

**Competition law enforcement in European post-socialist countries: authoritarian legal culture legacy, semantic dissonance and skewed agencification**

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1. INTRODUCTION

Eastern Europe is still ‘an under-researched social and legal world’.<sup>1</sup> This paper sheds light on competition law enforcement in European post-socialist countries, after their EU accession, from a rarely used angle of legal culture.<sup>2</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>3</sup> In this paper, we argue that more than thirty years after their democratic and economic transition, a legacy of authoritarian legal culture in post-socialist countries of Europe still works to limit the effectiveness of competition enforcement. Post-socialist countries of Europe (the countries of Central and Eastern Europe,

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<sup>1</sup> Hans-Wolfgang Micklitz, Prologue: The Westernisation of the East and the Easternisation of the West, in: Central European Judges Under the European Influence – The Transformative Power of the EU Revisited, Michal Bobek (ed.), Hart Publishing 2015, at p 2.

<sup>2</sup> No literature devoted directly to the topic of competition law enforcement and legal culture in CEECs could be identified, although in legal literature on ‘New Member States’ examples related to competition law might be occasionally found. For example, Zdenek Kuhn, Michal Bobek, Europe Yet to Come: the application of EU law in Slovakia, in: The application of EU law in the new member states – brave new world, Adam Lazowski (ed.), TMC Asser Press, 2010, pp. 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, Berkeley Journal of International Law, Vol. 23, Iss. 1, 2005.

<sup>3</sup> John Bell, English Law and French Law-Not so Different?, *Current Legal Problems*, Volume 48, Issue Part\_2, 1995, Pages 63–101, quoted from Tamara Čapeta, Courts, legal culture and EU enlargement, Croatian Yearbook of European Law and Policy, Vol. 1, 2005, pp. 23-53.

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, *European Law Journal* 11(5), 527-548, at p. 528.

CEECs) have been sometimes called ‘the last bastion of formalism’.<sup>4</sup> Focusing mainly on Croatia, but also using examples from other EU member states in Eastern Europe, we examine features such as excessive judicial formalism, including the insistence on textual interpretation, and disassociation between the legal norm and its socio-economic context in judicial interpretation. In the paper, we mainly focus on the courts, rather than on the national competition authority (NCA), as we find the judiciary faces more challenges than the competition authorities.

In addition, we discuss the issue of semantic dissonance – a situation where national rules, as aligned with EU rules in the pre-accession period, acquire a different meaning and are being applied differently by the courts in the recipient member state. We illustrate this phenomenon on the case law of the Croatian courts in the area of cartels, with an exceedingly high standard of proof for collusive conduct established by the national courts in the post-accession period.

Finally, finding a pronounced difference in legal cultures of the judiciary on the one hand and the NCA on the other, we attempt to provide reasons for such a bifurcation. Using the notion of a skewed agencification, we show how – during the pre-accession process – the emphasis was on competition authorities as the 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, had a consequence of a very slow reception of the EU competition law standards by the courts.

In sum, we find that the remnants of the authoritarian legal culture, with excessive formalism as one of its main straits, the semantic dissonance problem, and the skewed agencification issue all work to undermine the public interest function of competition policy. This ultimately undercuts the goals of the ECN+ Directive to establish national competition

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<sup>4</sup> Peter Cserne, Formalism in judicial reasoning: Is Central and Eastern Europe a special case?, in: Central European Judges Under the European Influence – The Transformative Power of the EU Revisited, Michal Bobek (ed), Hart Publishing 2015, p. 23-42, see references in footnotes 1-3.

According to Manko, Polish legal culture (like the pre-Revolutionary Russian one) was traditionally under a strong influence of German legal culture, including the 19th century highly formalist ‘conceptual jurisprudence’ (*Begriffsjurisprudenz*); the formalist aspects of hyperpositivism were not, therefore strange or foreign. See Rafal Manko, Survival of the socialist legal tradition? A Polish Perspective, *Comparative Law Review* 3 (2) 2013, pp. 8-9 with further references in fn 40.

Hyperpositivism was a crucial feature of the Socialist Legal Tradition. See Manko, Survival of socialist legal culture? A Polish perspective, *Comparative Law Review*, 3 (2) 2013, p. 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 analysing them on the merits. Manko, *ibid*, quoting Alan Uzelac, Survival of third legal tradition?, *Supreme Court Law Review*, 2010, 49, pp 377-396, at pp. 383-385.

authorities as effective enforcers of antitrust rules, but also adversely affects the ambition of the Regulation 1/2003 to achieve a uniform application of EU antitrust rules.

In effect, the traces of the authoritarian legal culture legacy, alongside other challenges identified in this paper, obstruct a discovery on how deeply the protection of competition ‘fits into the fabric of democracy’.<sup>5</sup> This pre-empts a more meaningful, and much needed, discussion on the goals of antitrust law in post-socialist countries.

In the first part of the paper, we address the interplay between the authoritarian legal culture and the rule of law. In the second part, we provide an overview of administrative judicial review and constitutional review in competition cases. In the third part, we discuss features of authoritarian legacy in legal culture, including excessive formalism, denial of policy considerations, circular reasoning, a literal application of the *iura novit curia* (‘the court knows the law’) principle, the negative effects of the application of the *de minimis non curat praetor* principle (a legal doctrine by which a court refuses to consider trifling matters), the lacking use of the case-law as a legal source, and several other features of the CEECs’ legal culture. In the fourth part, we address the adverse effects of semantic dissonance and protracted reception of European legal standards on competition law enforcement. In the fifth part, we attempt to explain the difference in legal culture between the competition authority and the courts by skewed agencification and missing constitutionalisation effects in competition cases. Finally, we provide some concluding remarks.

## 2. FOCUS ON EUROPEAN POST-SOCIALIST COUNTRIES

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>6</sup> Starting in the 1990s, the transition from a socialist system to a market economy in Eastern Europe necessitated a comprehensive change of national laws and an institutional overhaul. For a large group of ex-socialist countries, the transition was made easier by the process of EU rapprochement, which ended in 2004 (in 2007 for Bulgaria and Romania), when those countries became EU member states. Due to various reasons, including a

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<sup>5</sup> Spencer Weber Waller, ‘Antitrust and Democracy’ (2019) 46 Florida State University Law Review 807.

<sup>6</sup> William Kovacic, ‘Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement’ (2001) 77 Chicago-Kent Law Review 265.

belligerent break-up of Yugoslavia, Croatia went through the same process at a later point in time, obtaining the EU membership status in 2013.<sup>7</sup>

Although the CEECs that acceded to the EU in 2004, 2007 and 2013 are different in various aspects, their shared ex-socialist legacy allows us to address the challenges to developing competition law systems post-accession, as a group.<sup>8</sup> Indeed, these countries seemingly share common institutional challenges and issues relating to enforcement building.<sup>9</sup>

The democratic transition of CEECs included a heavy import of legal standards from the Western legal tradition. Writing in 1995, Ajani questioned the aptitude of the new models, i.e. legal transplants from West to Eastern Europe and Russia ('large-scale borrowers of Western models'), to match the needs of post-socialist societies.<sup>10</sup> However, the consistency between the transplanted standards and the needs of the recipient countries was hardly an issue, as the EU model was 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.<sup>11</sup>

Although CEECs underwent the same legislative alignment process with the EU *acquis* before being admitted and all, post-accession, participate in the decentralised application of Articles 101 and 102 TFEU, and although the challenges related to the authoritarian legal culture legacy remain universally shared in those countries, at varying degrees, as posited by this paper, their respective competition system development trajectories vary. While Hungary had significantly developed competition enforcement, recently, it encountered challenges in terms of the rule of law.<sup>12</sup> Croatia had steady pre-accession growth, followed by a post-

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<sup>7</sup> Croatia was accepted as a candidate country in 2004, with the beginning of accession negotiations in 2005.

<sup>8</sup> See Manko (fn 4), who describes the Central European legal culture from the point of legal education, legal scholarship and adjudication, mainly using examples from Poland and pointing to strong influences of German legal tradition. The 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.

<sup>9</sup> The literature on this issue is still developing. For single-jurisdiction studies see Marek Martyniszyn and Maciej Bernatt, 'Implementing a Competition Law System' Three Decades of Polish Experience' (2020) 8 *Journal of Antitrust Enforcement* 165, and Jasminka Pecotić Kaufman, On the development of (not so) new competition systems—findings from an empirical study on Croatia, *Journal of Antitrust Enforcement*, 2021; jnab018, <https://doi.org/10.1093/jaenfo/jnab018>.

<sup>10</sup> Gianmaria Ajani, By Chance and Prestige: Legal Transplants in Russia and Eastern Europe, *American Journal of Comparative Law*, Vol. 43, No. 1 (Winter, 1995), p. 93.

<sup>11</sup> Vlatka Butorac Malnar and Jasminka Pecotić Kaufman, 'The Interaction between EU Regulatory Implants and the Existing Croatian Legal Order in Competition Law' in Mitja Kovač and Ann-Sophie Vandenberghe (eds), *Economic Evidence in EU Competition Law* (Intersentia 2016).

<sup>12</sup> KJ Cseres, 'Rule of Law Challenges and the Enforcement of EU Competition Law: A Case-Study of Hungary and Its Implications for EU Law' (2019) 14 *The Competition Law Review* 75.

accession slump, facing challenges of ‘muted enforcement’.<sup>13</sup> The competition system in Poland was well developed, but its cartel enforcement record is virtually non-existent.<sup>14</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.<sup>15</sup> This was not so much the case in Croatia, where coming closer to the capitalist West was not a reflection of the deeply ingrained belief in a society founded on more individual and economic freedom, as the abandonment of communism occurred primarily in order to gain independence of the country from Yugoslavia.<sup>16</sup> However, the question remains if the competition law systems in the CEECs, which introduced strong economic reforms early on, developed more successfully long-term.

Even though competition rules and their enforcement are far from being a novelty in European ex-socialist countries, three decades after the transition, the process of building an effective competition system is far from over. This paper shows how transplanted EU competition law, when put in to action in the CEECs, encountered challenges due to the legacy of an authoritarian legal culture. Various countries find themselves in different positions in terms of leaving that legacy behind. For Croatia, the last one to join the Union, the process of escaping from the adverse impact of the authoritarian legacy seems to linger in an early phase.

One of our main findings is that, in Croatia, the locus of the authoritarian legal culture legacy lies in the judiciary rather than in the competition authority. This includes both the administrative law judiciary, which exercises judicial review in competition cases, and the constitutional court, which hears competition cases when claims of breach of constitutional rights (typically the right to a fair trial) are entertained by undertakings which, according to the competition authority, breached competition rules. We find that, in the post-accession period, the judiciary, having not been subjected to intensive pre-accession Europeanization exercise, unlike the competition agency, fails to contribute to the effective enforcement of competition law.

Cross-country or even country-specific literature related to competition system development or institutional antitrust in European ex-socialist countries is still relatively

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<sup>13</sup> Pecotić Kaufman (fn 9).

<sup>14</sup> Martyniszyn and Bernatt (fn 9).

<sup>15</sup> Cseres (fn 12), at 84.

<sup>16</sup> Velimir Šonje and Darko Polšek, *Prešućeni trijumf liberalizma: o praktičnoj važnosti slobode 1989.-2019.* (Arhivanalitika 2019), at 47.

limited, with Poland and Hungary as notable exceptions. Based on an empirical study of main Polish stakeholders, Martyniszyn & Bernatt critically analysed 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.<sup>17</sup> Another similar empirical study, focusing on Croatia's competition system development in the 1995-2018 period, was done by Pecotic Kaufman, identified a specific evolutionary path, as well as a lack of institutional and system embeddedness and functional self-restraint on the side of the authority, as the underlying causes of competition system immaturity.<sup>18</sup> Furthermore, the issue of the rule of law backsliding in Hungary and Poland was recently discussed. On the one hand, Cseres argued how basic tenets of the rule of law in Hungary have been neglected or outright abolished to allow for economic choices in favour of local actors or specific sectors.<sup>19</sup> On the other hand, 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 undermining of effective judicial protection required by EU primary law.<sup>20</sup> In a cross-country study exploring the CEECs competition law systems from the EU harmonisation perspective, Malinauskaite analysed each countries' institutional framework and key enforcement powers.<sup>21</sup> Using Croatia as a case study, Pecotic Kaufman & Simic Banovic examined the interaction of the competition system and the national culture through the governance perspective of European post-transitional society, finding several features inimical to the competition system development: 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.<sup>22</sup>

In contrast to the existing body of literature on CEECs and competition law enforcement, this article is the first to engage with how the legal culture of a post-socialist

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<sup>17</sup> Martyniszyn and Bernatt (fn 9).

<sup>18</sup> Pecotic Kaufman (fn 9).

<sup>19</sup> Cseres (fn 12).

<sup>20</sup> Maciej Bernatt, 'Rule of Law Crisis, Judiciary and Competition Law' (2019) 4 SSRN Electronic Journal 345.

<sup>21</sup> Jurgita Malinauskaite, *Harmonisation of EU competition law enforcement*, Springer 2020.

<sup>22</sup> 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', (2021), 44, *World Competition*, Issue 1, pp. 81-108.

country shapes competition law enforcement, but also to systematically explain the difference in legal cultures between the national courts and the NCA. By describing persistent features of the authoritarian legal culture legacy, primarily by example of Croatia, but including references of other CEECs, we expand the reach of the current literature by attempting to identify the sources of adverse impact stemming from the legal culture.

### 3. AUTHORITARIAN LEGAL CULTURE LEGACY AND THE RULE OF LAW

Although the rule of law is a concept of universal validity,<sup>23</sup> its exact meaning remains, to some extent, vague. The rule of law is one of the three “principles which form the basis of all genuine democracy”, together with individual freedom and political liberty.<sup>24</sup> It has become a “dominant organisational model of modern constitutional law and international organisations... to regulate the exercise of public powers”.<sup>25</sup> Similar to other ex-socialist countries and many other countries in the world, the 1990 Croatian Constitution recognised the rule of law as one of “the highest values of the constitutional order” of the country and “a basis for the interpretation of the Constitution”.<sup>26</sup> The rule of law is one of the founding values shared between the EU and its Member States.<sup>27</sup>

The key elements of the rule of law include “a system of certain and foreseeable law, where everyone has the right to be treated by all decisionmakers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures”.<sup>28</sup> The benchmarks adopted by the Council of Europe Venice Commission help identify, in a more practical manner, the standards to be fulfilled in order to achieve the rule of law, relating among other things to the

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<sup>23</sup> Rule of Law Checklist, adopted by the Venice Commission at Its 106<sup>th</sup> Plenary Session (Venice, 11-12 March 2016) 1, para 9.

<sup>24</sup> Preamble to the Statute of the Council of Europe 1949. The 1949 Statute also notes that the ‘true source of individual freedom, political liberty and the rule of law’ are the ‘spiritual and moral values which are the common heritage of their peoples’.

<sup>25</sup> ‘COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL A New EU Framework to Strengthen the Rule of Law /\* COM/2014/0158 Final \*/’ <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0158>> accessed 8 February 2021, at pp. 3-4.

<sup>26</sup> Article 3 Constitution of the Republic of Croatia, Official Gazette no. 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14.

<sup>27</sup> See the Preamble and Article 2 of the Treaty on European Union (TEU).

<sup>28</sup> Rule of Law Checklist (fn 23), para 15.

principle of legality, legal certainty, the prevention of abuse of powers, equality before the law and non-discrimination, or access to justice.<sup>29</sup>

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 behaviour accordingly.<sup>30</sup> Under the European Convention of Human Rights (ECHR), Article 6(1), three institutional and procedural requirements ensuring due process are recognised: that the parties have the right to a fair and public hearing; that the procedure is dealt with within a reasonable time; and that the hearing should be conducted and the decision delivered by an independent and impartial tribunal. In the *Menarini* case, the European Court of Human Rights (ECtHR) held that the reviewing court must have ‘full jurisdiction’, i.e., the power to annul in all respects, on questions of fact and law, the competition authority's decision.<sup>31</sup>

The European Ordo-liberal school regarded the rule of law as intricately connected with competition law, as it stood based on the application of the rule of law in the economy, focusing on the market mechanism, competition principle and the sole ordering principle of economic exchanges.<sup>32</sup> The ordoliberalists considered economic freedom as a direct result of an appropriate market order with its intrinsic value lying in the political, human freedom. They saw economic freedom as an essential basis for a democratic society, reigning within a constitutionally constrained market economy.

Mere rule adoption is not sufficient for a functional rule of law to exist. Implementing the rules in individual cases and their autonomous interpretation by the relevant institutions remains the key method of self-discovery of the content, role, and meaning of a set of legal rules in a society.<sup>33</sup> According to the Venice Commission, the duty to implement the law is one of the benchmarks for the rule of law in a country. “[A] fundamental requirement of the Rule

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<sup>29</sup> Ibid.

<sup>30</sup> Maurice E Stucke, ‘Does the Rule of Reason Violate the Rule of Law?’ (2008) 22 Loyola Consumer Law Review 15.

<sup>31</sup> *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, 27 September 2011.

<sup>32</sup> Cseres (fn 12).

<sup>33</sup> The Venice Commission Rule of Law checklist holds that ‘the proper implementation of the law is a crucial aspect of the Rule of Law’, para 25. The concrete ‘juridical, historical, political, social or geographical context’ must be thereby taken into account, since ‘the specific manner in which they are realised may differ from one country to another depending on the local context; in particular on the constitutional order and traditions of the country concerned’, para 34. ‘The very essence of the Rule of Law would be called in question if law appeared only in the books but were not duly applied and enforced’, para 53. Rule of Law Checklist (fn 23).



of Law is that the law must be respected. This means in particular that State bodies must effectively implement laws.”<sup>34</sup>

The judiciary has two important functions in the implementation of competition policy: ensuring that procedural due process is observed and applying the underlying substantive principles of the competition law correctly and consistently. 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>35</sup>

Despite being a universal concept, the rule of law and its features depend very much on the context of a particular country. Different aspects of socio-political, economic, and legal culture influence how rules are implemented. In particular, culture may undermine the rule of law in several ways. For example, in competition law, the predominant collusive culture may disparage the significance of cartel prohibition.<sup>36</sup> Indeed, a ‘robust political and legal culture’ is needed to support particular Rule of Law mechanisms and procedures.<sup>37</sup>

Based on Roman law, the continental European legal tradition shaped the legal systems of the East European countries until the Second World War. Under communism, those countries consciously abandoned the previous model and embarked upon building a socialist legal tradition. Less than fifty years on, the return to democratic and market values of the West marked an embrace of their (old) continental legal tradition, this time complemented by EU *acquis* tradition, as evolved in Western Europe.

However, despite the nominal transition back to the democratic legal tradition, CEECs’ scholars warned of a profound continuity in methods of legal reasoning used by the lawyers in the communist era until today’s post-communist time,<sup>38</sup> and of the enduring influence of authoritarian legal culture well into 21<sup>st</sup> century in post-socialist countries.<sup>39</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>40</sup>

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<sup>34</sup> Ibid, para 53.

<sup>35</sup> OECD, ‘Judicial Enforcement of Competition Law’, 1996, <https://www.oecd.org/daf/competition/prosecutionandlawenforcement/1919985.pdf>, at 10, 22.

<sup>36</sup> Pecotić Kaufman and Šimić Banović (fn 22).

<sup>37</sup> Venice Commission Checklist, para 42.

<sup>38</sup> For example, Zdenek Kühn, *The judiciary in Central and Eastern Europe: Mechanical jurisprudence in transformation?*, Brill Nijhoff, 2011.

<sup>39</sup> See, for example, Uzelac (fn 4); Siniša Rodin, *Discourse and authority in European and post-communist legal culture*, Croatian Yearbook of European Law and Policy, vol. 1 (2005), pp. 1-22; Čapeta (fn 3); Jasna Omejec, *Hrvatska uprava - od socijalističkog do europskog koncepta zakonitosti*, available at <https://www.bib.irb.hr/833843>; Manko (fn 4).

<sup>40</sup> Rodin (fn 39).

The legal culture was under different influences in the West and in the East. 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, and with pragmatic case law of the CJEU influencing the national judiciaries of the Member States.<sup>41</sup> In the European East, this change 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>42</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>43</sup>

With the judiciary playing such an essential role in maintaining the rule of law, the remnants of the authoritarian legal culture legacy come most vividly to life in the workings of the courts in post-socialist countries. A specific judicial culture developed in communist CEECs. In socialism, a judge was more of an official and therefore more susceptible to pleasing the political power than to respecting the law.<sup>44</sup> Socialist judges were afraid; afraid of responsibilities, of possible retribution; they stayed on the side-lines, wanting to remain as inconspicuous as possible, even anonymous; hence, they delayed adopting a decision and resorted to formalism, escaping from adopting a substantive decision.<sup>45</sup> A statement, still sometimes heard today, attributed to the late authoritarian Yugoslav leader Tito, cynically noted that ‘some judges were holding onto the law like a drunken man to a fence’.<sup>46</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 until this day, with systemic, long-term negative consequences.

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<sup>41</sup> Čapeta (fn 3). 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 4), at p. 534.

<sup>42</sup> Čapeta (fn 3).

<sup>43</sup> Rodin (fn 39), at p. 11; eg, it is the general understanding that the concept of immaterial damages includes only damages enumerated in the civil code, the consequence of such an understanding is the denial of compensation to legal persons, Rodin (fn 39).

<sup>44</sup> Jan Zobec and Jernej Letnar Cerninc, *The remains of the authoritarian mentality within the Slovene judiciary*, in: *Central European Judges Under the European Influence – The Transformative Power of the EU Revisited*, Michal Bobek (ed), Hart Publishing 2015, p. 138.

<sup>45</sup> *Ibid*, relying on Uzelac (fn 4), at p. 383.

<sup>46</sup> See Uzelac (fn 4), at p. 382.

The ethics of obedience, reflected in submissiveness, political opportunism, political correctness and, consequently, in the judges' self-censorship, were preserved through patterns of the old regime as a heritage of the totalitarian period and in the collectivist and corporatist mentality.<sup>47</sup> Noting the absence of mental independence of CEE judges, Bobek observes the striking absence of constructive disagreement within the judiciary, which may be evident by the style of using the case law of higher and European courts.<sup>48</sup> Now, 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' is at stake in the CEECs.<sup>49</sup>

Post-accession, the courts in post-socialist countries continue to struggle with traces of authoritarian legal culture. In this paper, we illustrate this thesis with several examples from the case-law of the Croatian courts exercising judicial review in competition cases. After 1 May 2004, under Regulation 1/2003, national courts were expected to play a significant role in enforcing EU competition law.<sup>50</sup> Showing the important role legal formalism still plays in judicial interpretation and a regretful ignorance of policy considerations by the courts exercising judicial review, we find that this, and other features of the legacy of authoritarian legal culture, are instrumental in explaining the formal obstacles that competition law standards have encountered in the Croatian courts post-accession, and that we might therefore be in the position to correctly assess the potential of the national judiciary to fulfil its role under EU law.

#### 4. ADMINISTRATIVE JUDICIAL REVIEW AND CONSTITUTIONAL REVIEW IN COMPETITION CASES

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). In EU competition law, through providing authoritative interpretations of the legislative or

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<sup>47</sup> Zobec and Letnar Cerninc (fn 44), p. 137; this characteristic 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 (fn 44), p. 137, fn 39.

<sup>48</sup> Michal Bobek, The fortress of judicial independence and the mental transitions of the Central European judiciaries, *European Public Law*, vol. 14, issue 1 (2008), pp. 99-123.

<sup>49</sup> *Ibid.*

<sup>50</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, p. 1-25.

Treaty texts and guidance through precedents, judicial review can also promote legal certainty for target undertakings by defining the boundaries of legal business conduct.<sup>51</sup> Judicial review plays a crucial role in a competition system, ensuring that the competition authority stays within limits prescribed by law, and limits the agency's likelihood of abuse of power. Full judicial review of both questions of 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.

By providing a check on the agency's actions, judicial review promotes the accountability of competition agencies.<sup>52</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>53</sup>

Without being exposed to judicial review by experts, the agency 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>54</sup> Courts without sufficient expertise may focus predominantly on the review decision's formal aspects, rather than on its substance.<sup>55</sup>

Distortions in the ability of the courts to function as a corrective force, to confirm or confront the competition authority decision 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 and its public interest function if the legal standards used by the court are not appropriate.

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<sup>51</sup> Yane Svetiev, *Experimentalist competition law and the regulation of markets*, Hart Publishing, 2020, p. 127.

<sup>52</sup> Maciej Bernatt, *Populism and antitrust: The illiberal influence of populist government on the competition law system*, Cambridge University Press, 2022, p. 112.

<sup>53</sup> *Ibid.*, p. 113.

<sup>54</sup> Maciej Bernatt, *Effectiveness of judicial review in the Polish competition law system and the place for judicial deference*, *Yearbook of Antitrust and Regulatory Studies*, vol. 2016, 9(14).

<sup>55</sup> Bernatt (fn 52), p. 130.

Unlike in the US, the European competition law tradition rests on the administrative process.<sup>56</sup> The administrative law tradition is predominant in post-socialist countries.<sup>57</sup> However, before 1977, in Croatia (at the time, part of the Yugoslav federation), the judicial control of administrative authorities' decisions was closer to the common law model, with the general courts (the High Commercial Court and the Supreme Court of the Socialist Republic of Croatia) in charge. In 1977, the French administrative law model was introduced with a specialised, administrative court set up to exercise judicial review of administrative decisions.<sup>58</sup>

Weaknesses of the 1977 model of administrative judicial review outlived the 1990 democratic transition: an almost complete absence of full judicial review by the administrative court, which exercised only a review of legality; adjudication on the merits and determining facts by the reviewing court rarely occurred; no adjudication during open session; and, perhaps most importantly, one-tier administrative judicial review.<sup>59</sup> Overall, the level of protection guaranteed through administrative dispute was significantly lower and against the prevailing standards in modern Europe.<sup>60</sup>

The ratification of the ECHR, in 1997, was a turning point eventually leading to the modernisation of the system of administrative judicial review in Croatia.<sup>61</sup>

Although the 2010 reform introduced two-tier administrative judicial review,<sup>62</sup> the competition law system, in contrast to other independent regulatory agencies, remained in the old model. Unlike other independent regulatory agencies, whose decisions – when challenged – had to initially go through the newly established lower administrative courts and then to the second instance High Administrative Court, the competition agency decisions went directly to the second-tier court. Thus, the goals of the administrative judiciary reform failed to bear fruit

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<sup>56</sup> David Gerber, *Law and Competition in Twentieth-Century Europe: Protecting Prometheus*, Oxford University Press, 2001.

<sup>57</sup> Malinauskaite (fn 21).

<sup>58</sup> Dario Đerđa, *Pravci reforme institucionalnog ustroja upravnog sudstva u Republici Hrvatskoj*, *Zbornik radova Pravnog fakulteta u Splitu*, 45 (2008), 1, pp. 75-94, at p. 78.

<sup>59</sup> Ivan Koprić, *Europski standardi i modernizacija upravnog sudovanja u Hrvatskoj*, in: *Europeizacija upravnog sudovanja u Hrvatskoj*, Ivan Koprić (ed), Zagreb, Institut za javnu upravu, 2014, pp. 1-204, at p. 9.

<sup>60</sup> *Ibid*, at p. 9.

<sup>61</sup> *Administrative Disputes Act (Zakon o upravnim sporovima, Official Gazette 20/10)*, in force 1 Jan 2012. However, some aims of the reform are still not fully achieved in practice, with eg casatory judicial review still predominant, and full jurisdiction exercised as an exception in administrative procedure. See Alan Uzelac, *Pravni lijekovi u upravnom sporu: kreću li se upravno i parnično sudovanje u suprotnim smjerovima?*, in: *Novosti u upravnom pravu i upravnosudskoj praksi*, Ante Galić (ed), Zagreb, Organizator, 2019, pp. 73-109, at p. 102-104.

<sup>62</sup> *General Administrative Procedure Act (Zakon o općem upravnom postupku, Official Gazette 47/09)*, in force 1 Jan 2010); *Administrative Disputes Act (Zakon o upravnim sporovima Official Gazette 20/10)* in force 1 Jan 2012, amended *Official Gazette 143/12., 152/14., 29/17*; *Constitutional Court decision U-I-2753/2012 et al. 27 Sept 2016, Official Gazette 94/16*).

in competition cases. The aim of the competition authority, which insisted on keeping a one-tier judicial review system for agency decisions, was to avoid protracted proceedings and speed up the process of obtaining a *res iudicata*. In the long run, however, this proved to be a poor choice.

Some scholars observed that, at first, keeping the one-tier model for competition agency decisions seemed ‘wise’ since it signalled the special importance of competition law, requiring a high level of judicial skills and expertise, which the experienced High Administrative Court judges presumably had.<sup>63</sup> However, it turned out that even for the judges, adjudicating in competition cases represented a real challenge.<sup>64</sup>

As already mentioned, the limited legality control that predominated before 2012, was in most cases a rather general judicial control, ‘without a deeper evaluation of the facts and evidence’, and was ‘somewhat superficial and insufficient’.<sup>65</sup> The 2012 administrative law reform significantly broadened the powers of the administrative courts, allowing the High Administrative Court to conduct a more intensive, full judicial review of the agencies’ 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 obliging it to conduct oral hearings.<sup>66</sup> The High Administrative Court has not yet used its power to decide on the merits and replace the agency decision; instead, it regularly annuls the agency decision and remands the case back to the agency for reconsideration.<sup>67</sup> The Constitutional Court recently insisted that performing full judicial review by the administrative judiciary is the way to avoid excessive formalism.<sup>68</sup>

As already mentioned, the administrative judicial review of competition authority decisions stayed in the pre-2012 mode, thereby perpetuating its weaknesses.<sup>69</sup> The rules

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<sup>63</sup> Dubravka Akšamović, Judicial review in competition cases in Croatia: Winning and losing arguments before the High Administrative Court of the Republic of Croatia, *Yearbook of Antitrust and Regulatory Studies*, 13 (2020), 22, pp. 7-25, at p. 12.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*, at pp. 12-13, 16.

<sup>66</sup> *Ibid.*, at pp. 12-13, 16.

<sup>67</sup> *Ibid.*, at p. 15.

<sup>68</sup> See details in Ivana Đuras, *Sud pune jurisdikcije kao alat protiv ekcesivnog formalizma*, *Zagrebačka pravna revija*, 2021, at pp. 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>69</sup> Uzelac notes a striking divergence between the reform of civil procedure and the reform of administrative procedure, with deatatisation of remedies, more favourable ratio between cassatory and, in the former. See Uzelac (fn 62), at p. 85. We agree with Uzelac, that a more active role of the Supreme Court in the area of administrative law would contribute to harmonisation of case law. The developments in the area of competition law, described in this paper, seem to confirm this thesis. A stronger involvement of the Supreme Court in competition cases would definitely advance a more complete reception of the EU template. As the evolution of case law has shown,

regarding the appraisal of facts from the Competition Act 2009 prevented the High Administrative Court from establishing facts on its own, since, according to Article 68 Competition Act 2009, the Court must decide based on the facts presented during the 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 agency. This significantly narrowed the scope and the intensity of judicial review before the High Administrative Court.<sup>70</sup> 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 Competition Act 2009 introduced a hybrid model of judicial review, still very much resembling the former model of the limited control of legality, which was previously abandoned and deemed ineffective.<sup>71</sup> Subsequent amendments to the Competition Act in 2013 and 2021 have not changed anything in this regard.

A party dissatisfied with the High Administrative Court judgment has only a limited right to further recourse. According to the Act on Administrative Disputes (Article 78/1), it may, claiming a violation of the law, file a request with the state attorney's office to submit an extraordinary legal remedy to the Supreme Court (the examination of the legality of a *res iudicata*). 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.<sup>72</sup> 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 extraordinary examination of the legality of a final decision from the competition authority.<sup>73</sup> Subsequently, in this case, the Supreme Court decided in favour of the agency, reversing the High Administrative Court judgement.<sup>74</sup>

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the Constitutional Court has overtaken the role of the Supreme Court as the highest regular courts instance in unifying the case law.

<sup>70</sup> Akšamović (fn 63), at p. 16.

<sup>71</sup> Ibid, pp. 16-17.

<sup>72</sup> Ibid, p. 17.

<sup>73</sup> Ibid.

<sup>74</sup> 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.

Aksamovic was the first to argue that the existing judicial control model, with the High Administrative Court as a single-tier judicial instance, was not working well.<sup>75</sup> Notably, she warned of a high inflow of constitutional appeals in competition cases, which – according to her – signalled a spill-over of cases, that would have otherwise been channelled to the Supreme Court, to the Constitutional Court.<sup>76</sup> We agree with the call for reform of the judicial review system in competition matters. Most EU Member States have two appeal instances for competition cases. Croatia, and partly Sweden, are the only States utilizing single-tier judicial review for competition cases.<sup>77</sup>

However, some scholars argue that, since the Competition Agency is considered a tribunal within the meaning of Article 6 ECHR, judicial review proceedings may be limited to 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>78</sup>

In addition to administrative judicial review, constitutional review is available for the parties challenging a decision of the competition authority.<sup>79</sup> Usually, the parties claim a breach of the constitutional right to fair trial in such cases. Although the Constitution's drafters envisioned a constitutional complaint only as an exceptional means of protecting fundamental constitutional rights and freedoms, with the Croatian Constitutional Court having no direct jurisdiction vis-à-vis the administrative bodies' decisions and the administrative courts' judgments, by deciding on the protection of fundamental and constitutional guarantees it becomes actively involved in the adjudication of administrative matters.<sup>80</sup> 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

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<sup>75</sup> Akšamović (fn 63), pp. 7-25; Dubravka Akšamović, (Re)definiranje uloge Visokog upravnog suda Republike Hrvatske u sporovima za zaštitu tržišnog natjecanja, u: Pravo tržišnog natjecanja u Republici Hrvatskoj i Europskoj uniji, Jakša Barbić (ed.), Zagreb, Hrvatska akademija znanosti i umjetnosti, 2021, pp. 39-60.

<sup>76</sup> Akšamović, (Re)definiranje... (fn 75).

<sup>77</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>, p. 23. More on the controversies regarding the true function of the High Administrative Court, see Uzelać (fn 61), at p. 98 et seq.

<sup>78</sup> Nikola Popović, Domagoj Maričić, Postupci pred nezavisnim regulacijskim tijelima i novi Zakon o upravnim sporovima, in: Europeizacija upravnog sudovanja u Hrvatskoj, Ivan Koprić (ed.), Institut za javnu upravu, Zagreb, pp. 201-226, at p. 204.

<sup>79</sup> According to Sadurski, constitutional complaint proceedings are available in roughly one half of CEE states, and there is a clear correlation between the existence of an activist and powerful constitutional court and the availability of a direct complaint procedure. Wojciech Sadurski, Judicial Review in Central and Eastern Europe: Rationales or Rationalizations?, *Israel Law Review*, 2009, 42(03), p. 503.

<sup>80</sup> Mario Jelušić, Duška Šarin, Vladavina prava i uloga Ustavnog suda Republike Hrvatske u izvršavanju upravnih i upravnosudskih odluka, *Zbornik radova Pravnog fakulteta u Splitu*, vol. 52, no. 1, 2015, pp. 175-201.



remedies regardless of the actual existence of violations of constitutional rights in previously conducted proceedings.<sup>81</sup> The review of constitutional complaints equals about 85% of cases within the jurisdiction of the Constitutional Court.<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup> 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.<sup>85</sup>

## 5. 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, the application of the *de minimis non curat praetor* principle, as well as some broader legal culture issues such as transparency, access to judgements, etc. Although initially derived from the positivist legal framework, and further distorted during the socialist era, we show how the above-mentioned features adversely impact the effective enforcement of competition law.

### a. Excessive formalism

In the post-communist countries' legal culture, the courts' engagement as the interpreters of legal rules and their application to a concrete factual situation is very restricted. The courts are generally reluctant to engage in teleological interpretation and rely almost exclusively on the statutory text to provide the solution to the concrete legal problem, using grammatical, textual interpretation.<sup>86</sup> The uneasiness with the more expansive interpretative

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<sup>81</sup> *Ibid*, at pp. 184-185.

<sup>82</sup> *Ibid*, at pp. 184-185.

<sup>83</sup> *Ibid*, at p. 185.

<sup>84</sup> *Ibid*, at p. 186.

<sup>85</sup> *Ibid*, at p. 188; Constitutional Act on the Constitutional Court (Official Gazette 99/1999, 29/2002, 49/2002-consolidated text), Arts 31/1, 76/1 and 77/2.

<sup>86</sup> "A change in the way of interpreting the law, which will inevitably occur by replacing the place now the dominant grammatical methods of interpretation and teleological methods, one might in our circumstances to be

role is felt in the judicial drafting style, with a very small portion of a judgement devoted to 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. For example, in the judgements 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.

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>87</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>88</sup>

Many scholars have warned of the excessive formalism in judicial interpretation as a widespread feature of ex-socialist jurisdictions' legal cultures,<sup>89</sup> having adverse effects in

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considered revolutionary which will require great effort to meet the new increased demands that will be placed thereby. Not without it the best regulations will not make the law work as required the needs of an orderly legal system. As well as a bad regulation good and professional application can make it bearable so good regulation is bad application can make it unacceptable. This is particularly sensitive in those areas of law which should be considered new and for the application of which there are no long-term experiences which are passed down from one generation of lawyers to another." Jakša Barbić, Utjecaj njemačkog prava na stvaranje hrvatskog prava društava, Zbornik radova Pravnog fakulteta u Splitu, vol. 44, no. 3-4, 2007, pp. 339-363, at p. 361.

<sup>87</sup> Marcin Matczak, Matyas Bencze and Zdenek Kuhn, Constitutions, EU law and judicial strategies in the Czech Republic, Hungary and Poland, *Journal of Public Policy*, 2010, vol. 30, issue 1, pp. 81-99, at p. 86, citing Franz Wieacker, *A history of Private law in Europe: with particular reference to Germany*, 1996, p. 442 ff.

<sup>88</sup> Čapeta (fn 3). 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>89</sup> Rodin (fn 39); Zdenek Kuhn, European law in the empires of mechanical jurisprudence: the judicial application of European law in Central European candidate countries, *Croatian Yearbook of European Law and Policy*, vol. 1, 2005, pp. 55-73; Uzelac (fn 4); Emmert speaks of 'excessive legal positivism', Frank Emmert, *The Independence of Judges - A Concept Often Misunderstood in Central and Eastern Europe* (2002) 3 *Eur. J. L. Reform* 4 405, at p. 406.

In recent years, an increasing, but still a limited, 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 39); Čapeta (fn 3)); in the context of civil procedure, see Uzelac (fn 4); in the context of public procurement, see Frane Staničić, *Pretjerani pravni formalizam i postupci javne nabave*, Zbornik Pravnog fakulteta u Zagrebu, vol. 67, no. 3-4, 2017, pp. 521-564; in terms of constitutional interpretation, see Luka Burazin, Đorđe Gardašević,

various disciplines of law.<sup>90</sup> According to Uzelac, excessive procedural formalism is one of the main features of the socialist legal tradition.<sup>91</sup> Scholars complained that courts and administrative bodies were “very frequently reaching for grammatical and narrow interpretation of the law, [...] not prepared to see the broader picture.”<sup>92</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>93</sup>

Despite a near consensus on excessive formalism as a feature of the CEE judicial style, 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, and with an absence of sufficient empirical evidence to support the distinctiveness of formalism.<sup>94</sup> Warning against idealizing common law judicial reasoning and placing it as a normative benchmark and antidote to the communist heritage,<sup>95</sup> 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’.<sup>96</sup>

Although there is strong loyalty to strict legalism within the civil law environment, the adherence to formalistic behaviour is even more pronounced in Eastern and South-Eastern Europe, with the ECHR often finding violations of the fair trial rights based on excessive

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Mario Krešić, Poustavljenje hrvatskog pravnog poretka, Zbornik Pravnog fakulteta u Zagrebu, vol. 71, no. 2, 2021, pp. 221-254; in terms of criminal procedure, see Zlata Đurđević, Dekonstitucionalizacija Vrhovnog suda RH u kaznenim predmetima i jačanje autoritarnih mehanizama za ujednačavanje sudske prakse: propuštena prilika Ustavnog suda RH, Hrvatski ljetopis za kaznene znanosti i praksu, vol. 27, no. 2, 2020, pp. 417-470.

<sup>90</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 90), at pp. 532, 547. For examples of excessive legal formalism in public procurement adjudication see *ibid*, at p. 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 3).

<sup>91</sup> Uzelac (fn 4), at 370.

<sup>92</sup> Staničić (fn 89), at p. 541.

<sup>93</sup> Omejec (fn 39).

<sup>94</sup> Cserne (fn 4), at pp. 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. *Ibid*, at p. 29.

<sup>95</sup> *Ibid*, at p. 26.

<sup>96</sup> *Ibid* (fn 4), at p. 34. Cserne argues that formalism is, in fact, a key feature of modern western legal thinking. *Ibid*, at p. 35.

formalism.<sup>97</sup> This is unlike the “deformalisation” process found in the Netherlands since the 1970s, where the ‘loosening of strict formal requirements’ are at least in part motivated by the goal of substantive and equitable results, as the intention of the reforms is to prevent the parties use of the rules of civil procedure to twist the result in their favour on formal grounds, unlike Norway with its ‘traditional sympathy for solutions based on equitable results and substantive justice’.<sup>98</sup>

In its 2010 judgement in the *Lesjak* case, the ECHR 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.<sup>99</sup> In a case related to the courts in Serbia, the ECHR 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’.<sup>100</sup>

As noted by Smerdel, 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>101</sup>

In the same vein, Rodin noted that excessive formalism meant that the law must be applied ‘as written’, with any *lacunae* to be filled ‘not by methods of statutory construction, but by recourse to so-called authentic interpretation that can be obtained either from the parliament or sometimes, the government’.<sup>102</sup> Excessive legal formalism, where the authority bound to decide in a case fails to consider that the application of law includes its interpretation,

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<sup>97</sup> 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 p. 131.

<sup>98</sup> *Ibid.*

<sup>99</sup> 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, *Postupci pred nezavisnim regulacijskim tijelima i novi zakon o upravnim sporovima*, p. 207

<sup>100</sup> Case *Masirevic v Serbia*, no. 30671/08, 11 February 4, para 48.

<sup>101</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>.

<sup>102</sup> Rodin (fn 40).

including creating legal constructs, leads to decisions that are ‘unreasonable, irrational, or contrary to common sense’.<sup>103</sup>

As Kuhn put it, ‘[i]n the legal process perceived this way, 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>104</sup>

Although this kind of judicial culture might be seen by some as intellectual laziness, there are profound historical and political reasons for such a stance towards legal interpretation in post-socialist jurisdictions. The non-interpretative role of the judiciary, as explained by Rodin, is nested in the ‘[u]nderstanding of the legislature [...] as the dominant branch of government that controls the executive and the judiciary’.<sup>105</sup> In the authoritarian legal culture, the judiciary’s interpretative role was taken over by other branches of government, and the interpretative role of the courts was supplanted by using the so-called authentic interpretation.<sup>106</sup>

Noting that authentic interpretation of laws by parliament can be found in Croatia, Slovenia, and until recently in the Czech Republic, Rodin observed in 2004, in relation to Croatia, that a ‘relatively large number of authentic interpretations’ and an ‘absence of concrete constitutional review’ indicated an ‘understanding of the judicial branch as instrumental to the legislature’, which had no constitutional underpinning and was characteristic of the authoritarian legal culture.<sup>107</sup>

In 2021, the problem of authentic interpretation has still not disappeared. Arguing that methods for ensuring the uniform application of law needed thorough modernization in Croatian legal order, Uzelac noted that modern model of ensuring uniform application is done by adjudication, rather than by abstract normative activity, and through an exchange of arguments and by accepting the most convincing arguments, and that legal position of other

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<sup>103</sup> Staničić (fn 89), at p. 540.

<sup>104</sup> Kuhn (fn 89). The term ‘mechanical jurisprudence’ was coined by Roscoe Pound, see Pound, R. (1908). Mechanical Jurisprudence. *Columbia Law Review*, 8(8), 605–623. <https://doi.org/10.2307/1108954>.

<sup>105</sup> Rodin (fn 39).

<sup>106</sup> Ibid.

<sup>107</sup> Ibid, at pp. 9-10.

judges and other courts are to be accepted voluntarily as a result of a pluralist discourse in which best reasoned opinion is accepted after a thorough discussion.<sup>108</sup>

The socialist concept of the unity of powers, which preceded the principle of division of powers inherent in democratic legal order, is crucial to understanding the role of the courts in post-socialist countries. The unity of powers used to be ‘one of the dominant dogmas of the communist era’, according to which ‘the parliament was an instrument of the “dictatorship of the working class” and the communist party, as the vanguard of the working class, had a monopoly of power and the last say in determining policy’.<sup>109</sup> This created two sets of consequences: the communist party ‘controlled the legislative process and other agencies in the unitary system of power’, and courts were ‘subservient to the parliament and had very little if any, judicial discretion’.<sup>110</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>111</sup>

Textual formalism can be observed both in the decisions, in competition matters, of the Croatian High Administrative Court and the Croatian Constitutional Court. Both courts have a relatively rich practice in competition law matters, unlike the Croatian Supreme Court, which issued only one judgement so far relating to the interpretation of the Competition Act.<sup>112</sup> This is not unexpected, since the only way the Supreme Court can be seized would be through extraordinary remedy, which is not as directly available to the parties as other remedies, be it a judicial review or constitutional complaint, as explained above.

In the *Orthodonts* case, not agreeing with the competition authority infringement decision against the Croatian Orthodontic Association which made available a price list, with recommended prices, on its website for three years, until the competition proceedings begun, the High Administrative Court held that the association was not liable under national competition rules since the power to adopt such a pricelist was given by statute to its mother

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<sup>108</sup> For a detailed discussion see Alan Uzelac, *Jedinstvena primjena prava u hrvatskom parničnom postupku: tradicija i suvremenost*, in: *Novine u parničnom procesnom pravu*, Jakša Barbić (ed.), Zagreb, 2020, pp. 111-170, for his key propositions for modernisation of instruments to ensure uniform application of law see p. 145-146; also see Đurđević (fn 89).

<sup>109</sup> Rodin (fn 39).

<sup>110</sup> Ibid, Rodin uses the concept of the unity of powers to explain the reluctance of the courts to apply the constitution directly, as he argues that this is indicative of the broader authoritarian legal culture

<sup>111</sup> Zdeněk Kühn, *Worlds apart: Western and Central European judicial culture at the onset of the European enlargement*, vol. 52, no. 3, 2004, *The American Journal of Comparative Law*, pp. 531-567.

<sup>112</sup> Judgment of the Supreme Court of the Republic of Croatia of 2 March 2021, U-zpz 16/2015-4 (the *Orthodonts* case).

association (Croatian Dental Association).<sup>113</sup> The Supreme Court eventually annulled this judgement, some eight years after the competition authority issued its infringement decision.

In the *Marinas* case, the High Administrative Court returned for retrial the competition authority decision which found a prohibited restrictive agreement and concerted practice between major Croatian marinas, discussing prices during the trade association meeting. Very formalistically, the Court held that to establish collusion, the agency must prove that all parties to the agreement signed the minutes of the meeting.<sup>114</sup>

In the *Private Security Companies* case, another hard-core restraint case, the Constitutional Court disapproved of the decision of the competition authority, which was confirmed in the judicial review proceedings, that found a cartel agreement between private security companies. Finding a breach of the constitutional right to a fair trial, the Court entertained a formalistic analysis of what constitutes a price.<sup>115</sup> In this case, the controversial legal test introduced by the Court unduly raised the standard for finding cartel agreements in breach of competition rules, notoriously departing from the CJEU standards.<sup>116</sup>

The above court decisions show ‘mechanical interpretative deductionism’, preventing a ‘pragmatic approach to solving social problems by legal methods’, and a ‘hypertrophy of legal logic’.<sup>117</sup>

The question might be posed how much those court judgements actually limited the NCA’s enforcement in Croatia. After all, it is only a handful of overturning court judgements,

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<sup>113</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>114</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>115</sup> Kušan and Petrović criticize the use of the fair trial legal basis 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)*, Zagrebačka pravna revija, vol. 7, no. 3, 2018, pp. 255-276, at p. 274.

<sup>116</sup> 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://hdppn.hr/wp-content/uploads/2018/06/usud-tr%C5%BE-natj.pdf>>; 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.)’ (2018) 11 Yearbook of Antitrust and Regulatory Studies 311.

<sup>117</sup> Rodin (fn 39), at p. 15.

so upon first glance, the effects might not be considered significant.<sup>118</sup> However, we emphasise that the judgements of the High Administrative Court and the Constitutional Court criticized in this paper relate to hard-core infringements, mostly cartel infringements, which are considered to be most grave competition law restrictions. The NCA's anti-cartel track record 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 NCA's cartel decisions, immediately post-accession, in which less than symbolic fines were pronounced, was considerable. It went against the internal legal culture that was built within the competition authority ever since its inception, with the EU competition law template as its source of inspiration – a culture of non-formalistic legal interpretation and of using the EU *acquis* as a legal interpretative fundament, sending a clear and demoralizing message to the NCA. As a consequence, in the next half-decade, from around 2015 until 2020, the NCA's cartel enforcements efforts were almost non-existent. The explanation for the enforcement freeze surely can be found in the open hostility to what was meant to be the core mission of the competition authority, conveyed through the overturning judgements. However, the controversy also exposed a surprisingly low level of the NCA's institutional resilience.

#### b. Denial of policy considerations

Another feature of authoritarian legal systems of post-communist countries is a 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>119</sup> 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

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<sup>118</sup> According to Akšamović, in the 2012-2020 period, based on 466 NCA's decisions, 97 judicial review appeals have been submitted (20.81%). She relied on the 'data published on the Agency website', but providing no details on exact source for data, or methodology, eg does the assessment only cover High Administrative Court judgements, or also Constitutional Court decisions. Out of all 97 appeals to the High Administrative Court, 15 were successful (15.46%). Akšamović, (Re)definiranje... (fn 75).

<sup>119</sup> Rodin (fn 39), at p. 12.



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’.<sup>120</sup>

Rodin observed that ‘the dominant legal culture refuses to accept the undeniable fact that judicial decisions have social consequences.’<sup>121</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>122</sup>

Policy arguments, when properly exercised, provide context, and play an educational role not only for addressees of a decision but also for the broader public. The Croatian competition authority frequently exercises policy arguments in its cartel decisions. Occasionally, the High Administrative Court repeats the broader policy goals advanced by the competition authority in the decision under review, but its own attempts to formulate or recognise competition policy goals, placing them within the context of an individual case, remain largely non-existent.

The judicial decisions, such as those in the *Orthodonts* case, the *Private Security* case, or the *Marinas* case, show a lack of understanding, at the judicial level, of the broader context of competition rules. The courts’ capacity to consider policy goals in competition cases would assure they were well placed to adopt a judgement on the soundness of the competition authority decision. If this is not the case, the authoritativeness of the court exercising judicial review is undermined.

### c. 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>123</sup>

Unlike other European post-communist countries, in Croatia and other post-Yugoslav countries, ‘certain political and legal concepts were not entirely absent from discourse’; in such cases, ‘solving semantic dissonance is more difficult th[a]n in cases of complete absence of

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<sup>120</sup> Ibid, at pp. 11-12.

<sup>121</sup> Ibid, at p. 12.

<sup>122</sup> Ibid, at pp. 12-13.

<sup>123</sup> Ibid, at pp. 13-14.

discourse'.<sup>124</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>125</sup> which was hardly implemented, prevents the effective fight against cartels in the post-socialist era.

d. Literal application of the *iura novit curia* principle

Literal application of the principle that the judge knows the law (*iura novit curia*) appears to have undesirable effects in post-socialist jurisdictions.<sup>126</sup> Kuhn argues that this principle 'appears to function as a barrier separating the parties before the court from the judge'.<sup>127</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>128</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>129</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>130</sup>

In Croatia, court judgements in competition matters never include references to the literature, and competition authority decisions rarely include such references.<sup>131</sup> Regarding the mention of relevant case law (European or national) in court judgements in competition matters, a very rare reference to a CJEU judgement can be found in the 2021 judgement by the Supreme Court in the *Orthodonts* case. Usually, none are to be found in the High Administrative Court judgements or in the decisions of the Constitutional Court. On the other hand, competition authority decisions regularly reference CJEU judgements and European

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<sup>124</sup> Ibid, at p. 14.

<sup>125</sup> See Tibor Varady, The emergence of competition law in (former) socialist countries, *American Journal of Comparative Law*, vol. 47, no. 2, 1999, pp. 229-275. See Pecotić Kaufman (fn 9).

<sup>126</sup> Zdenek Kuhn, The authoritarian legal culture at work: the passivity of parties and the interpretational statements of supreme courts, *Croatian Yearbook of European Law and Policy*, vol. 2, 2006, pp. 19-26, at p. 19.

<sup>127</sup> Ibid, at p. 19.

<sup>128</sup> Ibid, at p. 19.

<sup>129</sup> Ibid, at pp. 25-26.

<sup>130</sup> Ibid, at p. 19.

<sup>131</sup> Lack of citing literature in court judgements is noted by Manko (fn 4), at p. 541: 'the Polish Supreme Court never cites any literature (contrary to the Polish Constitutional Tribunal)'.

Commission decisions in its decisions. This practice is not similarly adopted by the courts, potentially indicating a difference in legal cultures. Curiously, the 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.

Judicial style, such as the one 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.

Formalistic application of the *iura novit curia* principle also calls into question the practical use of this procedural tool. So far, there have been no cases where the Croatian courts have admitted the NCA or European Commission as *amicus curiae*.

e. The *de minimis non curat praetor* principle

Unlike common law, the civil law tradition is more sympathetic to small claims, while the principle that judges should not waste their time on discretion as to small matters (*de minimis non curat praetor*) is generally rejected by the European systems of civil justice, with the consequence that courts take into consideration even trivial, groundless cases.<sup>132</sup> According to Uzelac, one of the main features of the socialist legal tradition, from the civil procedure point of view, is a distorted application of the *de minimis non curat praetor* principle, with disproportionate efforts being invested for reaching ephemeral and socially insignificant results.<sup>133</sup>

In the realm of competition law, negative effects of the application of this principle were visible in the procedural rules, as stipulated by the Competition Act, which the competition authority must obey, relating to the duty of the agency to respond to initiatives to initiate new cases. Before the Competition Act was amended in 2021 to accommodate for the ECN+ Directive rules aiming at allowing more strategic prioritization for competition authorities, the law mandated that the agency consider all potential cases equally. This prevented the competition authority from having a more focused, strategic choice of cases it

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<sup>132</sup> Storme et al. (fn 89), at pp. 128-129.

<sup>133</sup> Uzelac (fn 4), at p. 370. Until recently, Croatian legal scholars were sceptical towards the principle *de minimis non curat praetor*, see Uzelac (fn 62), at p. 88.

wanted to pursue. The transposition of the ECN+ Directive, effected in 2021, can help the agency to entertain a more focused enforcement policy.

This is an illustration of how supranational rules help alleviate adverse effects of post-socialist legal culture, allowing for a departure from the previous socialist legacy. In what way this new regime will reshape the enforcement practice of the competition authorities, and whether it will bring any real change, is not yet clear.

f. Case-law as a source of law

The use of case-law as a valid source of law when interpreting legal rules by the courts also suffers from authoritarian legal culture legacy. As Čapeta remarks, unlike in the 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 the 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>134</sup> On the other hand, the Constitutional Court regards case law as a legal source, citing decisions by the ECHR and the Croatian Supreme Court.<sup>135</sup> In competition cases adjudicated by the Constitutional Court, this has not been the case so far.

Čapeta notes in 2005, that until recently, judicial decisions were not even reported.<sup>136</sup> She remarks that this is 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>137</sup>

On the other hand, the competition agency has different legal culture: it frequently relies on and cites European soft law, European Commission decisions, and CJEU judgements to substantiate its own arguments. This is still done in a formalistic way, though, as they are listed in the beginning of the decision, rather than integrating them more fully when entertaining specific arguments.

To be able to properly apply Community law, national judges need to be familiar with the judicial *acquis communautaire*, i.e. judge-made law, which might be problematic for judges

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<sup>134</sup> Čapeta (fn 3).

<sup>135</sup> Ibid.

<sup>136</sup> Ibid. Čapeta observes that in most other ex-communist countries court rulings, at least from higher courts, were published, and that it seems that only in Croatia and Romania judicial decisions were not made public. Ibid.

<sup>137</sup> Ibid.

who are not used to keeping up with even the domestic courts' case law.<sup>138</sup> Instances where the High Administrative Court or the Constitutional Court rely on the CJEU practice are very rare. Ignoring CJEU case-law, post-accession, indicates difficulties of the domestic courts being able to assume their role as European courts, participating in the decentralized application of antitrust rules.

According to recent research evaluating cross-citations between 28 supreme courts in the EU, which defines several categories of countries ('true followers', 'true comparatists', 'reluctant followers', 'reluctant comparatists' and 'isolates'), while most of the 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>139</sup> The authors of this study 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>140</sup> The study found that many of the 'isolates' were civil law countries from Central and Eastern Europe, including Croatia.<sup>141</sup> Analysing this group under 'a possible Central and Eastern European (CEE) legal tradition', they found that CEECs showed a relative openness of legal cultures (for example, legal borrowing and cooperation), in particular legislatively, and the lack of such openness of judicial cultures (for example, the perception of the roles of judges).<sup>142</sup> They argued that no cross-citations between the supreme courts of the above-mentioned CEE countries indicated a 'low degree of judicial openness'.<sup>143</sup>

The low number of cross-citations could also be explained by the traditional roles of judges, elements of the 'survival' of the socialist legal tradition transposed throughout the judicial system (institutional continuity, appointment of judges and judicial argumentation),<sup>144</sup>

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<sup>138</sup> Ibid.

<sup>139</sup> D'Andrea et al. Asymmetric cross-citations in private law: An empirical study of 28 supreme courts in the EU, 2021, *Maastricht Journal of European and Comparative Law*, Vol. 28(4) 498-534, at p. 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.

<sup>140</sup> Ibid, at p. 534.

<sup>141</sup> 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. Ibid, at pp. 522-525.

<sup>142</sup> Ibid, at pp. 524-525.

<sup>143</sup> Ibid.

<sup>144</sup> See Manko (fn 4), fn 140.

language barriers, domestic publication and reporting practices and the accessibility of supreme court judgements.<sup>145</sup>

g. Legal Culture in the Digital Age

Apart from the features discussed above, several broader issues of legal culture are relevant when discussing the authoritarian legal culture legacy: digitalization and ease of access to decisions of competition authority and the courts, the tradition of critically assessing decisions of competition authority and the courts, and the independence of the judiciary.

First, 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.<sup>146</sup> Authoritarian legal culture is characterized by a closed-off judiciary, which is either not ready to allow easy access to its work, underplaying the importance of digitalization and making judgments publicly available,<sup>147</sup> or takes a formalistic stance and claims that practical ease of access is irrelevant since judgements, with few exceptions, are all 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>148</sup>

Difficulties in accessing the case law of the courts have detrimental consequences on the ability of the scholars to critically assess the judiciary's work. Non-publication of judicial decisions prevented 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>149</sup> In a society plagued by the authoritarian legal culture legacy, the hurdles related to accessing case law reinforce the culture

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<sup>145</sup> D'Andrea et al. (fn 139), at p. 525.

<sup>146</sup> Uzelac warns of the need to radically reorganize the system for publication of court judgements in Croatia, see Uzelac (fn 108), at p. 113.

<sup>147</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\\_Pravosudje2020.pdf](http://www.alanuzelac.from.hr/pubs/C02_Pravosudje2020.pdf).

<sup>148</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, a recent unsuccessful candidate for the position of the Supreme Court President, stated that the county courts published 2-6% of their decisions, while the number of published decisions of the Supreme Court was rapidly declining and in 2018 it was less than 50%. Arguing that the Croatian judiciary was 'a closed interest group' did not help her in being appointed for the high judicial office.

<sup>149</sup> Čapeta (fn 3).

that remains uneasy with questioning hierarchy and promoting critical voices. Similar problems regarding access to case law exist throughout the CEE region.<sup>150</sup>

Although in Croatia, court decisions are public in principle, access to full-text judgements can be cumbersome. Access is possible upon individual inquiry with the relevant court, but this can be a lengthy and cumbersome process for a scholar wanting access to judicial practice. Full-text judicial decisions are not published regularly. Digitalization of the case-law of the courts has been ongoing, seemingly with no real progress. The database of civil court judgements (SupraNova) is available only to judges, not to the public, so a search for cases related to antitrust damages is not easy.

The EU has provided strong financial support for the establishment of public databases of case law, including in Croatia.<sup>151</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 judgements in competition matters are available via the competition authority website. Also, as stipulated in the Competition Act, the administrative court judgements in competition matters must be published in the Official Gazette. The web portal of the Official Gazette has rather limited search possibilities, and sometimes, for unknown reasons, judgments might not even be published. On the other hand, the Constitutional Court publishes its full-text decisions on its website, an exception from the closed-off 'ordinary' judiciary, and its decisions are regularly published in their entirety in the Official Gazette.

In stark contrast to the never-ending process of reaching the final stage of full-text judicial decisions of the highest courts being publicly accessible in digital form, almost from the very inception of the competition law regime, the decisional practice of the competition authority was available online.<sup>152</sup> The first Competition Act, adopted in 1995, failed to address the issue of publication of the 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, shall be published in

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<sup>150</sup> Emmert (fn 89), at p. 408 writes on lack of access to judgements in Estonia: 'only the judgements of the Supreme court are systematically published; judgements 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>151</sup> D'Andrea et al. (fn 139), at 528.

<sup>152</sup> Anonymisation seems to be a problematic issue. We note a very peculiar practice of the competition agency to anonymizes the names of attorneys, representing the parties in competition proceedings, in publicly accessible versions of its decisions.

the Official Gazette. Departure from the authoritarian paradigm was a feature of the freshly minted competition law system, formed with the idea of promoting competition as a societal value, in sync with the democratic and economic transition that occurred in the early 1990s.<sup>153</sup>

Second, in Croatia, we note a lack of academic literature critical of institutions' decisions, e.g. administrative bodies, courts, etc.<sup>154</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>155</sup> In Eastern Europe, noted Kuhn, the task of legal scholars at universities has been to comment on the texts of the legal codes or, in the best case, compare the text of domestic code in a certain area with that of other countries.<sup>156</sup> Even the culture of publishing statute commentaries is not well developed, and judgements are not systematically published, analysed, or commented upon by academic writers.<sup>157</sup>

The reluctance to critically assess the work of the courts does not come as a surprise, since publicly commenting on non-final judicial decisions was deemed a criminal offence until 2013.<sup>158</sup> 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'.<sup>159</sup> 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'.<sup>160</sup>

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<sup>153</sup> In its inception stage the competition authority operated with unusual institutional transparency (frequent press conferences, detailed and educational decisions); this continued (with a short impasse) in the pre-accession period, when the process of Europeanisation was culminating. For historical assessment and development phases of the Croatian competition system, see Pecotić Kaufman (fn 9). In the post-accession stage, the competition agency does not announce which cases it is currently pursuing, unlike the European Commission.

<sup>154</sup> On the importance of academic literature for the interpretation of the Company Act see Barbić, (fn 86), at p. 362.

<sup>155</sup> Rodin (fn 39), at p. 11.

<sup>156</sup> Kuhn (fn 111).

<sup>157</sup> See Emmert (fn 89), at p. 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*, p. 409.

<sup>158</sup> Art. 309 of the Criminal Code, Official Gazette 110/1997; decriminalized by Criminal Act, Official Gazette 125/2011, in force as of 1 Jan 2013.

<sup>159</sup> HOK osudio komentiranje nepravomoćnih sudskih odluka o EUN-u, <http://www.iusinfo.hr/DailyContent/News.aspx?id=17466>, pristupljeno 15. ožujka 2019) <https://www.iusinfo.hr/aktualno/dnevne-novosti/17466>

<sup>160</sup> 2019 <https://www.hnd.hr/medijske-slobode-ne-smiju-bitu-ugrozene>



However, according to a recent survey, 21% of all judges participating in the survey said that academics or journalists should comment on neither final nor non-final judgements.<sup>161</sup>

Third, as the EU Justice Scoreboard 2020 shows, in most post-socialist countries, courts' and judges' perceived independence is unfavourable.<sup>162</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>163</sup>

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

During the pre-accession process, the legal systems of the post-socialist countries were exposed to the intensive process of alignment with the EU *acquis*. The Croatian Competition Act, introduced in 1995 – before the EU rapprochement process begun – was already modelled on the EU template.<sup>164</sup> The subsequent changes to the normative framework saw almost a complete remake of the initial Competition Act, aimed, among other things, at introducing new instruments to make the competition authority better equipped for effective enforcement. However, until late 2010, due to the dysfunctional fining system, the competition authority was not perceived as seriously threatening the collusive culture.<sup>165</sup> The agency was operational, but its infringement decisions were not operationalized. The courts which had to pronounce fines based on its decisions, misdemeanour courts at the time, were putting a hard stop on the efforts of the competition agency to establish itself as an effective enforcer. Almost no fines were collected for antitrust infringements during this period.<sup>166</sup> In other words, the bottleneck for

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<sup>161</sup> Tena Konjević, 'Neovisnost i nepristranost hrvatske sudbene vlasti kroz teoriju i praksu' [2020] Paragraf 103.

<sup>162</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>163</sup> European Commission, 2021 Report on the Rule of Law.

<sup>164</sup> Relying on the Western legal tradition template in the case of competition law was not an exception in post-socialist Croatia during 1990s. In the area of company law, for example, a return to the developed Western legal systems, in particular the German model – after a 40 years hiatus – was considered as the ideal option; “one should do nothing but accept what others have already come to”. In particular, “The use of German law as a model law allows for the use of case law of the German courts and legal literature, which is a great help not only in creation than in the application of law.” However, “not acting mechanically” but discerning if the model rules fit our legal system. “Experience of others should be used, but should not be followed blindly without the required dose of criticality”. See Barbić (fn 86), pp. 343, 362.

<sup>165</sup> On a discussion related to the collusive culture in Croatia, see Pecotić Kaufman and Šimić Banović (fn 22).

<sup>166</sup> See Pecotić Kaufman (fn 9).

enforcement occurred at the level of the misdemeanour courts, since one of the characteristics of the Croatian legal system inherited from Yugoslavia was that administrative authorities could not issue sanctions.

In 2009, a novel, and according to some scholars, controversial solution has been found, whereby the competition authority was to decide both on infringement and fines.<sup>167</sup> However, this solution failed in the long run, as the effectiveness in terms of collecting fines has not improved. Despite the attempts of the competition authority, in the years immediately following the accession, to pursue credible anti-cartel enforcement, its infringement decisions were disapproved by the intervening courts (both the High Administrative Court and the Constitutional Court) in the *Marinas* case, the *Orthodonts* case and the *Private Security companies* case. The controversial judicial decisions featured a formalistic interpretative method and showed a disregard for the standard of proof for collusive conduct as set by the CJEU.<sup>168</sup>

After late 2010, with the Competition Act 2009 coming into force, the misdemeanour courts were out of the picture when it came to sanctions for antitrust infringements. With the NCA receiving direct sanctioning powers, the question might be asked how much influence the courts still had on the competition law enforcement. The answer is that they did have some influence, but not the same kind of courts. The difference between the pre-2010 and the post-2010 period was that the pressure point moved to the High Administrative Court, which now exercised both control over the existence of an infringement and over the fine. Quite unexpectedly, the Constitutional Court also started intervening in competition cases and in the constitutional complaint proceedings. Both courts showed, in a series of judgements, little understanding for the significance of the cartel prohibition for the economic order of the country.

The problem that arose post-accession, for both the competition authority and the competition law system, can be best addressed under the ‘semantic dissonance’ discourse. 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>169</sup>

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<sup>167</sup> This was contrary to the prevailing understanding of administrative law scholars, as mixing administrative law, under which the agency was operating, with misdemeanour law to decide on fines was interpreted as interfering with the division of powers between the executive and the judicial branch. For more details see Pecotić Kaufman (fn 9).

<sup>168</sup> The courts decisions were criticized by Petrović (fn 116) and Alexandr Svetlicinii (fn 116). See also Pecotić Kaufman and Šimić Banović (fn 22), and Pecotić Kaufman (fn 9).

<sup>169</sup> Rodin (fn 39).

Despite being aligned, in the pre-accession process, with the EU legal order, the national rules ‘acquire a different meaning and are applied differently by the courts.’<sup>170</sup> Almost two decades later, semantic dissonance presents itself as a helpful theoretical framework to elucidate the position of the High Administrative Court and the Constitutional Court in Croatia regarding the notion of a cartel and the standard of proof for collusive conduct.<sup>171</sup> The dissonance in the meaning is clear: a cartel under the CJEU *acquis* is not a cartel for a Croatian judge.

Normatively, the prohibition of cartel behaviour is rather straightforward. However, when it comes to interpreting the meaning of this prohibition in a concrete case, alongside the potential for a hefty fine, semantic dissonance becomes apparent.<sup>172</sup> Normative alignment might not have been such a problem, especially when incentivised by conditionality, but alignment with the deeper economic context of where the norm initially comes from (the West) in a post-socialist country may pose significant difficulties. Transposing a cartel prohibition to a post-socialist country, scared by the planned economy experiment and permeated with the spirit of the acceptance of collusion between market operators as business as usual, might not work in the real world.<sup>173</sup> Aided by the formalistic legal interpretation method, the judges – still lingering in the old, pre-transition, pre-market paradigm, and preferring collusion to competition – are bound to interpret the cartel prohibition mechanically, superficially, and out of context of the antitrust law goals and objectives, in line with the authoritarian legal culture

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<sup>170</sup> Ibid, at p. 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 harmonisation of legal rules, while the adjustment of their meaning [was] left for the future’.

<sup>171</sup> The concept of semantic dissonance can be applied to further contexts, other than competition law. Omejec noted that in Croatia, a distinction has not been made between the terms legality and lawfulness – two very much different notions under the ECtHR *acquis*. She argued that the linguistic context (the same term used in Croatian for both legality and lawfulness (*zakonitost*) make it difficult to understand the European concept of lawfulness. Under the ECtHR *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 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 39), pp. 13-15.

<sup>172</sup> For a discrepancy between the ECtHR and Croatian Constitutional Court in interpretation of the notion of property/ownership, with the former requiring a broad interpretation and the latter engaging in a narrow interpretation; ECHR protects the right to “property” and the Croatian Constitution the right to “ownership”; Croatian translation of the ECHR protects “ownership”, see Kušan and Petrović (fn 115), at p. 261 et seq.

<sup>173</sup> For the rule of national culture, the clash of the Europeanization and collusive culture, and the role of trade associations in reinforcing collusion, see Pecotić Kaufman and Šimić Banović (fn 22).

legacy.<sup>174</sup> The legal transplant is there, part of the formal law. Still, the judges' informal understanding of how the economy should function shows a clear dissonance between national and European law.

Furthermore, the decisions of the Croatian courts in competition matters as discussed in this paper have raised an additional issue – a protracted reception of EU law, post-accession. 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>175</sup> the embrace of the EU *acquis* is lagging behind and the practice of the Constitutional Court in this regard is unstable.<sup>176</sup> The CJEU case-law is primarily, if at all, used by the domestic courts in an auxiliary manner, never as a primary argument.<sup>177</sup> Up to now, there have been no preliminary references to the CJEU in competition cases by the Croatian courts.<sup>178</sup>

Contrary to the observations of Čapeta, that, at least for a certain period following accession, the CEE judges acting as 'Community judges' will be docile executors of the new European legal order,<sup>179</sup> what we see from the 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>180</sup> In competition matters, this did not come to fruition; quite the contrary, the EU law remains largely ignored by the courts.

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

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<sup>174</sup> Note how, in the pre-accession context, Rodin identified three main obstacles to semantic harmonisation, as opposed to textual harmonisation of national legal norms with the *acquis*: (a) legal formalism, (b) denial of policy considerations, and (c) circular reasoning, Rodin (fn 39), at pp. 11-14.

<sup>175</sup> Omejec (fn 39), p 5.

<sup>176</sup> For details see Goran Selanec, Uloga Ustavnog suda u provedbi prava Europske unije u okviru pravnog poretka Republike Hrvatske, in: Nika Bačić Selanec et al., Pravo unutarnjeg tržišta Europske unije, Narodne novine, 2021.

<sup>177</sup> See Supreme Court judgement in the *Orthodonts* case; a similar phenomenon although related to ECtHR in CEE courts judgements is mentioned by Sadurski (fn 79), at p. 522.

<sup>178</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*, Common Market Law Review, 2008, 45, 6, 1611-1643. For the experience of Croatia see Kristijan Turkalj, Iskustva hrvatskih sudova u postavljanju prethodnog pitanja sudu Europske unije, Pravo i porezi, 9/2020, pp. 52-61.

<sup>179</sup> Čapeta (fn 3).

<sup>180</sup> *Ibid.*

In this section, we discuss the difference in legal cultures between the competition authority and the courts in Croatia by postulating two possible explanations: first, skewed agencification, and second, poor impact of the constitutionalisation process in competition cases.

a. Skewed agencification

The notion of agencification is used by political science scholars to denote the process of equipping new or existing agencies with the task of implementing policies and giving them more autonomy to perform specific tasks.<sup>181</sup>

During the pre-accession process in post-socialist countries, 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. 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 inherent, structural weaknesses of the judiciary, such as its fixation on excessive formalism, its problem with a large case backlog,<sup>182</sup> lack of specialization and a poor perception of judiciary and its independence, long term problems related to the judicial review process, and in particular the legal standards used by national courts, were bound to arise.<sup>183</sup>

Using the example of Croatia, we argue that the pre-accession focus on the competition authority, not addressing the weaknesses in the judiciary, resulted in a skewed balance between the courts and the agency 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, as the agency is faced with the formalistic interpretation of the notion of cartel by the

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<sup>181</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>182</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. 2019. “Reluctance to Participate in the Preliminary Ruling Procedure as A Challenge to EU Law: A Case Study on Slovenia and Croatia.” In *The Eurosceptic Challenge National Implementation and Interpretation of EU Law*, edited by C. Rauegger and A. Wallerman, 119–211. Oxford: Hart Publishing.

<sup>183</sup> In the area of company law, the application of a modern Company law statute, modelled on the German company law, struggled due to poor “legal infrastructure”; for examples of early judicial misinterpretations of the 1993 Company Act see Barbić (fn 86), at p. 348.

courts. Second, and more generally, the inability of the courts to act as an authoritative corrective force vis-a-vis the agency ultimately undermines the rule of law. Overall, embedding competition rules more effectively, thereby completing the economic transition in post-socialist countries, remains an open issue.

The Croatian experience shows how, post-accession, the courts remain primary carriers of the authoritarian legal culture legacy. Less so the competition authority, due to its more direct exposure to the Europeanization process, which started early with the adoption of the first Competition Act in 1995, already modelled on the EU *acquis*. This was before the beginning of the rapprochement with the EU, which Croatia started in the early 2000s. The competition authority was the promoter of EU competition standards from the very beginning despite being surrounded by the traditional actors with post-socialist legal culture. Ever since it was established, the Croatian competition authority embraced the EU competition rules as a guiding force for its practice and found ways to make the rules apply even to purely domestic situations.<sup>184</sup>

The 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 before the Croatian NCA.<sup>185</sup> Also, in the early period, the agency received some assistance from the U.S. agencies, rather than from the EU.<sup>186</sup>

Importantly, the NCA officials interact regularly with other competition enforcers at the European Competition Network (ECN), but also at the International Competition Network (ICN) and other international gatherings. However, the absorption capacity of such international exposure is limited, and better ways need to be found internally to increase the benefits of such interaction.<sup>187</sup>

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<sup>184</sup> The very question of the existence of a cross-border effect was side-lined and remains extremely rarely present in its decisions. cf. 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?’ (2015), 52 CMLR, 1247-75. 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, going against excessive legal positivism, and welcoming the process of Europeanisation of the domestic legal system.

<sup>185</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 89).

<sup>186</sup> See Pecotić Kaufman (fn 9), p 6.

<sup>187</sup> Ibid, pp. 19-20.

On the contrary, the judiciary slowly digested competition cases, mostly through deferential judgements, i.e. confirming the competition agency decisions. In its early judgements, the judiciary mostly relied on the same arguments that 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. The judiciary was unable to follow the now-fully equipped competition authority, which attempted to effectively use its enforcement powers, including its direct sanctioning powers.

From its inception phase, even before the pre-accession process began, the Croatian competition authority understood well that implementing competition rules meant interpreting them. Its inherent broad interpretative role in competition cases clashed with the legalistic stance of the dominant legal culture; the gap in legal culture is apparent even today. Although it is difficult to claim that no traces of textualism were, or are, still present in the practice of the competition authority, for the Agency it was always the body of the European competition law that stood as a template providing authority, inspiration, and support against the dominant authoritarian legal culture. For this reason, the competition authority served to emanate the spirit of a new legal culture that seeped in from the EU *acquis*, being offered as a model, during the pre-accession era.

It was understandable that the courts, isolated from the process of Europeanisation, were much slower to transition, as the harmonisation with the *acquis* mainly touched the legislative and executive branch of government. The spill over effects were extremely slow to appear when it comes to the judiciary, where socialist period features seem to have lingered longer, preventing what Rodin calls ‘a pragmatic approach to solving social problems by legal methods’.<sup>188</sup>

On the other hand, the administrative body, such as competition agency, and the courts have different cultures as well as different roles to play. The agency establishes facts and decides upon the merit, while the court exercising judicial control primarily looks at the procedure involved. Under the influence of EU law, or perhaps naturally due to the duty to decide on the merits of the case at hand, the style of decisions of the Croatian competition authority is very much factual, focused on substance and in particular on the analysis of the relevant legal and economic circumstances of a specific case. In addition, the Competition Act

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<sup>188</sup> Rodin (fn 39), at p. 15.

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.

Relying on the EU template, the value frame for interpretation of competition rules used by the competition authority was never an issue.<sup>189</sup> This is in stark contrast with the judiciary, which are continue to grapple with the issue of ‘semantic dissonance’. The way the courts have recently dealt with identifying the ideological value substrate behind the competition rules has grave consequences, not only in terms of legal certainty, but also for the institutional effectiveness of the competition authority. In any case, we should avoid a situation where ‘legal certainty is replaced by a “semantic lottery”’.<sup>190</sup> At this point, a semantic lottery is the situation where there is uncertainty if the court will ascertain the correct meaning of, and understand, the notion of a cartel.

b. Lacking constitutionalisation effects in competition cases

Constitutionalisation is a way to leave the excessive formalism and other features of an authoritarian legal culture legacy behind.<sup>191</sup> As Matczak, et al. have argued, the application of 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>192</sup> We cite from a Czech Constitutional Court judgement: ‘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>193</sup>

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<sup>189</sup> See Art 74 Competition Act on interpretative effect of EU law pre-accession, confirmed by Constitutional Court in PZ auto case, which was left post-accession to apply to instances of EU competition law being applicable to purely domestic situations

<sup>190</sup> Rodin (fn 39), at p. 15, fn 76 for the expression *semantic lottery*.

<sup>191</sup> Constitutionalisation in Croatia was delayed, with a time lag in comparison with other CEECs joining the EU in the 2000s, due to a belligerent breakup of Yugoslavia. With Croatia engulfed in armed conflict, being 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 in the development 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 39), pp. 30-31.

<sup>192</sup> Matczak, Bencze and Kuhn (fn 87), at p. 84.

<sup>193</sup> *Ibid*, p. 95.



With its 1990 Constitution, Croatia accepted European constitutional values, standards, and common European constitutional heritage.<sup>194</sup> Not unlike the Czech constitutional court, which in the first decade of its existence (1993-2003) ‘repeatedly emphasised 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>195</sup> the Croatian Constitutional Court consciously embraced the task of ‘constitutionalising’ the workings of the administrative apparatus, including the administrative judiciary.<sup>196</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 the old formalistic interpretative legal patterns. As we saw from the previous discussion, controversial judgements of the Constitutional Court in competition matters prove otherwise. The constitutionalisation 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 recognise the CJEU case law as a valid point of reference.

The authoritarian legal culture legacy worked to slow down the process of constitutionalisation. Omejec argues that the failure to change the main procedural statute under which administrative authorities in Croatia operate, the Act on General Administrative Procedure, as well as the statute ensuring judicial review for the administrative acts, the Act on Administrative Disputes, both inherited from the socialist era, and holding on to them during the period of twenty years after democratic transition ‘greatly contributed to the continuation of behaviour according to socialist administrative patterns’.<sup>197</sup> Likewise, there was no change in ‘administrative consciousness in accordance with the constitutional requirements harmonized with the values of developed European liberal democracies’;<sup>198</sup> and the

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<sup>194</sup> Omejec (fn 39), p. 4.

<sup>195</sup> Matczak, Bencze and Kuhn (fn 87), at p. 94 et seq.

<sup>196</sup> Cf Omejec (fn 39), p. 31.

<sup>197</sup> Omejec (fn 39), pp. 24-25. By applying specific solutions from the socialist Act on General Administrative Procedure, for example the application of rules in the examination of files, formalistic patterns were being perpetuated that unnecessarily burdened and aggravated the position of the parties in administrative proceedings. *Ibid*, pp. 25-26.

<sup>198</sup> *Ibid*, p. 26. Due to specific historical circumstances, Croatian administration skipped an important phase in the development of the principle of lawfulness through which the countries in Western Europe underwent after the Second World War, allowing them to advance to a phase where the entire administrative law was being seen through the lenses of the protection of individual fundamental rights. Omejec (fn 39), p. 31.

interpretation and application of the law in administrative proceedings remained ‘trapped in the shackles of rigid textual or grammatical positivism’.<sup>199</sup>

Congested by the number of individual cases, including especially complex ones that require both time and a high degree of competence, the administration escaped to rigid formalistic and positivist patterns of action, fundamentally indifferent to practical problems of justice, inevitably ending in blind formalism as an effective way of resolving cases; the application of law opens a high degree of legal uncertainty, and when it comes to the outcome of adjudication in legal matters, there is uncertainty and unpredictability.<sup>200</sup>

Administrative bodies, post-transition, still show traces of the authoritarian legal culture legacy. The question we discuss here is to what extent the competition authority fits into this picture, and whether it may be argued that, unlike most of the state administration, the agency succeeded in achieving a more pronounced departure from the lingering authoritarian pattern.

While administrative authorities are usually described ‘as an obedient apparatus for the mechanical execution of orders issued from above’, that is towards ‘political party commanders’, and ‘not downwards, towards citizens’,<sup>201</sup> and with a considerable authoritarian era legacy influencing their operation,<sup>202</sup> the competition authority seemingly remains an exception. Positioned as an independent agency, responsible to only the Parliament, and given considerable enforcement tools, in a field important for the development of the European internal market, the competition authority as established in 1995, an administrative body without pre-transition baggage, was bound to become a role model. The competition agency was applying the same statute regulating administrative procedure, but they were in the background, as special rules were devised regulating the procedure in competition cases, and both substantively and procedurally, they were modelled on the EU rules.

However, this departure from the authoritarian model by the competition authority, in particular at the point when the agency was in position to drastically improve its effectiveness by autonomously pronouncing fines, was disciplined by the judiciary, using its well-known formalistic interpretative patterns. The competition agency tried as much as it could, under its

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<sup>199</sup> Ibid, p. 26. The application of socialist administrative procedural legislation until 2010, due to which the administration was not forced to change its behaviour inherited from the socialist period, and not motivated to acquire comparative knowledge, generated a phenomenon that can be described as ‘laziness of administrative spirit’. See Jasna Omejec, *Pravnost hrvatske države, Zbornik radova Hrvatska država i uprava – stanje i perspektive*, Eugen Pusić (ed.), Zagreb, 2008, pp. 75–138.

<sup>200</sup> Omejec (fn 39), p. 28.

<sup>201</sup> Ibid, p. 19.

<sup>202</sup> Omejec calls them ‘political bureaucratic distortions’, *ibid*, p. 19.

more passive leadership,<sup>203</sup> to stay away from controversy, opting for a docile enforcement style with protracted use of symbolic fines in cases where it could have sent a strong message about the illegality of anti-competitive arrangements. The self-restraining enforcement approach only served to confirm the argument on the lacking embeddedness of competition rules in post-socialist Croatia.<sup>204</sup>

The process of constitutionalization of administrative law from the 1990s onwards has opened the space for adapting the rigid, positivist pattern in the work of the administration, marked by mechanically routine formalism.<sup>205</sup> However, the constitutionalization process, we argue, failed to show positive spill-over effects when it comes to competition law cases post-accession, probably due to the still nascent reception of the Luxembourg *acquis* by the Constitutional Court. The process of Europeanisation requires broad interpretation of legal concepts which conflicts with formalistic attitude of the national courts. Non-formal interpretation of concepts such as a cartel run contrary to the national judicial DNA. For those reasons, the transition of legal culture is a demanding process.

Already, the early case law of Strasbourg and Luxembourg has shown noticeable anti-formalist tendencies in the creation of convention and community law, as they arose in part as an expression of trying to overcome formal differences between national legal systems, with new binding legal principles being developed in the EU, a strong emphasis on interpretive argumentation, and new techniques and methods for resolving cases being created.<sup>206</sup> However, the anti-formalist features of the CJEU and ECtHR case law, we argue, have not yet found their recipient in the Croatian High Administrative Court and Constitutional Court, at least when it comes to competition cases, with the relevant case law still showing the same old formalistic paradigm, and interpretative argumentation remaining a somewhat foreign concept.

Recently, the rejection of the formalistic paradigm in judicial interpretation as advocated by the Constitutional Court, and applied in concrete cases by administrative judiciary, has been noted by Croatian scholars.<sup>207</sup> However, we argue that the use of more abstract constitutional arguments, targeted on economic consequences of cartel behaviour or competition law more generally, are still absent in the Croatian courts case-law, with the courts

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<sup>203</sup> On historical overview see Pecotić Kaufman (fn 9).

<sup>204</sup> For details, see Pecotić Kaufman (fn 9).

<sup>205</sup> Omejec (fn 39), at p. 29.

<sup>206</sup> Ibid, pp. 29-30.

<sup>207</sup> See Burazin, Gardašević and Krešić, (fn 90), at pp. 238-239 – rejection of grammatical legal interpretation and interpretation of legal rules in light of constitutional principles.

not taking into consideration the wider policy context of the rules, their goal and objectives, and their values. Arguably, the economic values are not considered due to the unfinished economic transition and planned economic legacy. With the passive stance of the competition authority in the realm of antitrust advocacy, this consequence is not to be wondered about. Only with a competition authority communicating its mission, and an internal awareness of the goals it wants to pursue, the policy arguments should find their way into the consciousness of the courts in concrete cases. Targeted constitutionalisation, i.e. protecting economic values in competition cases, should change the adjudicative landscape in post-socialist jurisdictions and mark a departure from features of an authoritarian legal culture legacy.

Staničić notes that the Croatian Constitutional Court, since 2008, regularly condemned the phenomenon of excessive legal formalism and the grammatical method of legal interpretation by the courts and administrative bodies.<sup>208</sup> However, examples of Constitutional Court decisions, warning of formalism in interpretation by ordinary courts, can be found throughout the early 2000s.<sup>209</sup> Indeed, it is observed 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’.<sup>210</sup> ‘For years, the Constitutional Court has persistently reiterated that the competent bodies, including the courts, are obliged to interpret the applicable law always and without exception in the light of the particular circumstances of each particular case’.<sup>211</sup> The Constitutional Court held that ‘[a]lthough the abstract evaluation of the legislation itself is important for the realization of the rule of law, the categorical nature of objective law does not mean that legal rules can be applied to specific life situations so inflexible mechanically and blindly that it becomes impossible to respect the imperatives of reasonableness and fairness; in such a case, this always boils down to excessive formalism which is [in itself] contrary to the Constitution’.<sup>212</sup>

In the competition law realm, the early pre-accession period saw a very flexible, non-formalistic attitude of the Constitutional Court towards the controversial issue of applying EU

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<sup>208</sup> Staničić (fn 89), at pp. 541 et seq, 547.

<sup>209</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 3).

<sup>210</sup> Staničić (fn 89), at p. 541; for examples of the Constitutional Court blaming administrative courts for excessive formalism see *ibid*, at pp. 542-543, eg permission is deemed an administrative act, while a decision on the issuance of such permission is not, fn 37.

<sup>211</sup> *Ibid*, at pp. 544-545.

<sup>212</sup> *Ibid*, at p. 545.

rules before Croatia's actual accession. It was questioned in several cases if the stance of the competition authority, applying EU rules to competition cases, was in fact in accordance with the Constitution. In the Euro-friendly *PZ Auto* case judgement, resolving the unsettled practice of the Administrative Court, the Constitutional Court held that EU rules were allowed to be used as interpretative instruments; a similar stance was previously taken by some CEECs' constitutional courts.<sup>213</sup>

We wonder then how the virus of excessive formalism 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>214</sup> As noted by Selanec, himself an insider, the Court's lacking institutional capacity adversely affects its ability to absorb European law and should be regarded as 'key factor' influencing the Courts' practice in this area.<sup>215</sup> Holding on to formalism by the Constitutional Court in the post-accession period, in our opinion, only helps to perpetuate low embeddedness of competition rules post-transition.<sup>216</sup>

## 8. CONCLUSION

Upon their EU accession, the post-communist countries of Central and Eastern Europe brought with them their legal culture, burdened with remnants of authoritarian legacy. In this paper, we discussed to what extent and in which ways this adversely impacted the enforcement of competition rules in the long run. Besides the instability of the normative framework in Croatia, due to major reforms in the area of administrative and competition law in the 2000s,

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<sup>213</sup> For details see Butorac Malnar and Pecotic Kaufman (fn 11); for similar position of the highest Czech and Polish courts, see Kühn, Z. (2005). The Application of European Law in the New Member States: Several (Early) Predictions. *German Law Journal*, 6(3), 563-582, at pp. 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 2).

<sup>214</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 3).

<sup>215</sup> See Selanec (fn 176), 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, eg in the field of free movement of goods.

<sup>216</sup> On a lack of embeddedness of competition rules in Croatia see Pecotić Kaufman (fn 9), and Pecotić Kaufman and Šimić Banović (fn 22).

we found that different features of authoritarian legal culture legacy 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. The emphasis on strengthening the functional independence of NCAs (in particular, in the context of the ECN+ Directive) seems in this context to be only partially addressing this issue. Rather than lingering at the institutional level, resolution of the semantic dissonance must go deeper, addressing more fundamental issues, as discussed in this paper. Organic development of competition law enforcement in post-communist countries, best ensured through sustained enforcement efforts, is essential to discover the proper function of antitrust.<sup>217</sup>

In this paper, we show how traces of authoritarian legal culture in post-socialist countries, using the example of Croatia, prevent the effective implementation of antitrust prohibitions. We found that the process of ‘transnationalising’ market values to the Croatian legal order,<sup>218</sup> as regards the cartel prohibition, encountered significant obstacles in the judicial arena post-accession.

The problem of a lacking embeddedness of competition rules in post-socialist countries<sup>219</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>220</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>221</sup>

Excessive formalism and other features of an authoritarian legal culture might have had an undisturbed life in the post-socialist jurisdictions before the Europeanisation process started. Post-accession, confronted with the mirror of the EU *acquis* and its fundamental liberal democratic context, their true nature is shown. The European legal tradition now reveals

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<sup>217</sup> See Pecotić Kaufman and Šimić Banović (fn 22).

<sup>218</sup> On ‘transnationalisation’ of values through EU law see Christian Calliess, Europe as transnational law - The transnationalisation of values by European law, *German Law Journal*, 10(10), 2009, pp. 1367-1382.

<sup>219</sup> As discussed in Pecotić Kaufman (fn 9).

<sup>220</sup> Rodin (fn 39), at p. 7.

<sup>221</sup> *Ibid*, pp. 1-22, at p. 7.

weaknesses in the authoritarian legal tradition, which proves inadequate to properly address the underlying goals of the competition prohibitions.

As shown in the paper, the Europeanization-driven transformative processes clashed with Croatia's authoritarian legal culture legacy, undermining 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, prevent the emergence of an enforcement tradition.

Two types of challenges, arising from the EU law template itself, make it difficult for the 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 the CEECs' lawyers and judges who 'still inhabit a realm governed by dogmatic textual positivism'.<sup>222</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 (very) slowly changing. We find that the fruits of an intensive pre-accession Europeanization process in the area of competition law failed to more fully affect the Croatian judiciary post-accession. 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>223</sup> Maczak et al. note

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<sup>222</sup> Kühn (fn 213), at p. 580.

<sup>223</sup> Looking at the 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-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. They argue that the accession has had both a direct and indirect influence on judicial behaviour in those countries, with the shift as a clear sign of departure from the classical French judicial style to reasoning, which serves as genuine guidance for both the parties and other judges in deciding similar cases. They argue that the more arguments a judge considers in the reasoning, the more the chance of socially sensitive, problem oriented and open minded decision making, with this kind of judicial thinking being of special importance in administrative cases where there is an asymmetry in strength between the litigating parties. Marcin Maczak, Mátyás Bencze and Zdenek Kühn, EU law and Central European judges: administrative judiciaries in

the following reasons for this shift: (1) the accession of those 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 taking 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>224</sup> However, Maczak et al. note that formalism in administrative adjudication has not fully disappeared.<sup>225</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>226</sup> Just as the influence of the 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, post-accession embrace of EU law is crucial in de-formalising the domestic legal culture. However, just as the Constitutional Court is aware of the role the 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 future, the same will be applicable to its own decisions in competition matters.

A question may be rightly asked why the process of embracing the EU law *acquis*, and leaving behind authoritarian legal influences, lasts so long. 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

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the Czech Republic, Hungary and Poland ten years after accession, in: Central European Judges Under the European Influence – The Transformative Power of the EU Revisited, Michal Bobek (ed), Hart Publishing 2015, at p. 70.

<sup>224</sup> Ibid, at p. 70.

<sup>225</sup> Matczak, Bencze and Kuhn offer explanation for the formalisms’ persistence 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 p. 71.

<sup>226</sup> Staničić (fn 89), at p. 538.



the autonomy is understood as an excuse for irresponsibility.<sup>227</sup> Several features seem prominent here: a lack of transparency regarding case-law publication, resistance to digitalisation, and barriers for horizontal mobility between the national judiciary and other professional careers for lawyers.<sup>228</sup> More generally, the overall legal culture – lacking critical discourse and practical orientation – is not helping. Lastly, a lack of specialization in the judiciary prevents novel areas of law, such as competition law, from gaining ground.<sup>229</sup> Čapeta hoped, in 2005, that ‘with proper education, judges can learn to function as Community judges’.<sup>230</sup> More than fifteen years on, we are still hopeful.

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<sup>227</sup> For a similar observation regarding the Central European judiciaries (judicial independence being used to cover up judicial shortcomings) and on the notion of judicial independence see Bobek (fn 48); on a misunderstood concept of independence see Emmert (fn 89), at p. 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>228</sup> For a similar observation as regards Central European countries see Bobek (fn 48), ‘no sign of lateral professional mobility’.

<sup>229</sup> More on the need for sub-specialisation by the administrative judiciary, particularly in “technically highly demanding” areas such as competition law, see Uzelac (fn 61), at pp. 100-101.

<sup>230</sup> Čapeta (fn 3).