka Pecotić Kaufman, “On the Development of (not so) New Competition Systems: Findings from an Empirical Study on Croatia“, 10 *Journal of Antitrust Enforcement* (2022), 326.

The democratic and economic transition of CEECs entailed a heavy import of legal standards from Western legal tradition. Writing in 1995, Ajani questioned the aptitude of the new models, i.e., legal transplants from the West to Eastern Europe and Russia, “large-scale borrowers of Western models” to match the needs of post-socialist societies.<sup>8</sup> However, the consistency between the transplants and the needs of the recipient countries was hardly an open issue, as the EU model was generally enthusiastically welcomed as a ready-made solution. For example, in Croatia, the reliance on EU competition law transplants as “interpretative tools” was generally understood as a beneficial exercise with an EU-friendly stance from the Constitutional Court.<sup>9</sup> In any case, the conditionality feature of the EU accession process did not allow for a divergent approach for CEEC countries in terms of “the process of competition law transfer”.<sup>10</sup>

Although CEECs underwent the same legislative alignment process with the EU *acquis* before their accession to the EU and are now participating in the decentralized application of Articles 101 and 102 Treaty on Functioning of the European Union (TFEU), their respective competition system development trajectories vary. While both Hungary and Poland managed to significantly develop their competition law system,<sup>11</sup> they recently encountered challenges in terms of the rule of law.<sup>12</sup> Croatia had steady pre-accession growth, which was followed by post-accession challenges of “muted enforcement.”<sup>13</sup>

In this paper, we argue that more than thirty years after their democratic and economic transition, the legacy of authoritarian legal culture in CEECs limits the effectiveness of competition enforcement. According to some, CEECs have been called the “last bastion of formalism.”<sup>14</sup> In this regard, we observe a particular impact of excessive judicial legal formalism, including the insistence on textual interpretation, and a disassociation between the legal norm and its socio-economic context in judicial interpretation within the context of competition law.<sup>15</sup> We focus primarily on Croatia, but we also use examples from other EU

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<sup>8</sup> Gianmaria Ajani, “By Chance and Prestige: Legal Transplants in Russia and Eastern Europe,” 43(1) *American Journal of Comparative Law* (Winter 1995) 93.

<sup>9</sup> See, for example, Vlatka Butorac Malnar and Jasminka Pecotic Kaufman, “The Interaction between EU Regulatory Implants and the Existing Croatian Legal Order in Competition Law”, *Economic Evidence in EU Competition Law* (Mitja Kovač and Ann-Sophie Vandenberghe, Intersentia, 2016).

<sup>10</sup> See KJ Cseres, “The Impact of Regulation 1/2003 in the New Member States” 6 *Competition Law Review* (2010) 145, at 162.

<sup>11</sup> In Hungary, competition law was key in creating a functioning market economy by supporting and stimulating the economic change and by introducing competition law control mechanisms which demonstrated Hungary’s commitment to the market economy, competition advocacy and fair market practices. KJ Cseres, “Rule of Law Challenges and the Enforcement of EU Competition Law: A Case-Study of Hungary and Its Implications for EU Law” 14 *The Competition Law Review* (2019), 75 at 84. For Poland, see Martyniszyn & Bernatt, fn 7.

<sup>12</sup> Cseres argued how basic tenets of the rule of law in Hungary have been neglected or outright abolished to make economic choices in favor of local economic actors or specific sectors. See Cseres, fn 11. Also, Bernatt maintained that the reforms of the judiciary in Poland and Hungary give rise to doubts regarding the independence and expertise of courts which are responsible for reviewing the decisions of national competition authorities adopted under Articles 101-102 TFEU and national competition laws, resulting in the effective judicial protection required by EU primary law being undermined. Maciej Bernatt, “Rule of Law Crisis, Judiciary and Competition Law” 4 *SSRN Electronic Journal* (2019), 345.

<sup>13</sup> Pecotic Kaufman, fn 7.

<sup>14</sup> See Peter Cserne, “Formalism in Judicial Reasoning: Is Central and Eastern Europe a Special Case?”, in Michal Bobek (ed), *Central European Judges Under the European Influence – The Transformative Power of the EU Revisited*, (Hart Publishing, 2015) 23-42, see references in footnotes 1-3.

<sup>15</sup> Hyperpositivism was a crucial feature of the Socialist Legal Tradition. See Manko, “Survival of Socialist Legal Culture? A Polish Perspective”, 3(2) *Comparative Law Review* (2013), 6 and reference fn 23. Hyperpositivism’s formalism extends not only to interpretation, but also entails a high level of purely procedural formalism, whereby courts tend to dismiss cases on formal grounds in order to avoid analyzing them on the

Member States with a socialist history. In our discussion, we focus mainly on the courts rather than on the Croatian competition authority, as we find that the judiciary is faced with more challenges than the competition authorities are.

In addition, we find that the excessively stringent legal standard of proof for cartel agreements, established by the Croatian courts following accession, indicates an incomplete semantic alignment with the EU competition law. We use the notion of semantic dissonance to denote a situation where national rules, as aligned with the EU *acquis* during the pre-accession period, acquire a different meaning and are interpreted differently by the courts in the recipient member state post-accession.

Moreover, we explain the difference in legal cultures between the judiciary and the competition authority by using the notion of “skewed agencification.” We show how – during the pre-accession process – emphasis was on competition authorities as primary importers of the new legal template and new legal culture, with the judiciary only indirectly and sporadically affected by the Europeanization process. This, in the long run, impacted the capacity of the courts to absorb EU competition law standards.

In contrast to the existing body of literature on CEECs and competition law enforcement,<sup>16</sup> this article is the first to engage with how the legal culture of a former socialist country that is now a European Union Member State impacts competition law enforcement. It is also the first to systematically explain the difference in legal cultures between the national courts and the national competition authority using the example of Croatia.

In Section 2, we address the relevance of legal culture and the judiciary for the enforcement of competition law in CEECs. In Section 3, we discuss various features of authoritarian legacy in legal culture and their relevance for competition law enforcement. In Section 4, we address the issue of semantic dissonance and protracted reception of European legal standards by the Croatian judiciary and its effects on competition law enforcement. In Section 5, we explain the difference in legal cultures between the competition authority and the courts by using the notion of “skewed agencification” and by observing a lack of “constitutionalization effects” in competition cases. Finally, we provide some concluding remarks.

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merits. Manko, *ibid.*, quoting Alan Uzelac, “Survival of Third Legal Tradition?”, 49 *Supreme Court Law Review* (2010), 377-396, at 383-385.

<sup>16</sup> Cross-country or even country-specific literature related to competition system development or institutional antitrust in ex-socialist European countries is still relatively limited, with Poland and Hungary as notable exceptions. Based on an empirical study of main Polish stakeholders, Martyniszyn & Bernatt critically analyzed the introduction and development of a system of competition law in Poland before 2016, with a focus on the competition agency’s setup, advocacy and enforcement efforts, but also examining the position and input of the judiciary, practitioners and the broader epistemic community. Martyniszyn and Bernatt, fn 7. Another similar empirical study, focusing on Croatia’s competition system development in the 1995-2018 period, was done by Pecotic Kaufman, identifying a specific evolutionary path, as well as detecting lack of institutional and system embeddedness, and functional self-restraint on the side of the authority, as underlying causes of competition system immaturity. Pecotic Kaufman, fn 7. In a cross-country study exploring the CEECs competition law systems from the EU harmonization perspective, Malinauskaite analyzed their institutional framework and key enforcement powers. Jurgita Malinauskaite, *Harmonization of EU Competition Law Enforcement*, Springer (2020). Using Croatia as a case study, Pecotic Kaufman & Simic Banovic examined the interaction of the competition system and national culture through the governance perspective of post-transitional European society, finding several features inimical to development of the competition system: collectivism and high power distance in the society; a strong influence of planned economy legacy; and a clash between the process of Europeanization and inherited collusion-friendly (in)formal governance mechanisms. Jasminka Pecotic Kaufman, Ružica Šimić Banović, “The Role of (In)formal Governance and Culture in a National Competition System: A Case of a Post- Socialist Economy,” 44 (1) *World Competition* (2021), 81-108.

## 2. LEGAL CULTURE AND THE JUDGE: RELEVANCE FOR COMPETITION LAW

Eastern Europe is still “an under-researched social and legal world.”<sup>17</sup> This paper sheds light on competition law enforcement in post-socialist European countries after their EU accession from a rarely used angle of legal culture, focusing on Croatia in particular.<sup>18</sup> Legal culture is understood in terms of “a specific way in which values, practices and concepts are integrated into the operation of legal institutions and the interpretation of legal texts.”<sup>19</sup>

The legal culture of the CEECs has multiple layers.<sup>20</sup> It developed under influences that are different from those in the West. As Čapeta explains, in the European West, the realism movement influenced the prevailing understanding of law, and strong formalism was replaced by a more pragmatic understanding that courts participate in the process of creating law with pragmatic case law of the CJEU influencing the national judiciaries of the Member States.<sup>21</sup> In the European East, this transition was not present, and instead, the positivism that followed the major codifications of the 19<sup>th</sup> century remained the prevailing understanding of law throughout the 20<sup>th</sup> century and into the 21<sup>st</sup> century, with formalism becoming even stronger in those countries.<sup>22</sup> As Rodin noted, during the fifty years of socialist rule, “original formalist assumptions, such as the objectivity, coherence and systemic nature of law degenerated into a vulgar, textual formalism.”<sup>23</sup> Indeed, the dominant legal culture in the countries of Central and Eastern Europe has been described as “highly formalistic and textualism-driven,” with the effect that the national courts in the majority of those countries struggled to comply well with the obligation to interpret national law in conformity with EU law, which demands “less

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<sup>17</sup> Hans-Wolfgang Micklitz, “Prologue: The Westernisation of the East and the Easternisation of the West,” in Bobek (ed.), *Central European Judges Under the European Influence – The Transformative Power of the EU Revisited* (Michal Hart Publishing, 2015) 2.

<sup>18</sup> We were unable to identify any literature devoted to the topic of competition law enforcement and legal culture in CEECs. However, occasional examples related to competition law are found in the literature on applying EU law in ‘New Member States’. For example, Zdenek Kuhn, Michal Bobek, “Europe Yet to Come: The Application of EU Law in Slovakia,” Adam Lazowski (ed.), *The Application of EU law in the New Member States – Brave New World*, (TMC Asser Press, 2010) 357-378. For a paper on German legal culture and private competition law enforcement see Hannah L. Buxbaum, “German Legal Culture and the Globalization of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement”, 23 (1) *Berkeley Journal of International Law* (2005).

<sup>19</sup> John Bell, “English Law and French Law - Not so Different?”, 48(2) *Current Legal Problems* (1995), 63–101, quoted from Tamara Čapeta, “Courts, Legal Culture and EU Enlargement,” 1 *Croatian Yearbook of European Law and Policy* (2005), 23-53.

<sup>20</sup> In his analysis of legal culture influences in Central Europe, Manko, focusing on the field of private law, identified four historical layers: the first, or ‘bottom layer’ dating back to the ‘old’ *ius commune Europaeum*, the second layer formed by distinctively national forms of legal culture, built upon elements of local custom and original thought, the third layer: the remnants of Communism which continue to influence the culture of private law today, the fourth, or ‘top layer’, consists of elements of the ‘new’ *ius commune Europaeum*, originating in the European Community. Rafal Manko, “The Culture of Private Law in Central Europe after Enlargement: A Polish Perspective,” 11(5) *European Law Journal*, 527-548, at 528.

<sup>21</sup> Čapeta, fn 19.

<sup>22</sup> Čapeta, fn 19. Manko argues that, with Marxist legal doctrine causing the petrification of 19<sup>th</sup>-century positivistic views on the sources of law, socialism insulated Central Europe from the impact of legal realism, which had its greatest expression in the United States, but also exerted a significant influence upon Western European legal culture. Manko, fn 6, at 534.

<sup>23</sup> Siniša Rodin, “Discourse and Authority in European and Post-Communist Legal Culture,” 1 *Croatian Yearbook of European Law and Policy* (2005), 1-22 at 11.

formalistic and more purpose-oriented judicial reasoning.”<sup>24</sup> On the other hand, the CJEU's “teleological and purpose-based doctrines” have been challenged by the national courts in many Western EU countries, with European legal cultures in general remaining “remarkably positivist and formalist.”<sup>25</sup>

Despite the nominal transition back to a democratic legal tradition, CEEC scholars warned of a profound continuity in methods of legal reasoning used by lawyers from the communist era until today's post-communist time,<sup>26</sup> and of the enduring influence of authoritarian legal culture well into the 21<sup>st</sup> century in post-socialist countries.<sup>27</sup> As Rodin noted in 2005, “The language of law and legal concepts that were developed under conditions of authoritarian discourse did not miraculously disappear with the fall of the Berlin Wall.”<sup>28</sup>

In addition, in order to understand how the legacy of authoritarian legal culture continues to shape judicial review in competition cases in CEECs, we need to acknowledge how a specific judicial culture developed in those countries. For this purpose, understanding the role of a judge during the socialist period of time is crucial. In socialism, a judge was “more of an official” and, therefore “more susceptible to pleasing political power than to respecting the law”.<sup>29</sup> Socialist judges were afraid – afraid of responsibilities and of possible retribution. They stayed on the side-lines and wanted to remain as inconspicuous (even anonymous) as possible. As such, they delayed adopting decisions and resorted to formalism and escaped from adopting substantive decisions.<sup>30</sup> A statement, attributed to the late authoritarian Yugoslav leader Josip Broz Tito, that “some judges were holding onto the law like a drunken man to a fence” well illustrates the stance towards the judge in communism as it was considered “rather normal that law would have to bend to politics”.<sup>31</sup> The unconcealed contempt for the autonomy of judges denoted a disdain for the rule of law, indicating that the real source of control was elsewhere. The debilitating effect of the communist-era mindset of institutional resilience and autonomy is arguably felt to this day, with negative systemic long-term consequences.

Not surprisingly, then, the EU Justice Scoreboard 2020 shows that in most post-socialist countries, the perceived independence of courts and judges is unfavorable.<sup>32</sup> As for the perceived independence of courts and judges among the general public, Croatia has the worst result (EU Justice Scoreboard 2020). More than 50% of respondents mentioned interference or pressure from economic or other specific interests, government, and politicians as reasons for this perception. In 2019, Slovakia was the worst, and Croatia second worst.<sup>33</sup>

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<sup>24</sup> Ivančan & Petrić, fn 5, 495. See also quoted articles, op.cit. fn 4.

<sup>25</sup> See Ivančan & Petrić, fn 5, op.cit. fn 5 for quoted articles.

<sup>26</sup> For example, Zdenek Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?*, Brill Nijhoff (2011).

<sup>27</sup> See, for example, Alan Uzelac, “Survival of Third Legal Tradition?” 49 *Supreme Court Law Review* (2010), 377-396, at 383-385; Rodin, fn 23; Čapeta, fn 19; Jasna Omejec, “Hrvatska uprava - od socijalističkog do europskog koncepta zakonitosti,” available at <https://www.bib.irb.hr/833843>; Manko, fn 6.

<sup>28</sup> Rodin, fn 23.

<sup>29</sup> Jan Zobec and Jernej Letnar Cerninc, “The Remains of the Authoritarian Mentality within the Slovene Judiciary, in Michal Bobek (ed.), *Central European Judges Under the European Influence – The Transformative Power of the EU Revisited* (Hart Publishing, 2015) 138.

<sup>30</sup> Ibid., relying on Uzelac, fn 27, at 383.

<sup>31</sup> See Uzelac, fn 27, at 382.

<sup>32</sup> [https://ec.europa.eu/info/sites/info/files/justice\\_scoreboard\\_2020\\_en.pdf](https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2020_en.pdf)

<sup>33</sup> European Commission, 2021 Report on the Rule of Law.

The ethics of obedience, reflected in submissiveness, political opportunism, political correctness, and, consequently, in the self-censorship of judges, were preserved through patterns of the old regime as part of the heritage of the totalitarian period and a collectivist and corporatist mentality.<sup>34</sup> Noting the absence of mental independence of CEE judges, Bobek observed a striking absence of constructive disagreement within the judiciary, evident by the style of using case law from higher and European courts.<sup>35</sup> Reflecting on the judiciary in post-socialist times, Kuhn speaks of post-communist era judges as “a class of subservient technocrats who still seek refuge in mechanical and formalistic interpretation of the law.”<sup>36</sup> Bobek noted that a “mental transition...from a caste of well-paid subservient civil servants to personally independent and critical judges who are ready to make and (publicly) defend their opinions” was at stake in the CEECs.<sup>37</sup>

A “robust political and legal culture” is needed to support particular Rule of Law mechanisms and procedures.<sup>38</sup> Indeed, the rule of law is a precondition for effective antitrust enforcement, with enforcement authorities applying clear legal prohibitions to particular facts with sufficient transparency, uniformity, and predictability so that private actors can reasonably anticipate what actions would be prosecuted and fashion their behavior accordingly.<sup>39</sup> Specific socio-economic culture may undermine the rule of law in various ways. For example, in competition law, the predominant collusive culture may disparage the significance of cartel prohibition.<sup>40</sup>

The role of the courts may be decisive in overturning or maintaining this kind of collusive culture. In this paper, we point to several controversial judgments of Croatian courts which have maintained collusive culture.

The judiciary has two important functions in the implementation of competition policy: on the one hand, ensuring that procedural due process is observed and, on the other hand, applying the underlying substantive principles of competition law correctly and consistently. In other words, a full judicial review of both questions pertaining to facts and law provides for a check of the correctness of the decision and the procedural correctness of the administrative proceedings leading to its adoption. The judiciary’s contribution to economic policy is twofold. On the one hand, the judiciary brings economic policy under the rule of law; on the other, it brings economic factors into the legal reasoning process.<sup>41</sup>

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<sup>34</sup> Zobec & Letnar Cerninc, fn 29, 137; these characteristics of most post-socialist countries confirmed by similar experiences in the Czech Republic, Slovakia, Croatia, Hungary and Bulgaria, see references in: Zobec and Letnar Cerninc op.cit., 137, fn 39.

<sup>35</sup> Michal Bobek, “The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries,” 14(1) *European Public Law* (2008), 99-123.

<sup>36</sup> Zdeněk Kuhn, “Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement,” 52(3) *The American Journal of Comparative Law*, 531-567.

<sup>37</sup> Bobek, fn 35.

<sup>38</sup> Venice Commission Checklist, para 42.

<sup>39</sup> Maurice E Stucke, “Does the Rule of Reason Violate the Rule of Law?” 22(15) *Loyola Consumer Law Review* (2008). 15. For an interesting recent judgment of the General Court of the EU in which the court annulled the decision of European Commission, which rejected a complaint brought by a private company against a public company in Poland for abuse of dominance. The court instructed the Commission to take into account that the “respect for the rule of law is a pertinent factor that the Commission must take into account while determining the competition authority that is best placed to examine a complaint.” Judgment of the General Court of 9 February 2022, *Sped-Pro S.A. v European Commission*, Case T-791/19, ECLI:EU:T:2022:67, para 92.

<sup>40</sup> Pecotić Kaufman & Šimić Banović, fn 16.

<sup>41</sup> OECD, “Judicial Enforcement of Competition Law,” 1996, <https://www.oecd.org/daf/competition/prosecutionandlawenforcement/1919985.pdf>, at 10, 22.

As Svetiev observed, judicial review is “a key traditional mechanism that ensures the accountable exercise of regulatory discretion, respecting the constitutional and legislative mandate of the authority, protecting rule of law principles (such as non-arbitrary decision-making and the principle of legality) and fundamental rights (including the right of defence).”<sup>42</sup> Also, “through providing authoritative interpretations of the legislative or Treaty texts and guidance through precedents,” judicial review promotes legal certainty for target undertakings “by defining the boundaries of legal business conduct.”<sup>43</sup> By providing a check on the agency’s actions, judicial review promotes the accountability of competition agencies.<sup>44</sup> However, judicial review helps to promote accountability only when exercised by independent and competent courts; otherwise, the impartiality of judicial decision making and the capability to review the substance of agencies decisions is negatively affected.<sup>45</sup> Without being exposed to judicial review by experts, the competition authority has limited incentive to develop and attach adequate importance to the quality of reasoning supporting the agency decision. Judicial review in competition law should be constructed in such a way that it assures that the courts can exercise a competent check on the substance of the competition authority’s decision.<sup>46</sup> Courts without sufficient expertise may focus predominantly on the review decision’s formal aspects, rather than on its substance.<sup>47</sup>

With their source in the legacy of authoritarian legal culture, distortions in the ability of the courts to function as a corrective force and to confirm or confront competition authority decisions with appropriate authority based on the courts’ ability to understand the background, context, and objectives of competition rules while avoiding mechanical, formalistic legal interpretation, may severely limit the ability of the competition system to function optimally. Distorted judicial review can operate in two ways: to the detriment of the plaintiffs if their right to a fair trial is compromised, or to the detriment of the competition authority as enforcer of competition rules if the legal standards used by the court are not appropriate.

European competition law tradition, unlike the US system, rests on the administrative process.<sup>48</sup> In order to address the problems related to judicial review of decisions made by the competition authority, we need to understand how the administrative judiciary developed in Croatia. Administrative law tradition is predominant in CEECs,<sup>49</sup> including Croatia.<sup>50</sup> One of the main weaknesses of the model of administrative judicial review in Croatia was an almost complete absence of full judicial review by the administrative court, which in the majority of

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<sup>42</sup> Yane Svetiev, *Experimentalist Competition Law and the Regulation of Markets* (Hart Publishing, 2020), 127.

<sup>43</sup> Ibid.

<sup>44</sup> Maciej Bernatt, *Populism and Antitrust: The Illiberal Influence of Populist Government on the Competition Law System* (Cambridge University Press, 2022) 112.

<sup>45</sup> Ibid., 113.

<sup>46</sup> Maciej Bernatt, “Effectiveness of Judicial Review in the Polish Competition Law System and the Place for Judicial Deference,” 9(14) *Yearbook of Antitrust and Regulatory Studies* (2016).

<sup>47</sup> Bernatt, fn 44, 130.

<sup>48</sup> David Gerber, *Law and Competition in Twentieth-Century Europe: Protecting Prometheus* (Oxford University Press, 2001).

<sup>49</sup> Malinauskaite, fn 16.

<sup>50</sup> Prior to 1977, the judicial control of administrative authorities’ decisions in Croatia, a republic in the Yugoslav federation at that time, was closer to the common law model, with ordinary courts (the High Commercial Court and the Supreme Court of the Socialist Republic of Croatia) exercising judicial review in administrative matters. In 1977, relying on the French administrative law model, a specialized administrative court was set up to exercise judicial review of administrative decisions. Dario Đerđa, “Pravci reforme institucionalnog ustroja upravnog sudstva u Republici Hrvatskoj,” 45(1) *Zbornik radova Pravnog fakulteta u Splitu* (2008), 75-94, at 78.

cases exercised only a limited legality control.<sup>51</sup> This was addressed by reform in 2010, in which the two-tier judicial system of review (regional administrative first instance courts and High Administrative Court as the court of second instance) was introduced.<sup>52</sup>

However, the new two-tier system was not applicable to judicial review of decisions made by the competition authority.<sup>53</sup> Thus, the competition authority remained in its pre-2010 model, meaning that appeals against competition agency decisions went directly to the second-tier court, the High Administrative Court.<sup>54</sup> Although holding on to the one-tier model for competition authority decisions seemed “wise” since it signaled a special importance of competition law that required a high level of judicial skills and expertise, which the experienced High Administrative Court judges presumably had, it turned out that judicial review of competition cases was challenging even for them.<sup>55</sup> In fact, most EU Member States have two appeal instances for competition cases. Only Croatia and partly Sweden, have a single-tier judicial review for competition cases.<sup>56</sup> However, in the case of Croatia, there is a limited right to further appeal, with the party dissatisfied with the judgment of the High Administrative Court having the option of asking the state attorney's office to submit an extraordinary legal remedy to the Croatian Supreme Court to examine the legality of the High Administrative Court judgment.<sup>57</sup>

Most importantly, the 2010 administrative law reform allowed the High Administrative Court to conduct a more intensive, i.e. a full judicial review of the competition authority decision with the possibility to decide on the merits of the case and replace the decision of the competition authority with its own decision and oblige the High Administrative Court to

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<sup>51</sup> The limited control of legality was a rather general judicial control, “without a deeper evaluation of the facts and evidence” and was “somewhat superficial and insufficient.” See Dubravka Akšamović, “Judicial Review in Competition Cases in Croatia: Winning and Losing Arguments Before the High Administrative Court of the Republic of Croatia,” 13(22) *Yearbook of Antitrust and Regulatory Studies* (2020), 7-25, at 12-13, 16. Other weaknesses in the system of judicial control prior to the 2010 reform were identified as follows: adjudication on merits and determining facts by the reviewing court rarely occurred; no adjudication during open session; and, perhaps most importantly, one-tier administrative judicial review; overall, the level of protection guaranteed through administrative dispute was significantly lower and against the prevailing standards in modern Europe. See Ivan Koprić, “Europski standardi i modernizacija upravnog sudovanja u Hrvatskoj,” in: Ivan Koprić (ed.) *Europeizacija upravnog sudovanja u Hrvatskoj* (Institut za javnu upravu, Zagreb, 2014) 1-204, at 9.

<sup>52</sup> Administrative Disputes Act (*Zakon o upravnim sporovima*, Official Gazette 20/10), in force from 1 Jan 2012.

<sup>53</sup> This was in contrast to other independent regulatory agencies in Croatia, whose decisions, under the new rules, had to be appealed first to the newly established regional lower first instance administrative courts.

<sup>54</sup> The aim of the competition authority, which proposed keeping a one-tier judicial review system for its decisions, was to avoid protracted proceedings and speed up the process of obtaining a *res iudicata*.

<sup>55</sup> Akšamović, fn 51, at 12.

<sup>56</sup> Study on judges' training needs in the field of European competition law final report, John Coughlan et al. (authors), ERA – Academy of European Law, EJTN – European Judicial Training Network, Ecorys, Jan 2016, <https://ec.europa.eu/competition/publications/reports/kd0416407enn.pdf>, 23. More on the controversies regarding the true function of the High Administrative Court, see Alan Uzelac, “Pravni lijekovi u upravnom sporu: kreću li se upravno i parnično sudovanje u suprotnim smjerovima?”, in: Ante Galić (ed), *Novosti u upravnom pravu i upravnosudskoj praksi* (Organizator, Zagreb 2019), 73-109, at 98 et seq.

<sup>57</sup> Act on Administrative Disputes, Article 78/1. The state attorney's office has broad discretionary power in this regard. It has no obligation to disclose reasons if it rejects the request for filing for extraordinary review. The Supreme Court, if it allows the request, may annul the judgment of the High Administrative Court and either remand the case for a new decision or reverse the judgment (Article 78/4 Act on Administrative Disputes). Since 2012, the state attorney's office received only one request for an extraordinary examination of the legality of a final decision from the competition authority (Orthodontists case). In this case, the Supreme Court decided in favor of the competition authority, reversing the High Administrative Court judgment. Judgment of the Supreme Court of the Republic of Croatia of 2 March 2021, U-zpz 16/2015-4. Notably, the Supreme Court reversed the lower court's ruling, substituting it with its own decision. Akšamović, fn 51, at 17.

conduct oral hearings.<sup>58</sup> However, some aims of the reform were not fully achieved in practice, with e.g. the administrative courts, unlike civil courts, exercising full jurisdiction only as an exception.<sup>59</sup> Indeed, the High Administrative Court has not yet used its power to decide on merits and replace the competition authority decision with its own; instead, it regularly annuls the appealed decision and remands the case back to the competition authority for reconsideration.<sup>60</sup> In this respect, the Constitutional Court recently insisted that performing full judicial review by the administrative judiciary was the way to avoid excessive formalism.<sup>61</sup>

Notably, Akšamović observed that rules found in the Competition Act itself (Article 68) themselves limited the scope of judicial review as the Court must decide based on the facts presented during proceedings before the competition authority, and plaintiffs could not present any evidence related to new facts, save if they could prove that they had not or could not have had knowledge of these facts during the proceedings before the competition authority.<sup>62</sup> This prevents the High Administrative Court from establishing facts on its own and significantly narrows the scope and intensity of judicial review.<sup>63</sup> In effect, Akšamović noted that, instead of allowing for an extensive appraisal of all the facts and evidence at the judicial review instance, including the examination of new evidence which could be crucial for the final outcome of the court proceedings, the former model of the limited control of legality, abandoned by the 2010 reform, was preserved for the competition cases thanks to the rule in the Competition Act.<sup>64</sup> Subsequent amendments to the Competition Act in 2013 and 2021 have not changed anything in this regard.<sup>65</sup> However, some scholars argue that, since the competition authority is considered a tribunal within the meaning of Article 6 ECHR, judicial review proceedings may be limited to the examination of substantive and procedural illegality, with no need for the court to review all of the relevant facts after they have been already established by the Agency.<sup>66</sup>

As a consequence, faced with a limited judicial review regarding the decisions of the competition authority, both in terms of the scope of review (limited legality) and in terms of the number of instances (single-tier system), the parties turned to the Croatian Constitutional Court, claiming a breach of the constitutional right to a fair trial as an additional way of challenging the decision of the competition authority.<sup>67</sup> Akšamović rightfully noted that the

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<sup>58</sup> Akšamović, fn 51 at 12-13, 16.

<sup>59</sup> See Uzelac, fn 56, at 102-104.

<sup>60</sup> Akšamović, fn 51 at 15.

<sup>61</sup> See details in Ivana Đuras, “Sud pune jurisdikcije kao alat protiv ekcesivnog formalizma,” *Zagrebačka pravna revija* (2021), at 169-170, and the decision of the Constitutional Court of the Republic of Croatia, U-IIIBi-3201/2018, 3 Apr 2019, para 5.2.

<sup>62</sup> See Akšamović, fn 51, at 16. Competition Act, Official Gazette 79/09.

<sup>63</sup> Akšamović, fn 51, at 16.

<sup>64</sup> *Ibid.*, 16-17.

<sup>65</sup> Amendments to the Competition Act, Official Gazette 80/13 and Amendments to the Competition Act, Official Gazette 41/21.

<sup>66</sup> Nikola Popović, Domagoj Maričić, “Postupci pred nezavisnim regulacijskim tijelima i novi Zakon o upravnim sporovima,” in: Ivan Koprić (ed.), *Europeizacija upravnog sudovanja u Hrvatskoj* (Institut za javnu upravu, Zagreb, 2014), 201-226, at 204.

<sup>67</sup> The drafters of the Croatian Constitution envisioned a constitutional complaint only as an exceptional means of protecting fundamental constitutional rights and freedoms and the Croatian Constitutional Court has no direct jurisdiction vis-à-vis the administrative bodies' decisions and the administrative courts' judgments. However, by deciding on the protection of fundamental and constitutional guarantees, the Constitutional Court becomes actively involved in the adjudication of administrative matters. Since its introduction in 1990, the constitutional complaint has grown into a remedy that is regularly filed in all types of proceedings, available after exhausting ordinary and extraordinary legal remedies regardless of the actual existence of violations of constitutional rights

existing judicial control model, with the High Administrative Court as a single judicial instance and a high inflow of constitutional appeals in competition cases signaled a spill-over of competition cases to the Constitutional Court that would have otherwise been channeled to the Supreme Court.<sup>68</sup>

A stronger involvement in competition cases by the Supreme Court, which by law has the role of unifying case law of national courts, would definitely bring about a more complete reception of EU competition law standards. However, due to the exceptional nature of its involvement as an instance to review decisions made by the competition authority, its role will remain limited unless the law is changed.

Membership in the EU “profoundly transforms national judiciaries.”<sup>69</sup> As of 1 May 2004, pursuant to Regulation 1/2003, national courts in EU Member States are expected to play a significant role in enforcing EU competition law.<sup>70</sup> In other words, the role of national judges in Member States is paramount in the context of decentralized application of EU competition law.<sup>71</sup> In the process of judicial review, judges are in many cases final decision-makers. However, in the context of CEECs, not only the ability of the courts to apply Articles 101 and 102 of TFEU directly is crucial but, taking into account the lack of direct application of EU competition law in CEECs,<sup>72</sup> even more important is the ability of national courts to interpret national competition rules in light of EU law.

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in previously conducted proceedings. The review of constitutional complaints equals about 85% of cases within the jurisdiction of the Constitutional Court. The total number of constitutional complaints that are endorsed is approximately 4%, while about 50% will be rejected for various procedural reasons, and roughly 46% for substantial reasons. During constitutional complaint proceedings, the Court will also look into any erroneous application of substantive law, provided the application constitutes a violation of constitutional rights. If the decision of the competition authority was rescinded and sent for retrial, the competition authority is bound by the legal reasoning of the Constitutional Court. See Mario Jelušić, Duška Šarin, “Vladavina prava i uloga Ustavnog suda Republike Hrvatske u izvršavanju upravnih i upravnosudskih odluka,” 52(1) *Zbornik radova Pravnog fakulteta u Splitu* (2015), 175-201, at 184-186, 188.

<sup>68</sup> Akšamović (fn 51), 7-25; also see Dubravka Akšamović, “(Re)definiranje uloge Visokog upravnog suda Republike Hrvatske u sporovima za zaštitu tržišnog natjecanja,” in: Jakša Barbić (ed.), *Pravo tržišnog natjecanja u Republici Hrvatskoj i Europskoj uniji*, (Hrvatska akademija znanosti i umjetnosti, Zagreb, 2021), 39-60. Kušan and Petrović criticize the use of the fair trial legal basis in competition cases as a trigger for the involvement of the Constitutional Court to decide in competition cases, arguing that “the right to a fair trial under Art. 29/1 Croatian Constitution is intended primarily to protect due process and to prevent conduct which, in its form, does not ensure a fair trial and within a reasonable time. The notion of fairness here does not refer to the assessment of substantive rights or to the assessment of whether a court has correctly applied the law in its proceedings because if so, then the Constitutional Court, completely unnecessarily and contrary to the Constitution itself, becomes a regular court of the highest instance controlling correct application of law by other courts.” Lovorka Kušan, Siniša Petrović, “Ustavna jamstva i gospodarski ustroj Republike Hrvatske (o poduzetničkoj i tržišnoj slobodi i pravu vlasništva),” 7(3) *Zagrebačka pravna revija* (2018) 255-276 at 274.

<sup>69</sup> Ivančan & Petrić, fn 5, 494.

<sup>70</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, 1–25.

<sup>71</sup> Importantly, Regulation 1/2003 “affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law”. Ibid., Preamble, para 5.

<sup>72</sup> Botta et al. found that the NCAs of the “new” EU Member States have notified to the Commission a lower number of decisions based on Articles 101–102 TFEU in comparison to “old” EU Member States; according to the authors, this does not mean that the NCAs in CEECs have been “less active” in terms of enforcement but have adopted “most of their decisions under the national competition rules”. Marco Botta, Alexandr Svetlicinii and Maciej Bernatt, “The Assessment of the Effect on Trade by the National Competition Authorities of the ‘New’ Member States: Another Legal Partition of the Internal Market?” 52 *Common Market Law Review* (2015), 1247-75.

We argue that the courts in the post-socialist EU Member States continue to struggle with the legacy of authoritarian legal culture, which is clashing with their role to interpret domestic law in accordance with the wording and purpose of relevant EU law.<sup>73</sup> In Section 3, we will illustrate this thesis with several examples from the case law of the Croatian courts exercising judicial review in competition cases. In order to assess the potential of the national judiciary to fulfil its role under EU law, we will show how features of the legacy of authoritarian legal culture, for example, excessive legal formalism in judicial interpretation and ignorance of policy considerations by the courts exercising administrative and constitutional judicial review, are instrumental in explaining the formal obstacles that EU competition law standards have encountered in Croatian courts post-accession.

### 3. FEATURES OF AUTHORITARIAN LEGACY IN LEGAL CULTURE

In this section, we discuss features of authoritarian legacy in the legal culture of post-socialist countries, such as excessive formalism, denial of policy considerations, circular reasoning, literal application of the *iura novit curia* principle, as well as some broader legal culture issues such as transparency and access to judgments. We argue that the existence of those features helps explain the problem of a protracted reception of EU competition law standards in Croatia.

#### 3.1. Excessive formalism

Many scholars have warned of excessive formalism in judicial interpretation as a widespread feature of legal cultures in ex-socialist jurisdictions<sup>74</sup> that has adverse effects in various disciplines of law.<sup>75</sup> According to Uzelac, excessive procedural formalism is one of the main features of the socialist legal tradition.<sup>76</sup>

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<sup>73</sup> More on how Croatian courts coped with the interpretive obligation in general see Ivančan & Petrić, fn 5.

<sup>74</sup> Rodin, fn 23; Zdenek Kuhn, “European Law in the Empires of Mechanical Jurisprudence: “The Judicial Application of European Law in Central European Candidate Countries,” 1 *Croatian Yearbook of European Law and Policy* (2005), 55-73; Uzelac, fn 27; Emmert speaks of “excessive legal positivism,” Frank Emmert, “The Independence of Judges - A Concept Often Misunderstood in Central and Eastern Europe” 3(4) *Eur. J. L. Reform*, (2002), 405 at 406. In recent years, an increasing number of scholars in Croatia expose the phenomenon of excessive legal formalism when it comes to interpretation of legal rules by the courts and by the administrative bodies: Rodin and Čapeta in the context of the pre-accession process were forerunners in this regard (Rodin, fn 23; Čapeta, fn 19); in the context of civil procedure, see Uzelac, fn 27; in the context of public procurement, see Frane Staničić, “Pretjerani pravni formalizam i postupci javne nabave,” 67(3-4) *Zbornik Pravnog fakulteta u Zagrebu* (2017), 521-564; in terms of constitutional interpretation, see Luka Burazin, Đorđe Gardašević, Mario Krešić, “Poustavljenje hrvatskog pravnog poretka,” 71(2) *Zbornik Pravnog fakulteta u Zagrebu* (2021) 221-254; in terms of criminal procedure, see Zlata Đurđević, “Dekontitucionalizacija Vrhovnog suda RH u kaznenim predmetima i jačanje autoritarnih mehanizama za ujednačavanje sudske prakse: propuštena prilika Ustavnog suda RH,” 27(2) *Hrvatski ljetopis za kaznene znanosti i praksu* (2020) 417-470.

<sup>75</sup> For example, Staničić notes that decisional practice of the State Commission for the Control of Public Procurement Procedures (DKOM), appellate body for public procurement procedures, is often marked by severe legal formalism, with a narrow and grammatical interpretation of regulations. Staničić (fn 74), at 532, 547. For examples of excessive legal formalism in public procurement adjudication see *ibid.*, at 549 et seq. For examples of formalism from case law of ordinary Croatian courts, for example in the area of execution proceedings, see Čapeta, fn 19.

<sup>76</sup> Uzelac, fn 27, at 370.

As Smerdel explained, excessive formalism implies a “grammatical interpretation *stricto sensu*,” with the exclusion of “even logical methods of analysis of the legal text,” and with an understanding that legal *lacunae* “must not be filled using an objective or teleological interpretation,” but that “any prohibition must be stated literally.” What “is not explicitly stated in the legal text does not exist, so it remains only be concluded that there is a legal *lacuna* and that the decision should be left to someone else.”<sup>77</sup>

Staničić complained that courts and administrative bodies in Croatia were “very frequently reaching for a grammatical and narrow interpretation of the law, [...] not prepared to see the broader picture” and that excessive legal formalism leads to decisions that are “unreasonable, irrational, or contrary to common sense.”<sup>78</sup> Omejec, former President of the Croatian Constitutional Court, wrote about “the shackles of rigid textual or grammatical positivism,” “chronic excessive formalism,” and “formalistic positivist patterns of action, [which are] fundamentally indifferent to practical problems of justice.”<sup>79</sup>

Adherence to formalistic behavior is pronounced in Eastern and South-Eastern Europe, with the European Court of Human Rights (ECtHR) often finding violations of the right to a fair trial due to excessive formalism.<sup>80</sup>

Despite a near consensus on excessive formalism as a feature of the CEE’s judicial style in literature, some scholars claim that formalism is largely mistaken for faulty legal reasoning and that the debate has been conducted in simplified and misguided terms with historical and normative claims often mixed with an absence of sufficient empirical evidence to support the distinctiveness of formalism.<sup>81</sup>

We observe textual formalism as a feature of judicial adjudication in decisions related to competition matters made by the Croatian High Administrative Court and the Croatian

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<sup>77</sup> Branko Smerdel, “Važan iskorak: Ustavni sud protiv pravnog formalizma, Informator,” no. 6021-6022, <https://informator.hr/strucni-clanci/vazan-iskorak-ustavni-sud-protiv-pravnog-formalizma> (translation by the author).

<sup>78</sup> Staničić, fn 74, at 540-541.

<sup>79</sup> Omejec, fn 27.

<sup>80</sup> See Storme, Marcel et al., “Civil Procedure in Cross-Cultural Dialogue: Eurasia Context” (September 18, 2012). IAPL World Conference on Civil Procedure, September 18-21, Moscow, Russia: Conference Book/Edited by Dmitry Maleshin; International Association of Procedural Law, Moscow, 2012, UC Irvine School of Law Research Paper No. 2013-119, University of Cambridge Faculty of Law Research Paper No. 25/2013, Available at SSRN: <https://ssrn.com/abstract=2280682>, at 131. For example, in its 2010 judgment in the *Lesjak* case, the ECtHR found a breach of the right to fair trial due to excessive, rigid formalism in the interpretation of specific procedural provisions by the Croatian Administrative Court. In this case, the Administrative Court, despite being aware that it had no competence in the case at hand, and that it had to submit a request to the Supreme Court to resolve the conflict of competence, the Administrative Court insisted on its request to the petitioner to submit a copy of the legal act and eventually rejected the plea due to non-compliance with its request; see Popovic, Maričić, fn 66, 207. In a case related to the courts in Serbia, the ECtHR held that a “particularly strict interpretation” by courts of rules of a procedural nature “may deprive an applicant of the right of access to a court.” See Case *Masirevic v Serbia*, no. 30671/08, 11 February 4, para 48.

<sup>81</sup> Cserne, fn 14, 23, 37. Cserne does not deny the impact of the four decades of socialism on judicial attitudes; he argues that the precise nature of this impact is difficult to ascertain. *op.cit.*, 29. Cserne argues that formalism is, in fact, a key feature of modern western legal thinking. Warning against idealizing common law judicial reasoning and placing it as a normative benchmark and antidote to the communist heritage, Cserne sees the need to distinguish faulty reasoning, on the one side, from legal formalism, as a rule-based reasoning, on the other, noting that faulty reasoning in judicial practice is not specific to CEECs, with “[l]arge portions of doctrinal commentary in most legal cultures [being] exactly about criticism of faulty, floppy or otherwise deficient judicial reasoning.” *op.cit.*, 26, 34-35.

Constitutional Court.<sup>82</sup> In the *Marinas* case, the High Administrative Court returned for a retrial of the competition authority decision, which found a prohibited restrictive agreement and concerted practice between major Croatian marinas, in which prices were discussed during a meeting of the trade association. Very formalistically, the Court held that to establish collusion, the competition authority must prove that all parties to the agreement signed the minutes of the meeting.<sup>83</sup> In the *Private Security Companies* case, another hard-core restraint case, the Constitutional Court disapproved of the decision made by the competition authority, previously confirmed by the High Administrative Court, that found an illegal cartel agreement between private security companies.<sup>84</sup> Finding a breach of the constitutional right to a fair trial, the Constitutional Court entertained a formalistic analysis of what constitutes a price. In this case, the controversial legal test introduced by the Court to establish the existence of illegal price fixing unduly raised the standard for finding cartel agreements in breach of competition rules, notoriously departing from the CJEU standards.<sup>85</sup> In the *Orthodontists* case, the High Administrative Court agreed with the appellant, the Croatian Orthodontists Association, and annulled the infringement decision of the competition authority. The question was whether recommended prices, i.e., a pricelist that was made publicly available on the association's website for a period of three years, were illegal under the Croatian Competition Act. The High Administrative Court held that the association was not liable under national competition rules since its mother association, the Croatian Dental Association, had, by law, the power to adopt such a pricelist.<sup>86</sup> Also, the High Administrative Court held that in order to be deemed illegal, a price-fixing agreement "must be enforceable in practice, meaning that the Competition Agency should have proved that there was price fixing or that there was an intention to fix prices".<sup>87</sup> The Supreme Court eventually annulled this judgment, some eight years after the competition authority issued its infringement decision.<sup>88</sup>

A formalistic approach and a disregard for the underlying economic rationale of the rules prohibiting competitors from colluding on prices are visible in these cases. In particular, the

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<sup>82</sup> Both courts have a relatively rich practice in competition law matters, unlike the Croatian Supreme Court, which issued only one judgment so far relating to the interpretation of the Competition Act. Judgment of the Supreme Court of the Republic of Croatia of 2 March 2021, U-zpz 16/2015-4 (the *Orthodontists* case). This is not unexpected, since the only way the Supreme Court can be seized would be through extraordinary remedy.

<sup>83</sup> The *Marinas* case (CCA Decision of 17 March 2015, *CCA v Adriatic Croatia International Club d.d. et al.*; annulled: judgment of the High Administrative Court of the Republic of Croatia of 17 March 2016, *Ilirija d.d. et al. v CCA*, UsII-39/15-10; CCA Decision of 13 December 2016, *CCA v Adriatic Croatia International Club d.d. et al.* (decision to suspend proceedings)).

<sup>84</sup> Decision of the Croatian Competition Agency of 17 March 2015, *Competition Agency v. Sokol Marić d.o.o., et al.*, UP/I-034-03/2014-01/002, confirmed: Judgment of the High Administrative Court of the Republic of Croatia of 22 April 2016, *Sokol Marić d.o.o. v. Competition Agency*, UsII-40/15-10 (and other cases), annulled: Judgment of the Constitutional Court of the Republic of Croatia of 1 February 2018, *Sokol Marić d.o.o.*, U-III-2791/2016 (and other cases).

<sup>85</sup> For criticism of the Croatian Constitutional Court judgments in competition cases see Siniša Petrović, "Tržišno natjecanje u praksi Ustavnog suda Republike Hrvatske – osvrt na recentne odluke Ustavnog suda" (U-III-952/2017 /'Presečki' i U-III-2791/2016, U-III6196/2016, U-III-2826/2016, U-III-2820/2016 /'Zaštitar')'2019, <https://hdpptn.hr/wp-content/uploads/2018/06/usud-tr%C5%BE-natj.pdf> and C Alexandr Svetlicinii, "The Judicial Review of the Standard of Proof in Cartel Cases: Raising the Bar for the Croatian Competition Authority – Case Comment to the judgment of the Constitutional Court of the Republic of Croatia No. U-III-2791/2016 of 1 February 2018 (Sokol Marić d.o.o.)" 11 *Yearbook of Antitrust and Regulatory Studies* (2018), 311.

<sup>86</sup> CCA Decision of 12 June 2014; judgment of the High Administrative Court of the Republic of Croatia of 5 March 2015 (*Croatian Orthodontist Association v CCA*), UsII-70/14-6.

<sup>87</sup> Pecotic Kaufman, Butorac Malnar, Akšamović, *Competition Law in Croatia* (Kluwer, 2019), at 215.

<sup>88</sup> Judgment of the Supreme Court of the Republic of Croatia of 2 March 2021, U-zpz 16/2015-4 (the *Orthodontists* case).

ruling in the Private Security Companies case, with an artificial distinction between various notions of a price, is illustrative of a “hypertrophy of legal logic.”<sup>89</sup> Also, in the judgments of the Croatian High Administrative Court in competition matters, in cases where the competition authority’s decision is confirmed, the court mostly relies on the findings and the positions of the competition authority. When the court annuls the competition authority’s decision, the reasoning is not well developed, cursory, and formalistic.<sup>90</sup> Uneasiness with the more expansive interpretative role is felt in the judicial drafting style, with a very small portion of a judgment devoted to an actual explanation of the courts’ position and its understanding of how the law applies to the facts. This might be due to the large workload and limited time for adjudication in individual cases but also to features of legal culture that downplay the role of judges as independent and impartial servers of justice. In any case, the rulings presented above went against the ethos that had been established within the competition authority ever since its inception: the use of the EU competition law template as its source of interpretative strength and a source of non-formalistic legal interpretation, the one that instead of being confirmed by the highest courts in the land was, on the contrary, rejected.

Going back to what Cserne claimed to be “faulty, floppy or otherwise deficient judicial reasoning” instead of formalism as a feature of CEE judicial style,<sup>91</sup> we believe that, in the case of Croatia, the underlying causes of deficient legal reasoning as shown above in the examples from the case law to be a mixture of excessive formalism embodied in the excessively stringent standard of proof for collusion and a disregard for EU competition law standards showcasing a lack of knowledge and the inability to comply with the interpretive obligation, i.e., the obligation of national courts in EU Member States to interpret domestic law in accordance with the wording and purpose of relevant EU law.<sup>92</sup> The false judicial interpretation arising out of this mixture of causes prevents the judiciary to act as a “competent check on the substance of the competition authority’s decision.”<sup>93</sup>

The question of how much those court judgments actually limited the competition authority’s enforcement in Croatia might be posed. After all, it is only a handful of overturning court judgments, so at first glance, the effects might not be considered significant. However, on the one hand, the judgments of the High Administrative Court and the Constitutional Court criticized in this paper relate to hard-core infringements – mostly cartel infringements, which are considered the most grave competition law restrictions. On the other hand, they relate to the first attempt by the Croatian competition authority to use its direct fining powers after the 2009 reform in a series of more prominent cartel cases. The Croatian competition authority’s anti-cartel track record up until EU accession was patchy and unimpressive, mainly covering small-scale, territorially-limited hard-core agreements, with a lenient fining policy exercised by the competition authority and almost no fines collected. The impact of overturning several more prominent cartel decisions made by the competition authority immediately post-accession, in which less than symbolic fines were pronounced, we believe was, in fact, quite considerable: from around 2015 until 2020, the Croatian competition authority’s cartel enforcement efforts were almost non-existent, which reveals a surprisingly low level of the institutional resilience of the competition authority.

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<sup>89</sup> Rodin, fn 23, at 15.

<sup>90</sup> For example see the judgment of the High Administrative Court of the Republic of Croatia of 5 March 2015 (*Croatian Orthodontist Association v CCA*), UsII-70/14-6.

<sup>91</sup> See fn 81.

<sup>92</sup> Analysis of the case law of the highest Croatian courts, done by Ivančan & Petrić, shows “the blatant lack of a basic knowledge of EU law.” Ivančan & Petrić, fn 5, 514-515.

<sup>93</sup> Bernatt, fn 46.

### 3.2. Denial of policy considerations

Another feature of authoritarian legal systems in post-communist countries is denial of policy considerations. This is a corollary of the textual method of interpretation, whereby judicial decisions “seek justification in the text rather than in its meaning, and in its legal logic rather than in policy choices.”<sup>94</sup>

Rodin observed that “the dominant legal culture refuses to accept the undeniable fact that judicial decisions have social consequences.”<sup>95</sup> Since when “drafting laws, the legislator attempts to achieve certain regulatory goals,” the interpretation of the law that ignores these goals, detached from the social context of a concrete case, is “worthless,” both in cases of judicial activism or textual formalism.<sup>96</sup>

As Matczak et al. observed, most standards “external to law, e.g. policies or efficiency of law, are excluded from the reasoning when law is applied” because they are not considered the law proper, and the rules should be mechanically followed using arguments derived from their literal meaning, with the original idea behind formalism to limit judicial discretion.<sup>97</sup> Čapeta noted how the largely positivistic and formalistic legal culture in Croatia, with a view of the law as a set of written rules, is not only common among Croatian judges but also among lawyers and the public at large.<sup>98</sup>

Judicial decisions, such as those in the *Orthodontists* case, the *Private Security* case, or the *Marinas* case, show a lack of understanding, at the judicial level, of the broader economic context of competition rules. The capacity of the courts to consider policy goals in competition cases would ensure they were well-placed to adopt a judgment on the soundness of the competition authority’s decision.

### 3.3. Circular reasoning

Circular reasoning, which can “typically be identified in judicial decisions that apply certain standards prescribed by law, without substantively underpinning their application to a pending case,” is also a feature of authoritarian legal culture.<sup>99</sup> In competition cases, Croatian judges

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<sup>94</sup> Rodin, fn 23, at 12. Rodin noted that the understanding that “legal rules comprise a legal and policy component and that the latter is an important source of information that can be used in the interpretation of legal rules” faced “two-pronged resistance in post-communist Europe”: there was “no substantial departure from the formalist legal tradition of the nineteenth century” and “denial of the policy component of the law, developed as a reaction to communist intervention in the judicial process, continue[d] even in the absence of outside pressure.” Rodin, fn 23, at 11-12.

<sup>95</sup> *Ibid.*, at 12.

<sup>96</sup> *Ibid.*, at 12-13.

<sup>97</sup> Marcin Matczak, Matyas Bencze and Zdenek Kuhn, “Constitutions, EU Law and Judicial Strategies in the Czech Republic, Hungary and Poland,” 30(1) *Journal of Public Policy* (2010), 81-99, at 86, citing Franz Wieacker, “A History of Private Law in Europe: With Particular Reference to Germany” (1996) 442 ff.

<sup>98</sup> Čapeta, fn 19. Čapeta cites late Professor Željko Horvatić, professor of criminal law at the University of Zagreb, who claimed that “In modern states organized in accordance with the principle of the separation of powers, judicial power does not, and cannot, have any sort of ‘policy’, nor may its action when applying the law be described in that way,” see fn 55 in Čapeta.

<sup>99</sup> Rodin, fn 23, at 13-14.

traditionally structure their judgments in a “non-discursive, formalistic and circular-way: verdict – arguments of the parties – disputed facts and law – concluding formulation ‘on the basis of everything abovementioned, it has been decided as stated in the verdict.’”<sup>100</sup> The traditional absence of an open discussion of “interpretive choices” has until recently been the norm.<sup>101</sup> This method of legal reasoning hardly fits with the teleological and discursive method developed by the CJEU, with adverse effects on the ability of the Croatian courts to exercise appropriate judicial review over the decisions of the competition authority.

### 3.4. Literal application of the *iura novit curia* principle

A literal application of the principle that the judge knows the law (*iura novit curia*) appears to have undesirable effects in post-socialist jurisdictions.<sup>102</sup> Kuhn argues that this principle “appears to function as a barrier separating the parties before the court from the judge.”<sup>103</sup> Under the authoritarian, post-communist conception of law, the *iura novit curia* principle means that no assistance from the parties is needed to help the judge know the law.<sup>104</sup> If one understands law as discourse, as the conflict lies in the parties’ views over both fact and law, then “a judge must explain why his reading of the law is the best interpretation when faced with other interpretations offered by the parties, conflicting case law, or legal literature.”<sup>105</sup>

Since judges often ignore the arguments of the parties and “only elaborate the court’s own legal theories,” the legal arguments “made by the parties’ attorneys in their briefs rarely exceed a few paragraphs and almost never include proper citations to the literature and case law.”<sup>106</sup>

In Croatia, references to literature or previous judgments are rare. Court judgments in competition matters never include references to the literature, and competition authority decisions rarely include such references.<sup>107</sup> Regarding the mention of relevant case law (European or national) in court judgments in competition matters, a rare reference to a CJEU judgment can be found in the 2021 judgment by the Supreme Court in the *Orthodontists* case.<sup>108</sup> Usually, none are found in the High Administrative Court judgments or in the decisions of the Constitutional Court. On the other hand, competition authority decisions regularly reference CJEU judgments and European Commission decisions.. Curiously, competition authority decisions rarely cite primary EU legislation, for example, Article 101 or 102 TFEU; instead, secondary legislation, even soft law, such as European Commission guidelines, are regularly relied on to substantiate the competition agency’s arguments.

<sup>100</sup> Ivančan & Petrić, fn 5, 518-519.

<sup>101</sup> Ivančan & Petrić note some examples of a change in legal reasoning, coming from the lower courts in Croatia, with the judges, when using with the interpretive obligation, moving away from the formalistic approach. Ivančan & Petrić, fn 5, 518-519, 521 for examples of judgments see op.cit. fn 83.

<sup>102</sup> Zdenek Kuhn, “The Authoritarian Legal Culture at Work: The Passivity of Parties and the Interpretational Statements of Supreme Courts,” 2 *Croatian Yearbook of European Law and Policy* (2006), 19-26, at 19.

<sup>103</sup> *Ibid.*, at 19.

<sup>104</sup> *Ibid.*, at 19.

<sup>105</sup> *Ibid.*, at 25-26.

<sup>106</sup> *Ibid.*, at 19.

<sup>107</sup> Lack of citing literature in court judgments in Poland is noted by Manko, fn 6, at 541: “The Polish Supreme Court never cites any literature (contrary to the Polish Constitutional Tribunal).”

<sup>108</sup> Ivančan & Petrić find that the Croatian Supreme Court has “repeatedly held that the interpretive obligation mandates all national courts to interpret domestic law in accordance with EU law,” while the Croatian Constitutional court “still has not openly adopted a position on the interpretive obligation following accession,” Ivančan & Petrić, fn 5, 524-525.

Judicial style such as that entertained by Croatian courts – which omits references to CJEU landmark cases, academic literature, or even their own previous case law – discourages practitioners and the competition authority from submitting quality briefs and has an adverse impact on the overall quality of judicial adjudication.

### 3.5. Case law as a source of law

The way case law is used, or, rather, not used as a source of law for the purposes of judicial interpretation also reflects the legacy of authoritarian legal culture. As Čapeta remarks, unlike in older EU Member States and the EU legal system itself, where – apart from written legal acts – soft laws, case law, and legal doctrine are used as legal sources in judicial practice, in CEECs, including Croatia, only written legal sources that form part of domestic law are used by judges in practice, with ordinary courts usually not taking case law into consideration when adjudicating cases.<sup>109</sup>

Although Čapeta states that the Constitutional Court does regard case law as a legal source, citing decisions by the ECtHR and the Croatian Supreme Court,<sup>110</sup> we fail to confirm this when it comes to competition cases adjudicated by the Constitutional Court. On the contrary, the Croatian Competition Authority regularly relies on and cites CJEU judgments, European Commission decisions and European soft law rules, for example, Commission notices and guidelines, to substantiate its own arguments. This is usually done in a rather formalistic way, though, as they are listed in the beginning of the decision, rather than integrating them more fully when entertaining specific arguments.

At the appellate level, where the decision of the competition authority is under review, the High Administrative Court usually avoids mentioning any case law.<sup>111</sup> The same goes for the Constitutional Court when deciding competition matters. A notable recent push in the opposite direction is the judgment of the Croatian Supreme Court in the Orthodontists case, in which a CJEU judgment was relied upon as a source of law relevant for the adjudication in that concrete case.<sup>112</sup> Quite understandably, to be able to properly apply [EU] law, national judges need to be familiar with the judicial *acquis communautaire*, i.e. judge-made law, which might be problematic for judges who are not used to even keeping up with the case law of domestic courts.<sup>113</sup> Ignoring CJEU case law post-accession indicates the difficulties of the national courts in being able to assume their role as European courts, participating in the decentralized application of EU competition rules.<sup>114</sup> The authors of a study looking at cross-

<sup>109</sup> Čapeta, fn 19.

<sup>110</sup> Ibid.

<sup>111</sup> This is not to say that lawyers' appellate briefs or the competition authority briefs contain no references to EU law. However, their relevance is usually ignored by the appellate court. For a similar observation, see Zdenek Kuhn, "The Authoritarian Legal Culture at Work: The Passivity of Parties and the Interpretational Statements of Supreme Courts," 2 *Croatian Yearbook of European Law and Policy* (2006), 19-26, at 19.

<sup>112</sup> Holding that in case of a restriction of competition by object concrete effects of the agreement were irrelevant the Supreme Court made a reference to the judgment of the Court of Justice in case C-49/92 P *Commission v Anic Participazioni SpA*, 8 July 1999, ECLI:EU:C:1999:356. See Judgment of the Supreme Court of the Republic of Croatia of 2 March 2021, U-zpz 16/2015-4 (the Orthodontists case).

<sup>113</sup> Čapeta, fn 19.

<sup>114</sup> Cf D'Andrea S, Divissenko N, Fanou M, et al. "Asymmetric Cross-Citations in Private Law: An Empirical Study of 28 Supreme Courts in the EU," 28(4) *Maastricht Journal of European and Comparative Law* (2021), 498-534. The study looked at cross-citations between 28 supreme courts in the EU in private matters; it did not look at the citations by the national courts of the EU Court of Justice case law. Countries were categorized as

citations between supreme courts in private matters argue that “a more comprehensive use of cross-citations in the EU will only emerge if judges and lawyers perceive themselves as forming part of a common European legal culture.”<sup>115</sup>

### 3.6. Ease of access to case law and lack of criticism

Most certainly, the ease of access to the courts’ case law and the decisions of the competition authority is relevant when assessing the legal culture in a country. Authoritarian legal culture is characterized by a closed-off judiciary, which is either not ready to allow easy access to its work and underplays both the importance of digitalization and making judgments publicly available.<sup>116</sup> In 2005, Čapeta noted that in Croatia, until recently, judicial decisions were not even reported.<sup>117</sup> Anecdotal evidence shows that judges frequent a formalistic stance claiming that practical ease of access is irrelevant since judgments, with few exceptions, are in any event adopted in public proceedings. It has been recently noted that, in Croatia, “the right of access to judgments is understood as a judge’s privilege.”<sup>118</sup> Similar problems regarding access to case law exist throughout the CEE region. For example, in Estonia, “only the judgments of the Supreme court are systematically published; judgments from courts of first instance and even from appellate level courts are not, at least not systematically, accessible to the interested public, and often not even to the judges within the system, with the sole exception of those judges who have actually participated in the decision.”<sup>119</sup>

The EU has provided strong financial support for the establishment of public databases of case law, including in Croatia.<sup>120</sup> However, as in other countries, while most supreme courts have made their decisions freely available online, there exist “practical problems in the search functions of the available databases,” which is “a concern for judicial transparency in general and the function of judicial dialogue for EU integration in particular.”<sup>121</sup>

The High Administrative Court, which exercises judicial review over the decisions of the competition authority, does not publish its full-text decisions. However, its judgments in

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‘true followers’, ‘true comparatists’, ‘reluctant followers’, ‘reluctant comparatists’ and ‘isolates.’ The defining characteristic of isolate courts is the low absolute number of cross-citations of any foreign higher courts (less than 10 cross-citations). The supreme courts found to belong to this group are from the following countries: Croatia, Estonia, Finland, Greece, Hungary, Romania, Bulgaria and Latvia. *op.cit.*, 522-525. The authors argued that a low number of cross-citations between the supreme courts of the above-mentioned CEE countries indicated a “low degree of judicial openness” but that it could also be explained by language barriers, domestic publication and reporting practices and the accessibility of supreme court judgments. *op.cit.* 525.

<sup>115</sup> *Ibid.*, at 534.

<sup>116</sup> In terms of using digital technology for court proceedings, Croatia is radically behind other European countries, see Alan Uzelac, *Pravosuđe u Hrvatskoj 2020*, Stanje, uzroci krize i moguće mjere, Teze za diskusiju, [http://www.alanuzelac.from.hr/pubs/C02\\_Pravosuđe2020.pdf](http://www.alanuzelac.from.hr/pubs/C02_Pravosuđe2020.pdf).

<sup>117</sup> Čapeta fn 19 observes that in most other ex-communist countries, except Croatia and Romania, court rulings, at least from higher courts, were made public. She notes that this was probably due to the belief that judges have nothing to do with creating law and that the law is something written in the statutes, thus, case law is irrelevant.

<sup>118</sup> Zlata Đurđević, <https://www.jutarnji.hr/vijesti/hrvatska/zlata-durdevic-mjesecima-me-diskreditiraju-mocnici-iz-politickih-i-sudackih-redova-jer-sam-im-prijetnja-15083412> Professor Đurđević recently stated that the county courts (*županijski sudovi*) publish 2-6% of their decisions, while the number of the Supreme Court published decisions was rapidly declining and in 2018 it was less than 50%.

<sup>119</sup> Emmert, fn 74, at 408.

<sup>120</sup> D D’Andrea et al., fn 114, at 528.

<sup>121</sup> *Ibid.*, at 534. The study looked at cross-citations between supreme courts in private matters, it did not look at the citations by the national courts of the EU Court of Justice case law.

competition matters are made available by the competition authority on its website.<sup>122</sup> In contrast, the Constitutional Court publishes its full-text decisions on its website, and its decisions are regularly published in their entirety in the Official Gazette. Decisions of first-instance commercial courts are not published so digital access to any antitrust damages rulings is difficult. Access to the High Commercial Court, the appeal instance in antitrust damages cases, is possible in theory, but the limited options of the existing internet search engine make it cumbersome to find concrete judgments.

On the contrary, although some finetuning of the search engine on the aztn.hr website would be desirable, the decisional practice of the competition authority is available online, except for its earliest practice.<sup>123</sup> The first Competition Act, adopted in 1995, failed to address the issue of the publication of decisions. This was fixed in 1998, less than a year after the agency became operational when the amendments to the Competition Act provided that full-text decisions of the Agency, as well of the court exercising judicial review, were to be published in the Official Gazette.

Difficulties in accessing the case law of the courts have detrimental consequences on the ability of scholars to critically assess the judiciary's work. Non-publication of judicial decisions prevents the development of a discourse between the judiciary and academic community; scholars have not and could not (as the court decisions were not published) comment on the interpretation of legal norms in practice.<sup>124</sup> Uzelac warns of the need to radically reorganize the system for the publication of court judgments in Croatia<sup>125</sup>.

As Rodin noted, during the communist period, legal scholarship was not expected to be critical but descriptive and apologetic, while the function of education was understood as transmission of the uncontested ultimate truth from teachers to disciples: *magister dixit, discipulus scripsit*.<sup>126</sup> In Eastern Europe, noted Kuhn, the task of legal scholars at universities has been to comment on the texts of legal codes or, in the best case, compare the text of domestic code in a certain area with that of other countries.<sup>127</sup> But Emmert observed that in CEECs, the culture of publishing statute commentaries is not well developed, and judgments are not systematically published, analyzed or commented upon by academic writers.<sup>128</sup>

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<sup>122</sup> [www.aztn.hr](http://www.aztn.hr). As of 1998, the Competition Act stipulates that full text decisions of the competition authority as well as the rulings of the court exercising administrative judicial review in competition matters must be published in the Official Gazette. It must be noted that the search engine on the web portal of the Official Gazette has rather limited search possibilities, and sometimes, although rarely, judgments might not even be available. When it comes to decisions by the competition authority made available on its web site in full text, we note a peculiar practice to anonymize the names of attorneys representing the parties in proceedings led by the competition authority in the publicly available versions of decisions.

<sup>123</sup> Anonymization seems to be a problematic issue. We note a very peculiar practice of the competition agency to anonymize the names of attorneys representing the parties in competition proceedings in publicly accessible versions of its decisions.

<sup>124</sup> Čapeta, fn 19. On the importance of academic literature for the interpretation of the Company Act, see Jakša Barbić, "Utjecaj njemačkog prava na stvaranje hrvatskog prava društava," 44(3-4) *Zbornik radova Pravnog fakulteta u Splitu* (2007) 339-363, at 362.

<sup>125</sup> see Uzelac, fn 108, at 113.

<sup>126</sup> Rodin, fn 23, at 11.

<sup>127</sup> Kuhn, fn 36.

<sup>128</sup> See Emmert, fn 74, at 408, who believes this would provide the judges "with a powerful incentive to provide persuasive reasons for their decisions;" Emmert argues that it is crucial to teach judges in CEECs the fundamentals of legal methodology and that judicial retraining should shift the focus from substantive law to methodology of law, *ibid.*, 409.

Reluctance to critically assess the work of the courts does not come as a surprise since in Croatia, publicly commenting on non-final judicial decisions was deemed a criminal offence until 2013.<sup>129</sup>

#### 4. SEMANTIC DISSONANCE AND PROTRACTED RECEPTION OF EUROPEAN LAW

In addition to the features of authoritarian legacy in legal culture used to explain the problem of a protracted reception of EU competition law by the judiciary in the post-accession period in Croatia, as discussed above, in this section, we entertain the concept of “semantic alignment” with the same aim. Rodin uses the term “semantic dissonance” to denote the “difference in the understanding of fundamental legal and political concepts... [e]ven in instances of literal transcription.”<sup>130</sup> Within the context of the pre-accession process, he argued that national rules – despite being aligned with EU legal order – “acquire a different meaning and are applied differently by the courts.”<sup>131</sup> The lack of semantic alignment also exists in relation to the ECHR acquis.<sup>132</sup>

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<sup>129</sup> Art. 309 of the Criminal Code, Official Gazette 110/1997. Commenting on non-final rulings was decriminalized in 2013, Criminal Act, Official Gazette 125/2011, in force as of 1 Jan 2013. However, the Croatian Bar Association noted in 2014 that commenting on non-final judicial decisions “potentially distorts independence of the judiciary,” unlike commenting on final decisions, which was “welcome” to “further develop legal science and harmonise case law to obtain ever more level of legal certainty.” <https://www.iusinfo.hr/aktualno/dnevne-novosti/17466> accessed on 15 March 2019. In 2019, Judge Mrčela, vice-president of the Croatian Supreme Court, noted that whether commenting on court decisions was allowed was no more relevant, since it was apparent that “everyone is allowed to comment on anything.” 2019 <https://www.hnd.hr/medijske-slobode-ne-smiju-biti-ugrozene> However, according to a recent survey, 21% of all judges participating in the survey thought commenting on any judgment, irrespective if it was a *res judicata* or not, was not appropriate. Konjević, T. (2020). “Neovisnost i nepristranost hrvatske sudbene vlasti kroz teoriju i praksu”, Paragraf, 4(1), 103-134.

<sup>130</sup> Rodin, fn 23.

<sup>131</sup> Ibid., at 7. In 2005, Rodin complained that in the pre-accession period, “the entire problem of adjustment of national law to the acquis [was] being presented as one of harmonization of legal rules, while the adjustment of their meaning [was] left for the future.”

<sup>132</sup> An example of semantic dissonance is a discrepancy between the ECtHR and Croatian Constitutional Court in the interpretation of the notion of property/ownership, with the former court requiring a broad interpretation and the latter court engaging in a narrow interpretation of the notion of property/ownership. While ECHR protects the right to property (*vlasništvo*), the Croatian Constitution protects the right to ownership (*imovina*), with the Croatian translation of the ECHR using the term ‘ownership’. For a detailed discussion, see Kušan and Petrović (fn 68), at p. 261 et seq. In addition, Professor Omejec, former Chief Justice of the Croatian Constitutional Court, noted that in Croatia, a distinction has not been made between the terms ‘legality’ and ‘lawfulness’ – two very different notions under the ECHR acquis. She argued that the linguistic context (the same term used in Croatian for both legality and lawfulness is *zakonitost*) makes it difficult to understand the European concept of lawfulness. Under the ECHR *acquis*, lawfulness is understood to cover any measures by the public powers which interfere with the Convention rights of individuals, and those measures need to be lawful, which encompasses both prohibition of arbitrariness, respect of substantive legal assumptions, and fair and correct procedure. Under the Croatian Constitution, Article 19/1, the principle of legality in the functioning of the administration is related to individual acts of state administration and bodies with public powers, which must be based on law. Omejec notes that Convention law is wider in scope, putting under control domestic legislation, general acts of the state, stable court or administrative case law, or any other written or non-written national rule which is a source of law, and a legal basis for certain measure undertaken by the public power. Modelling its case law on the ECtHR, the Croatian Constitutional Court held many times that the rule of law, as stipulated in Article 3 of the Constitution, related to all legal norms, not only to law in formal sense. Omejec, fn 27, pp. 13-15.

In the area of competition law, the problem of semantic dissonance has not been eliminated post-accession. On the contrary, it presents itself as a helpful theoretical framework to elucidate the position of the High Administrative Court and the Constitutional Court in Croatia regarding the judicial interpretation of the notion of a cartel and the relevant standard of proof. From our reading of the controversial judgments analyzed above, the semantic dissonance is clearly present: a cartel under the CJEU *acquis* is not a cartel for a Croatian judge. At odds with the EU *acquis*, the excessive standard of proof for prohibited collusive conduct, as entertained by the Croatian courts, significantly narrows down, if not completely disables, any fight against cartels.

It seems that while the ECHR *acquis* was embraced as “an important reference point,” having a “quasi-constitutional position... thanks to the practice of the Croatian Constitutional Court,”<sup>133</sup> the embrace of the EU *acquis* is lagging behind. The practice of the Constitutional Court in this regard has been described as unstable.<sup>134</sup> CJEU case law is primarily, if at all, used by the domestic courts in an auxiliary manner, never as a primary argument.<sup>135</sup> So far, there have been no preliminary references to the CJEU in competition cases by the Croatian courts.<sup>136</sup>

Contrary to the observations of Čapeta that at least for a certain period following accession, CEE judges acting as “community judges” would be docile executors of the new European legal order,<sup>137</sup> what we see from post-accession case law in competition matters is not docile execution, but rather an ignorance of the relevance of their new role and of the CJEU *acquis* altogether. In addition, Čapeta hoped that the deep-rooted formalism of Croatian judges, due to which they tend to apply the rules mechanically without questioning them, could in fact turn them into “good European judges.”<sup>138</sup> In competition matters, this did not come to fruition. Quite the contrary, EU law remains largely ignored by the courts.

Interestingly, Rodin observed how, unlike other European post-communist countries, in Croatia and other countries that were once a part of Yugoslavia “certain political and legal concepts were not entirely absent from discourse” and that thus “solving semantic dissonance is more difficult th[a]n in cases of complete absence of discourse.”<sup>139</sup> Putting this argument in the context of competition law, we wonder how much the prohibition of “monopolistic agreements” under the laws of socialist Yugoslavia,<sup>140</sup> which was hardly implemented, prevented the effective fight against cartels in the post-communist era.

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<sup>133</sup> Omejec, fn 27, p 5.

<sup>134</sup> For details see Goran Selanec, “Uloga Ustavnog suda u provedbi prava Europske unije u okviru pravnog poretka Republike Hrvatske,” Nika Bačić Selanec et al. (eds.), *Pravo unutarnjeg tržišta Europske unije* (Narodne novine, 2021).

<sup>135</sup> See the Supreme Court judgment in the *Orthodontists* case; a similar phenomenon although related to ECtHR in CEE courts judgments is mentioned by Sadurski, fn 79, at 522.

<sup>136</sup> For the experience regarding preliminary references in CEECs in the early years after their accession, see Michal Bobek, “Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice”, 45 *Common Market Law Review* (2008), 1611-1643. As for Croatia, in the 2013-2018 period (the first five years of EU membership), twelve preliminary references in total were sent from Croatia to the CJEU. Ivančan & Petrić, fn 5, p. 517-518. Also see Kristijan Turkalj, “Iskustva hrvatskih sudova u postavljanju prethodnog pitanja sudu Europske unije,” *Pravo i porezi* 9/2020, 52-61.

<sup>137</sup> Čapeta, fn 19.

<sup>138</sup> Ibid.

<sup>139</sup> Rodin, fn 23, at 14.

<sup>140</sup> See Varady, fn 2. See Pecotić Kaufman, fn 7.

## 5. EXPLAINING THE DIFFERENCE IN LEGAL CULTURES BETWEEN THE COMPETITION AUTHORITY AND THE COURTS

In our previous discussion, we addressed the problem of a slow embrace of EU competition law standards by the Croatian judiciary. Unlike the courts, the competition authority very early on interpreted national competition rules in light of the EU acquis. Observing a difference in legal cultures between the competition authority and the courts in Croatia, in this section, we attempt to offer two possible explanations: first, “skewed agencification,” and second, the poor impact of the constitutionalization process when it comes to adjudication in competition cases.

### 5.1. Skewed agencification

The notion of agencification is used by political science scholars to denote the process of equipping new or existing agencies to implement policies and give them more autonomy to perform specific tasks.<sup>141</sup>

During the pre-accession process in CEECs, there was a strong emphasis on agencification; the idea was to establish independent and powerful competition authorities. However, while the emphasis was on competition authorities as primary importers of the new legal template and new legal culture, the judiciary was only indirectly and sporadically affected by the process of Europeanization.<sup>142</sup>

In this paper, we use the term “skewed agencification” to denote the problem that subsequently arose. With most expertise at the competition authority level, and almost none at the judicial level, and with structural issues faced by the judiciary, such as a large case backlog,<sup>143</sup> problems related to the judicial review of decisions of the competition authority were bound to arise long term.<sup>144</sup>

In other words, we argue that in Croatia the pre-accession focus on the competition authority exclusively, not addressing the weaknesses in the judiciary, resulted in a skewed balance between the courts and the authority with adverse consequences. First, the role of the authority as competition enforcer is undermined in the long run, especially in terms of its fight against cartels due to an excessively formalistic interpretation of the notion of cartel by the courts. Second, and more generally, the inability of the courts to act as an authoritative corrective force vis-a-vis the competition authority ultimately undermines the rule of law.

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<sup>141</sup> Bengt Jacobsson, Göran Sundström, “Governing state agencies: Transformations in the Swedish administrative model,” 2007, <http://regulation.upf.edu/ecpr-07-papers/bjacobsson.pdf>

<sup>142</sup> The exception was the Croatian Constitutional Court which was considered “the champion of recognizing the interpretive obligation as binding on Croatian courts during the pre-accession period,” holding repeatedly that “EU law should be taken into consideration as an ‘ancillary interpretive tool’ to fill in legal gaps in a manner consistent with the spirit of national law.” *op.cit.*, 508, and articles cited in *op.cit.* fn 50.

<sup>143</sup> Heavily burdened national judges or those lacking sufficient access to court resources are those who will generally prioritize national law over EU law. See Glavina M., “Reluctance to Participate in the Preliminary Ruling Procedure as A Challenge to EU Law: A Case Study on Slovenia and Croatia”, C. Rauegger and A. Wallerman (eds.), *In the Eurosceptic Challenge National Implementation and Interpretation of EU Law* (Oxford: Hart Publishing, 2019), 119–211.

<sup>144</sup> In the area of company law, the application of a modern company law statute, modelled on German company law, struggled due to poor “legal infrastructure”; for examples of early judicial misinterpretations of the 1993 Company Act, see Barbić, fn 124, at p. 348.

Overall, embedding competition rules more effectively, thereby completing the economic transition more thoroughly, remains an open issue.

The Croatian experience shows how, post-accession, the courts remain primary carriers of the legacy of authoritarian legal culture. Less so does the competition authority, due to its more direct exposure to the Europeanization process primarily due to the Stabilization and Association Agreement that demanded the use of EU competition *acquis* as an interpretative tool.<sup>145</sup>

While the judiciary adhered to strict formalism in judicial interpretation, the enforcement of domestic competition rules in Croatia was exposed to the influence of the EU law system, where, for example, soft law is considered a very important source of law. As Kuhn observed, “where the judiciary is shackled by the chains of parochial formalism and where mechanical jurisprudence is the only permissible religion, the very concept of soft law as a persuasive authority (such as non-binding EU law having the force of persuasive and substantive argument) is not accorded a warm reception. In the view of mechanical jurisprudence, nothing but a binding source of law (i.e., statute) might be used in the judicial interpretation of law. In this view, law is perfect as it is written, and no loopholes or *lacunae* exist.”<sup>146</sup> Thus, the interpretational role of the Croatian competition authority was modelled on this EU law template.

The Croatian competition authority modelled its enforcement practice, as much as it could, on the European Commission, also receiving concrete pre-accession assistance. For example, resident experts from EU member states helped translate EU law standards to pending cases.<sup>147</sup> In the early period, the agency received some assistance from the U.S. agencies, rather than from the EU.<sup>148</sup>

After EU accession, Croatian Competition Authority officials have interacted regularly with other competition enforcers at the European Competition Network (ECN), but also at the International Competition Network (ICN) and other international gatherings.<sup>149</sup>

Even before the pre-accession process began, the Croatian competition authority seemed to understand that implementing competition rules meant interpreting them using EU law as a benchmark. Although it is difficult to claim that no traces of textualism were, or are, still present in its practice, for the competition authority it was always the body of the European competition law that stood as an interpretative template. For this reason, the process of nudging the competition authority to embrace the transformational spirit of a new legal

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<sup>145</sup> Late Professor Vedran Šoljan helped draft a prominent legal provision in the 2003 Competition Act (now Article 74 Competition Act 2009), which is a legal basis for the application of the EU competition *acquis* in cases before the competition authority in cases of legal *lacunae*. This was a very progressive, Euro-friendly solution that went against excessive legal positivism and welcomed the process of Europeanisation of the domestic legal system. For a detailed analysis of Croatia’s Stabilisation and Association Act see Sinisa Rodin, “Sporazum o stabilizaciji i pridruživanju u pravnom poretku Europske zajednice i Republike Hrvatske” 53(3-4) *Zbornik Pravnog fakulteta u Zagrebu* (2003), 591-613. Also see Butorac Malnar, Pecotic Kaufman, fn 9.

<sup>146</sup> Kuhn, fn 74. The term ‘mechanical jurisprudence’ was coined by Roscoe Pound, see Pound, R. “Mechanical Jurisprudence,” 8(8) *Columbia Law Review* (1908), 605–623.

<sup>147</sup> In this regard, the Croatian agency was no different from other CEE competition authorities. As Kuhn noted, the Czech antitrust authorities took into account EU law in almost every important case. This practice was approved by the Czech High Court in the *Škoda Auto* case. Kuhn, fn 74.

<sup>148</sup> See Pecotić Kaufman, fn 7, 6.

<sup>149</sup> The absorption capacity of such international exposure is limited, and better ways need to be found internally to increase the benefits of such interaction. *Ibid.*, 19-20.

culture that emanated from the EU *acquis* in the period before Croatia's accession can be taken as a success overall.<sup>150</sup>

On the contrary, the judiciary slowly digested competition cases mostly through deferential judgments, i.e., confirming competition authority decisions. In its early judgments, the judiciary mostly relied on the same arguments upon which the competition authority based its decisions. Although the pre-accession attitude of the court was expected, as in the initial period it was getting acquainted with the new body of law, the post-accession weaknesses of skewed agencification were more fully revealed. Once the competition authority attempted to effectively use its enforcement powers, including its direct sanctioning powers to fight more prominent cartels and thereby test its powers, the judiciary was not only unable to act as a competent check on its activities, but it also acted to prevent a more coherent anti-cartel enforcement by the competition authority.

It was understandable that the courts, isolated from the process of Europeanization, were much slower to transition as harmonization with the *acquis* mainly affected the legislative and executive branches of government. Also, it probably helped that the Competition Act was coined under the EU law template, both in its substantive and procedural provisions, while the laws regarding administrative and civil proceedings are under the lesser influence of EU law. However, the spill-over effects were slow to appear when it comes to the judiciary, where features of the socialist period seem to have lingered longer, preventing what Rodin calls “a pragmatic approach to solving social problems by legal methods.”<sup>151</sup> In any case, we should avoid a situation where “legal certainty is replaced by a ‘semantic lottery’.”<sup>152</sup> In the context of our discussion, a semantic lottery is a situation where there is uncertainty if the court ascertains the correct meaning of and understanding of the notion of a cartel. In essence, due to the “skewed agencification” problem, the courts in Croatia are unable to correctly perform their corrective role vis-à-vis the competition authority, which ultimately leads to suboptimal enforcement of competition rules.

## 5.2. Lack of constitutionalization effects in competition cases

Constitutionalization is a way to leave the excessive formalism and other features of an authoritarian legal culture legacy behind.<sup>153</sup> As Matczak et al. have argued, the application of

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<sup>150</sup> For a notable exception see the decision of the Croatian Competition Agency of 31 March 2021 in Pčelarska udruga „Učka“ and Pčelarska udruga „Milutin Barač“/Udruženje pčelarskih udruga Primorsko-goranske županije, in which the Croatian NCA showed an unusual misunderstanding of the notion of concerted practice and cartel-like conduct. Also, we observe a narrow interpretation of the effect on trade concept entertained by the Croatian competition authority in comparison to the existing CJEU case law, in line with the observation of Botta et al. as regards some other NCAs in CEECs. For example, the Bulgarian and Polish NCAs “have not considered cartels extending over the entire territory of the Member State or abuse of dominant position on the entire territory of the Member State as affecting intra-Community trade”, which is “in contrast with relevant ECJ case law [footnote omitted], which has ruled that practices covering the entire territory of a Member State can discourage new entrants in the market, by thus partitioning the internal market”. Botta et al., fn 72, at 1271. Finally, for a criticism of a “lenient and ineffective fining policy” of the Croatian NCA see Pecotić Kaufman, fn 7, at 33.

<sup>151</sup> Rodin, fn 23, at 15.

<sup>152</sup> Rodin, fn 23, at 15, fn 76 for the expression *semantic lottery*.

<sup>153</sup> Constitutionalization in Croatia was delayed with a time lag in comparison to other CEECs joining the EU in the 2000s due to the belligerent breakup of Yugoslavia. With Croatia engulfed in armed conflict, and eventually successful in securing its territorial integrity, the development of administration in accordance with the requirements of the 1990 Constitution was delayed for a peaceful time. In the second period of the development

both constitutional and EU law principles opens the way to the use of non-formal elements in judicial reasoning, including references to values, lawmakers' intent, and public interest.<sup>154</sup> We cite from a Czech Constitutional Court judgment:

“One of the functions of the Constitution, and especially of the constitutional system of basic rights and freedoms, is its ‘radiation’ throughout the legal order. The sense of the Constitution rests [...] also in a duty of state and public bodies to interpret and apply law considering the protection of basic rights and freedoms.”<sup>155</sup>

With its 1990 Constitution, Croatia accepted European constitutional values, standards, and common European constitutional heritage.<sup>156</sup> Not unlike the Czech constitutional court, which in the first decade of its existence (1993-2003) “repeatedly emphasized the anti-formalist nature of judicial interpretation of law and criticized the excessive textual positivism embedded deeply in the post-communist perception of judicial application of the law and judicial self-understanding,”<sup>157</sup> the Croatian Constitutional Court consciously embraced the task of “constitutionalizing” the workings of the administrative apparatus, including the administrative judiciary.<sup>158</sup> Staničić noted that the Croatian Constitutional Court, since 2008, has regularly condemned the phenomenon of excessive legal formalism and the grammatical method of legal interpretation by the courts and administrative bodies.<sup>159</sup> However, examples of Constitutional Court decisions warning of formalism in interpretation by ordinary courts can be found throughout the early 2000s.<sup>160</sup> However, adapting the administration to the requirements of Europeanized legal canons meant that the Constitutional Court itself had to become a bearer of the new spirit, clearly departing from old formalistic interpretative legal patterns. As we saw in the previous discussion, controversial judgments of the Constitutional Court in competition matters prove otherwise. The constitutionalization that the Court preached to others failed to address its own weaknesses, with the formalistic legal interpretation of the notion of the cartel and a failure to recognize CJEU case law as a valid point of reference.

In the realm of competition law, the early pre-accession period saw a very flexible, non-formalistic attitude of the Constitutional Court towards the controversial issue of applying EU rules before Croatia's actual accession. In several cases, it was questioned if the stance of the competition authority, applying EU rules to competition cases before Croatia became an EU Member State, was in fact in accordance with the Constitution. In the EU acquis-friendly *PZ Auto* case judgment, which resolved the unsettled practice of the Administrative Court, the Constitutional Court held that EU rules were allowed to be used as interpretative instruments;

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of Croatia as an independent state starting in 2000, the law only continued to function according to a pattern that was a perverted extension of the socialist tradition. The joining of the European Union was not accompanied with a real change in the working of the administrative apparatus in Croatia in accordance with the European concept of lawfulness. Omejec, fn 27, 30-31.

<sup>154</sup> Matczak, Bencze and Kuhn, fn 97, at 84.

<sup>155</sup> Ibid., 95.

<sup>156</sup> Omejec, fn 27, 4.

<sup>157</sup> Matczak, Bencze and Kuhn, fn 97, at 94 et seq.

<sup>158</sup> Cf Omejec, fn 27, 31.

<sup>159</sup> Staničić, fn 74, at 541 et seq, 547.

<sup>160</sup> Čapeta quotes a 2000 Constitutional Court decision, noting that “formalism in interpretation by ordinary courts is so entrenched that the Constitutional Court has felt the need to explicitly warn them not to base their decisions exclusively on formal criteria” (decision of the Constitutional Court in case U-III/956/1999 of 5 Apr 2000). See Čapeta, fn 19.

a similar stance was previously taken by some CEEC constitutional courts.<sup>161</sup> Indeed, Ivančan & Petrić observed that “during the pre-accession period it was extremely receptive to the idea that Croatian courts are bound by the interpretive obligation” but that following EU membership, “there was not a single instance of the Constitutional Court explicitly acknowledging the interpretive obligation, or actually engaging in an EU-harmonized interpretation of national law.”<sup>162</sup>

We wonder then how the “virus of excessive formalism”<sup>163</sup> remained operational, post-accession, in competition cases that appeared before the Constitutional Court, while its preeminent role as an anti-formalism warrior was fully exercised vis-à-vis ordinary courts and administrative bodies. The explanation might lie in the capacity of the Court to engage with complex or less than complex areas of economic law and regulation, such as competition law.<sup>164</sup> As noted by Justice Selanec, himself an insider, the Court’s lacking institutional capacity adversely affects its ability to absorb European law and should be regarded as a “key factor” influencing the Court’s practice in this area.<sup>165</sup> Holding on to formalism by the Constitutional Court in the post-accession period, in our opinion, only helps to perpetuate the low embeddedness of competition rules post-transition.<sup>166</sup>

At this point, the use of more abstract constitutional arguments, targeted at economic consequences of cartel behavior or competition law more generally, is still absent in the case law of Croatian courts, with the courts not taking into consideration the wider policy context of the rules, their goal and objectives, and their values. Arguably, economic values are not considered due to incomplete economic transition and a planned economic legacy. Targeted constitutionalization, i.e., protecting economic values in competition cases by embracing the Luxembourg *acquis* more fully, should change the adjudicative landscape in post-socialist jurisdictions and mark a departure from the features of an authoritarian legal culture legacy.

## 6. CONCLUSION

Upon their accession to the EU, the post-communist countries of Central and Eastern Europe brought with them a legal culture burdened with remnants of an authoritarian legacy. In this paper, using the example of Croatia, we discussed to what extent and in which ways this

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<sup>161</sup> For details, see Butorac Malnar and Pecotic Kaufman (fn 9); for similar position of the highest Czech and Polish courts, see Kühn, Z., “The Application of European Law in the New Member States: Several (Early) Predictions,” 6(3) *German Law Journal* (2005), 563-582, at 566-568, and also Kuhn, fn 89; for an exception see the experience in Slovakia with the absence of any argumentative use of EU law prior to the accession, with the Slovak Supreme Court openly refusing to consider EU law as an argumentative tool to interpret domestic law in a Euro-friendly way, see Kuhn and Bobek, fn 18.

<sup>162</sup> Ivančan & Petrić, fn 5, 515.

<sup>163</sup> Staničić noted that “the virus of excessive legal formalism [was] present in all branches of adjudication since decisions of the Constitutional Court relate to constitutional appeals in administrative, criminal, and civil matters” Staničić, fn 74, at 541; for examples of the Constitutional Court blaming administrative courts for excessive formalism see Staničić fn 74, at 542-543.

<sup>164</sup> Similar to our reflections in this paper, which found the Constitutional Court itself engaging in undue legal formalism in its competition cases, Čapeta finds that the Constitutional Court itself has sometimes given a very narrow and formalistic interpretation of the Constitution, regarding the guarantee of a fair trial. Čapeta (fn 19).

<sup>165</sup> See Selanec, fn 133, who criticizes the unstable practice of the Court regarding the use of the Article 267 TFEU mechanism – preliminary reference procedure – warning of the situations where the Court ignored the established CJEU case law, e.g., in the field of free movement of goods.

<sup>166</sup> On a lack of embeddedness of competition rules in Croatia, see Pecotic Kaufman, fn 7, and Pecotic Kaufman & Šimić Banović , fn 16.

adversely impacted the enforcement of competition rules in the long run. We found that different features of the authoritarian legacy in the legal culture shaped judicial interpretation disadvantageously in competition cases. An excessively stringent standard of proof for cartel agreements was established by the Croatian courts, indicating a problem of an incomplete semantic alignment post-accession. This shows how obstacles in the process of “transnationalizing” market values to the Croatian legal order,<sup>167</sup> in the first place regarding cartel prohibition, shape the enforcement of competition rules in the post-accession period.

The problem of a lack of “embeddedness” of competition rules in post-socialist countries<sup>168</sup> – the rules which were created, interpreted, and evolved in the West – seems to be best explained by “different dynamics” in the development of the economies and societies between post-communist and liberal democratic societies in the first half of the twentieth century.<sup>169</sup> As Rodin notes,

“[C]onfronted with the obligation of integrating and applying the legal rules developed in a system defined by rational discourse, such as the legal system of the European Union, post-communist jurists are faced with the problem of adjusting the language of law and the meaning of legal concepts to the pluralistic discursive paradigm.”<sup>170</sup>

As shown in the paper, Europeanization-driven transformative processes clashed with Croatia’s authoritarian legacy in its legal culture, which has possibly undermined the rule of law. The formalistic, textual approach in judicial interpretation, including a minimalistic explanation of reasons on which judgments were founded and the avoidance of engaging with broader policy goals, currently prevents the emergence of an “enforcement tradition.”

Two types of challenges arising from the EU law template itself make it difficult for EU competition law standards to find root in post-socialist countries. First, a “non-dogmatic approach towards legal argumentation,” a peculiar feature of the Community legal order, as well as the “pragmatic and instrumental” quality of the European discourse, are very much at odds with the approach of CEEC lawyers and judges who “still inhabit a realm governed by dogmatic textual positivism.”<sup>171</sup> For courts not accustomed to teleological interpretation, this is an exercise that seems practically outside of what the judges perceive as their job. Second, the way competition rules themselves are framed, leaving significant room for judicial interpretation, invites the courts to balance policy considerations, to which – again – the courts seem to be unaccustomed. However, we do not claim that the administrative process tradition is not suitable to address competition law concerns, but rather that distortions of such a tradition in post-socialist countries negatively affect competition enforcement.

However, the legal culture in Croatia is slowly changing. Literature on some Central European countries, such as the Czech Republic and Hungary, shows that it takes approximately a decade for a transformation of the legal culture, with less reliance on formalism in judicial interpretation and a more comprehensive embrace of the CJEU *acquis*.<sup>172</sup> Maczak et al. note the following reasons for this shift: (1) the accession of those

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<sup>167</sup> On ‘transnationalisation’ of values through EU law, see Christian Calliess, “Europe as transnational law - The Transnationalisation of Values by European Law,” 10(10) *German Law Journal* (2009), 1367-1382.

<sup>168</sup> As discussed in Pecotić Kaufman, fn 7.

<sup>169</sup> Rodin, fn 23, at 7.

<sup>170</sup> *Ibid.*

<sup>171</sup> Kühn, fn 161, at 580.

<sup>172</sup> Looking at administrative judicial decisions in the Czech Republic, Hungary and Poland, Maczak et al. find that, in comparison with the period between 1999 and 2004 (pre-accession), in the period 2005-2013 (post-

countries to the EU, with EU law becoming an element of the internal legal system of member states and references to this law have overtime become similar to references to internal law values; (2) information technology, especially the Internet, affecting everyday judicial work with numerous professional and open access databases facilitating the exploration of the relevant case law, literature, or other necessary legal materials when a judge discusses a difficult case; (3) judges having many transnational opportunities to learn, take part in conferences and communicate cross-border; and (4) a brand new generation of lawyers and judges coming of age, many of them speaking foreign languages, taking part in the Erasmus program, being familiar with the jurisprudence of CJEU, ECtHR, and of their own national constitutional court.<sup>173</sup> However, they note that formalism in administrative adjudication has not fully disappeared.<sup>174</sup>

Leaving excessive formalism behind will require the courts and administrative bodies to view legal norms “primarily in [their] social context,” being obliged “to achieve [their] goal and purpose,” which is not possible “without questioning the social circumstances and the goals behind the legal norm in question.”<sup>175</sup> Just as the influence of ECtHR case law raised the Croatian Constitutional Court’s awareness of the need to reject excessive legal formalism with ensuing spill-over effects in the judiciary, the post-accession embrace of EU law is crucial in de-formalizing domestic legal culture. However, just as the Constitutional Court is aware of the role that other courts ought to play in legal interpretation and that a shift away from textual interpretation and excessive formalism is a must, we hope that in the future, the same will be applicable to its own decisions in competition matters.

The question of why the process of embracing the EU law *acquis* and leaving behind authoritarian legal influences lasts so long is one that can rightly be asked. Perhaps one of the challenges could, paradoxically, lie in the independence of the judiciary or, to be more accurate, in a false interpretation of independence, ivory-tower independence, and an entrenched judiciary where autonomy is understood as an excuse for irresponsibility.<sup>176</sup> Several features seem to be prominent here: a lack of transparency regarding case law publication, resistance to digitalization, and barriers to horizontal mobility between the national judiciary and other professional careers for lawyers.<sup>177</sup> More generally, the overall legal culture, which lacks critical discourse and practical orientation, is not helping. Lastly, a

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accession), significant changes have occurred in the judicial style of administrative courts, with the judges using more non-formalistic nontraditional arguments, pro constitutional, pro-EU reasons and values external to law, indicating a change of judicial thinking. Matczak, Mátyás Bencze and Zdenek Kühn, “EU law and Central European Judges: Administrative Judiciaries in the Czech Republic, Hungary and Poland Ten Years After Accession,” Michal Bobek (ed), *Central European Judges Under the European Influence – The Transformative Power of the EU Revisited* (Hart Publishing 2015) at 70.

<sup>173</sup> Ibid., at 70.

<sup>174</sup> Matczak et al. offer an explanation for the persistence of formalisms in the steady pressure on judges to finish their cases as fast as possible and, within the context of young and relatively weak democracy, in the courts try to remain strictly minimalist in discussing cases with political implications, which administrative cases often have. Ibid., at 71.

<sup>175</sup> Staničić, fn 74, at 538.

<sup>176</sup> For a similar observation regarding Central European judiciaries (judicial independence being used to cover up judicial shortcomings) and on the notion of judicial independence see Bobek, fn 35; on a misunderstood concept of independence see Emmert, fn 74, at 405, recounting how, participating in litigation before an Estonian court of first instance, the co-counsel advised him not to make references in the written brief to established case-law because “the judges might react rather strongly against such an attempt at questioning or restricting their judicial independence.”

<sup>177</sup> For a similar observation regarding Central European countries noting “no sign of lateral professional mobility,” see Bobek, fn 35.

lack of specialization in the judiciary prevents novel areas of law, such as competition law, from gaining ground.<sup>178</sup>

The slow reception of EU competition law standards by the Croatian judiciary adversely impacts the enforcement of competition rules in Croatia in the post-accession period. The limited ability of judges to function as “[EU] judges”<sup>179</sup> and act as a competent check on the decisions of the competition authority undercuts the goals of the ECN+ Directive to establish national competition authorities as “effective enforcers” of competition rules.<sup>180</sup>

Traces of authoritarian legal culture legacy, alongside other challenges identified in this paper, obstruct a discovery of how deeply the protection of competition “fits into the fabric of democracy.”<sup>181</sup> This preempts a more meaningful and much-needed discussion on antitrust goals in post-socialist countries. Excessive formalism and other features of authoritarian legal culture might have had a peaceful life in post-socialist jurisdictions before the process of Europeanization started. Post-accession, confronted with the expectation of seeing the EU *acquis* in the mirror along with its fundamental liberal democratic context, their true nature is shown. European legal tradition now reveals weaknesses in authoritarian legal tradition, which proves inadequate to properly address the underlying goals of competition prohibitions.

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<sup>178</sup> More on the need for sub-specialization by the administrative judiciary, particularly in “technically highly demanding” areas such as competition law, see Uzelac, fn 56, at 100-101.

<sup>179</sup> Čapeta, fn 19.

<sup>180</sup> Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, 3–33.

<sup>181</sup> Spencer Weber Waller, “Antitrust and Democracy”, 46 Florida State University Law Review (2019), 807.

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