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**The Adjustment of Moldova's Competition Law  
to European Union Competition Law**

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## **The Adjustment of Moldova's Competition Law to European Union Competition Law**

Dumitrița Bologan\*

### **Abstract**

*This paper explores the historical background of the political and economic relations between the Republic of Moldova and the European Union, presenting an overview of relevant documents such as the Partnership and Cooperation Agreement and the Association Agreement. Special emphasis is put on the development of competition law in Moldova as one of the main instruments for ensuring the function of a market economy. In this context, the paper also addresses the process of adjustment of Moldova's relevant legislation to the European Union competition law, describing the range of legal instruments and institutions involved in this process and the monitoring thereof by the European Union.*

**Key words:** European integration, Partnership and Cooperation Agreement, Association Agreement, European competition law, Moldavian competition law, adjustment of competition rules, neighbor policy.

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### **Abbreviations**

EC	European Community
ECJ	European Court of Justice
e.g.	exempli gratia lat. (for example)
ENP	European Neighbourhood Policy
EU	European Union
MSSR	Moldovan Soviet Socialist Republic
MCR	Merger Control Regulation
PCA	Partnership and Cooperation Agreement
p.	pagina lat. (page)
pp.	paginae lat. (pages)
TFEU	Treaty on the Functioning of the European Union
USSR	Union of Soviet Socialist Republics
WTO	World Trade Organisation

During the last several years, the Republic of Moldova has clearly demonstrated its dedication to adopting European Union values and principles, and it has committed itself to accept and adjust to the European model of political, economic, and social development. Following its declaration of independence, despite the Transnistrian conflict, the country has firmly declared its democratic aspirations and has developed its relations with the European Union.

After experiencing more than 40 years of a Soviet-type planned economy, the Republic of Moldova has adopted a market economy and has developed steady relations with the European Union. It has implemented the Partnership and Cooperation Agreement relatively well, which was followed by the Country Strategy Paper 2004-2006 for Moldova and the EU/Moldova Action Plan.

In addition to detailed commitments by Moldova to complete the transition process and to tackle its legislative, socio-economic, and political issues, these documents also provided separate sections for competition policy. They stipulated the adjustment of Moldovan competition law to European Union law, including its adherence to the principles of non-discrimination, transparency and procedural fairness, as well as the obligation to ensure the enforcement of competition rules, in particular, by establishing a national agency for the protection of competition which is a politically independent institution with adequate legal powers. This agency was required to have decision-making powers, the right to engage in investigations upon its own initiative, and the right to issue enforcement orders and effective sanctions. Furthermore, it was provided with adequate human and financial resources and responsible for the training of its administrative staff. The Association Agreement, signed this year, also underlines the importance of free and undistorted competition in trade relations.

The first approach to competition law and norms appeared in the Republic of Moldova through Law no. 906 of 1992 regarding limiting monopolistic activity and the development of competition. Although still primitive, this piece of legislation represented a foundation of competition-based principles and market behaviour in Moldova. The new Law no. 1103 of 2000 on the protection of competition established a broader regulatory policy in the field of competition. This law institutionalised the first competition authority in the Republic of Moldova that was responsible for promoting the state's competition policy by preventing, limiting, and suppressing anticompetitive activity. Finally, the Law on competition no. 183 of 2012 introduced European Union competition rules to the Moldovan legal system by faithfully transposing the relevant provisions of the TFEU and the Merger Regulation. Following a lengthy preparatory process, this law has aligned domestic competition law rules with EU legislation on competition law.

The adjustment of the Moldovan competition law has taken place over several years with external assistance. It now seems that Moldova has made good progress, compared to other countries in the region. Nevertheless, additional effort is needed to finalise the reforms that are already under way.

The crucial role of competition in ensuring consumer welfare, achieving optimal resource distribution, and providing strong incentives for efficiency and for the improvement of the technical and qualitative level of production is well known. Establishing a competitive environment not only ensures the optimal functioning of a competitive market economy, but also creates benefits for consumers. The effective enforcement of competition rules leads to the development of a competition culture and allows undertakings to learn how to follow the rules, and the preferences of consumers, and thereby, to become more aware of the advantages to themselves offered by competition.

In this respect, the newly transformed Competition Council has a vital role in continuing the legislative change, which is absolutely necessary to ensure a more effective and comprehensive mechanism for the enforcement and monitoring of competition law, and for the adjustment to the advanced practices of European Union countries.

## **1. European integration and the Republic of Moldova**

### **1.1 Historical background: political and economic relations between the Republic of Moldova and the European Union**

The first reference to the name "Moldova" dates from the time of the formation of the Principality of Moldova under Bogdan I in 1359. The peak of the Principality's development was in the 15th century under the rule of Stephen the Great, followed by approximately 300 years of Ottoman Empire suzerainty. In 1812, as a consequence of the Russo-Turkish war, the eastern part of the Principality of Moldova (Basarabia), situated between the Prut and Nistru rivers, was ceded to the Russian Empire, and the West (which is now part of Romania) remained within the influence of the Ottoman Empire. In 1917, after the Russian Revolution and the crisis in the tsarist army, representatives of the Basarabian intelligentsia created a parliamentary-type institution – the Country Council, which voted in 1918 for the unification of Basarabia with Romania. The European states officially recognised this union at the Paris Peace Conference in 1919. In response, in 1924, the Soviet Union created a small Autonomous Soviet Socialist Republic (now known as "Transnistria") along the Nistru river (Romania's eastern border). In 1940, Stalin occupied, following the Molotov-Ribbentrop Pact of August 1939, Basarabia. With some intermittent reversions to Romania, from 1944 to 1991, it had the status of the Moldovan Soviet Socialist Republic (MSSR).

In the context of the disintegration of the USSR and massive national movements, on 27 August 1989, during a Grand National Assembly attended by 750,000 Moldovans (about 1/6 of the then population), it was demanded that the Moldovan (Romanian) language with Latin script be proclaimed the state language. On 31 August 1989, the Supreme Soviet managed to adopt laws that fulfilled the demands of the people. On 23 June 1990, the Supreme Soviet of the MSSR adopted the "Declaration of Sovereignty"<sup>1</sup>, which stated that the MSSR was a unitary and indivisible state, and acknowledged the truth that all people are equal and have the inalienable right to life, liberty, and prosperity. Moreover, in order to "institutionalize justice, [and to] preserve legality and social stability", it recognised that the source of sovereignty is the people.

On 27 August 1991, the Parliament also adopted the "Declaration of Independence"<sup>2</sup>, which proclaimed that the Republic of Moldova was a sovereign, independent, and democratic state, free to decide its present and future, without any interference from outside. Moreover, it asked the states and governments of the world to recognise its independence, as it had been proclaimed by a freely chosen Parliament, and it expressed its willingness to establish political,

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<sup>1</sup> Declaration of Sovereignty of the Moldovan Soviet Socialist Republic No. 148-XII, published in *Vestile nr.8/192, 1990*, available in Romanian at <http://www.constcourt.md/pageview.php?l=ro&id=275&idc=11>

<sup>2</sup> Declaration of Independence of the Republic of Moldova, adopted by Law No. 691 of 27.08.1991, published on 30.12.1991 in the *Official Monitor* No. 11-12, available in Romanian at <http://lex.justice.md/viewdoc.php?action=view&view=doc&id=313228&lang=1>

economic, and cultural relations, as well as relations in other areas of common interest, with, *inter alia*, the European countries.

In its turn, on 16 December 1991, the European Union adopted a declaration on the “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union”<sup>3</sup>. In this declaration, the Community and its Member States adopted a common position on the process of the recognition of these states, respected the inviolability of all frontiers, and committed to the establishment of diplomatic relations.

On 2 March 1992, Moldova became a member of the United Nations, and in 1995, it was the first former member state of the USSR to become a member of the Council of Europe. It later became a member of the Organization for Security and Co-operation in Europe, the Central European Initiative, the South-East Europe Co-operation Initiative, the Euro-Atlantic Partnership Council, the World Trade Organization, the Stability Pact for South-Eastern Europe, and other international organisations.

Meanwhile, in September 1990, on the left bank of the river Nistru, separatists (mostly of Russian origin) declared the establishment of the Soviet Socialist Moldovan Transnistrian Republic. In March 1992, armed clashes began between the Transnistrian separatists and Moldovan forces. After the former Soviet 14th Guards Army entered the conflict, the Moldovan authorities no longer exercised effective control or influence in this territory.

The Republic of Moldova initiated its relations with the European Union after 27 August 1991. In July 1992, the European Commission proposed that several newly established independent – formerly Soviet – states, excluding Moldova, sign partnership and cooperation agreements. Following repeated letters from Moldova’s then president Snegur, addressed to the presidents of the European Council and the European Commission (in November 1993 and January 1994), the Agreement on Partnership and Cooperation between the EU and the Republic of Moldova was negotiated within a relatively short period and was signed on 28 November 1994. Because it took a relatively long time for this Agreement to enter into force in 1998, an “Interim Agreement on trade between the Republic of Moldova and the European Union” designed to foster immediate commercial exchange was signed on 2 October 1995, and it entered into force on 1 May 1996.

The entry into force of the Partnership and Cooperation Agreement on 1 July 1998 officialised the relations between the Republic of Moldova and the EU. This Agreement set up the legal basis for the implementation of the TACIS Assistance Programme in Moldova.

European integration, as a goal, appeared for the first time in April 1999 in the Activity Programme of the Government of the Republic of Moldova, where it was stated, “European integration is the main strategic objective of the foreign policy of the Republic of Moldova. This direction is determined by objective factors such as the building of a democratic and prosperous state, based on a market economy and its integration in the European security and stability area”. For the coordination of the process of integrating the Republic of Moldova into the European Union, a department for European Integration was to be created.

On 27 December 2001, the Country Strategy Paper for Moldova 2002-2006<sup>4</sup> was adopted, which focused on institutional, legal, and administrative reform, the private sector and economic development, as well as the alleviation of the social consequences of the transition. It also defined further objectives for future cooperation with the EU.

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<sup>3</sup> Available at <http://207.57.19.226/journal/Vol4/No1/art6.html>

<sup>4</sup> Available at [http://eeas.europa.eu/moldova/csp/02\\_06\\_en.pdf](http://eeas.europa.eu/moldova/csp/02_06_en.pdf)



In March 2003, Moldova was granted the status of a special EU neighbour. The European Commission issued a communication entitled “Larger Europe-neighbourhood: a new framework for the relations with Eastern and Southern EU neighbours”<sup>5</sup>, in which it emphasised the need to preserve a peaceful and prosperous neighbourhood and the promise that, in return for concrete progress in reforms, the EU’s neighbourhood countries would benefit from closer economic integration with the EU.

The EU integration of seven new states in 2004 brought Moldova closer to the EU. In December 2009, the European Neighbourhood Policy and an Action Plan for Moldova was passed. This new level of collaboration required a series of measures to be undertaken which opened new perspectives for Moldova.

Over the years, in close collaboration with the OSCE, the EU has played an important role in the process of settling the Transnistrian conflict. The Union has also used an array of CFSP instruments to support the conflict resolution process – including the appointment of an EU special representative, the introduction of a travel ban against the Transnistrian leadership, as well as common actions under the ENP Action Plans with Moldova and Ukraine relating to conflict resolution in Transnistria<sup>6</sup>.

In January 1994, the first Moldovan Ambassador to Belgium was accredited as the head of the Republic of Moldova’s Mission to the European Union. The Delegation of the European Union to the Republic of Moldova was established in October 2005.

During these first years of strengthening its institutional framework, the Republic of Moldova has benefited from important European financial aid. From 1991 to 2006, it amounted to 320,72 million Euros<sup>7</sup>. During 2007-2013, the EU assistance to Moldova exceeded 560 million €, and in 2014, it was intended to increase further.

Moldova became an immediate neighbour to the EU in January 2007, when Romania became a Member State. In June 2008, the Republic of Moldova – EU Mobility Partnership was launched.

In 2010, the Dialogue on the visa liberalisation regime and the establishment of the Deep and Comprehensive Free Trade Area were initiated, and in September 2011, the European Parliament adopted the Resolution pertaining to negotiations on the Association Agreement.

Currently, the EU is Moldova's predominant trading partner with 54% of Moldova's total trade. Overall trade with Moldova accounts for only 0.1% of the EU's overall trade. Machinery, transportation equipment, chemicals, fuels, mining products, and agricultural products dominated EU exports to Moldova (€ 2 billion in 2012). EU imports from Moldova (€ 940 million in 2012) are mainly agricultural products, clothing, textiles, and machinery<sup>8</sup>.

## **1.2 The Partnership and Cooperation Agreement between the EU and the Republic of Moldova**

Relations between Moldova and the EU gained momentum and became institutionalised with the conclusion on 28 November 1994 and entry into force on 1 July 1998 of the Partnership and Cooperation Agreement between the European Communities and their Member States and the

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<sup>5</sup> Available at [http://eeas.europa.eu/enp/pdf/pdf/com03\\_104\\_en.pdf](http://eeas.europa.eu/enp/pdf/pdf/com03_104_en.pdf)

<sup>6</sup> Popescu, (2006, p.1)

<sup>7</sup> According to the Ministry of Foreign Affairs and European Integration of the Republic of Moldova, at <http://www.mfa.gov.md/privire-general/>

<sup>8</sup> Available at <http://ec.europa.eu/trade/policy/countries-and-regions/countries/moldova/>

Republic of Moldova<sup>9</sup>. The main reasons for such a long stand-by period in EU-Moldova relations include the lack of an efficient political dialogue between the parties, the initiation of the Transnistrian conflict and the fragility of the internal situation, political uncertainty, insufficient strengthening of sovereignty, weak institutional bodies, and, within this context, the difficulty of identifying powerful internal and decision-making actors<sup>10</sup>.

Legally, the PCA was a mixed agreement based on Articles 113 and 235 of the EC Treaty<sup>11</sup>, as it covered areas in which the Community was not exclusively competent. Its entry into force thus required ratification by the Member States. Furthermore, the European Parliament's assent was required for its conclusion, as it established "a specific institutional framework by organizing co-operation procedures"<sup>12</sup>. However, in comparison with the European Agreements/Association Agreements, the PCA did not provide for an association objective. The document, concluded for a 10-year period, with automatic prolongation, established the legal framework for the relations between Moldova and the EU in the political, economic, commercial, legal, and cultural-scientific fields.

According to Article 1 of the Agreement, a partnership has been established between the Community, on the one part, and the Republic of Moldova, on the other part, with the following objectives:

- to provide an appropriate framework for political dialogue between the Parties to allow the development of political relations;
- to promote trade and investment, and harmonious economic relations between the Parties, and so, to foster their sustainable economic development;
- to provide a basis for legislative, economic, social, financial, and cultural cooperation;
- to support the efforts of the Republic of Moldova to consolidate its democracy and develop its economy, and to complete the transition into a market economy.

The PCA established a three-stage institutional hierarchical scheme: the Cooperation Council, the Cooperation Committee, and the Parliamentary Cooperation Committee. The Cooperation Council, which meets once a year, includes members of the Government of the Republic of Moldova, members of the Council of the European Union and Members of the Commission. A Cooperation Committee composed of members of both parties at the civil servant level assisted the Council. Upon the entry into force of the PCA, each body held 8 sittings<sup>13</sup>. The Parliamentary Cooperation Committee is a forum for members of the Moldovan Parliament and the European Parliament to meet and exchange views. Monitoring the implementation of the PCA in the political, economic, legal, financial, social, and cultural spheres, and promoting political dialogue are the primary tasks of these institutions.

Article 48 of the PCA governs the issues related to competition law. Paragraph 1 of Article 48 reads as follows:

*"The Parties agree to work to remedy or remove through the application of their competition laws or otherwise, restrictions on competition by enterprises or caused by State intervention insofar as they may affect trade between the Community and the Republic of Moldova."*

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<sup>9</sup> Ratified by Parliament Decision No. 627-XIII of 03.11.1995, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:21998A0624%2801%29&from=EN>

<sup>10</sup> Chirilă, (2001, p. 3)

<sup>11</sup> [now: Articles 284 and 268 of the TFEU]

<sup>12</sup> Hillion, (1998, p. 405)

<sup>13</sup> Gheorghiu, (2007, p.12)

Paragraph 2 of Article 48 indicates the measures, which must be taken in order to fulfil the objectives mentioned in paragraph 1. The Parties must ensure that they have and enforce laws regarding restrictions on competition. Furthermore, they must refrain from granting State aid that favours certain undertakings or the production of goods other than primary products or the provision of services, which distort or threaten to distort competition, so that trade between the Community and the Republic of Moldova is affected. Moreover, each of the Parties is obliged to provide, upon request from the other Party, information on its aid schemes or on particular individual cases of State aid. No discrimination regarding the conditions under which goods are procured or marketed shall be made between the State monopolies of a commercial character of any of the Parties. In the case of public undertakings or undertakings to which Member States or the Republic of Moldova grant exclusive rights, the Parties shall ensure that there is neither enacted nor maintained any measure distorting trade between the Community and the Republic of Moldova to an extent that is contrary to the Parties' respective interests.

In Article 50 of the PCA, “the Parties recognize that an important condition for strengthening the economic links between the Republic of Moldova and the Community is the approximation of the Republic of Moldova's existing and future legislation to that of the Community. The Republic of Moldova shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community”. Competition law is one of the fields mentioned in paragraph 2 of Article 50, to which the approximation of laws shall be extended.

According to Chirilă<sup>14</sup>, by the conclusion of this Agreement, a new, fundamental, and more advanced chapter has been opened for Moldova. First, it contributed to the strengthening of Moldova's statehood and its independence, which were still fragile. The country managed to affirm itself as an international actor and gained credibility in its process of implementing democratic values. Second, the PCA should not be seen simply in terms of a simple agreement that sets out the rules required to govern the further development of bilateral relations, but as more of a commitment between the two parties for the affirmation of democratic values. Thus, the EU has committed to support Moldova's efforts aimed at strengthening its democracy and making the transition to a market economy. In turn, Moldova is committed to democratic values and the principles of international law, human rights, and a market economy. Third, the PCA established a political dimension of Moldova's cooperation with the EU, thus transcending the purely economic objectives of trade and economic cooperation. The Parties undertook to promote a political dialogue aimed at consolidating the rapprochement between the Republic of Moldova and the European Union to support the political and economic changes in Moldova. Furthermore, they wanted to contribute to a convergence of positions in international issues of mutual interest, to encourage their cooperation in matters relating to democratic principles and finally to strengthen stability and security in Europe.

For the implementation of the provisions, Moldova has carried out some institutional reforms, including the establishment of:

- the National Commission for European Integration (2002), which approved the Concept of Integration of the Republic of Moldova into the EU on 16 September 2003 and submitted it to the European Commission;
- the Parliamentary Committee for European Integration (2003);
- the Department of European Integration of the Ministry of Foreign Affairs and the subdivisions in charge of the European integration;

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<sup>14</sup> Chirilă, (2001, p.6-7)

- an inter-ministerial group in charge of legislative approximation (2004).

Although the PCA did not offer a prospective membership, or any sort of association with the European Union, it has managed to develop free trade conditions with the European Union.

Although the implementation process has proven to be more problematic due to the unresolved dispute over Transnistria, which has weakened the whole process of the transition<sup>15</sup>, Moldova can be regarded as a relatively good example of PCA implementation, and, as such, as a partial success of the EU's policy. However, it does not yet guarantee the successful completion of the transition of Moldova, which faces incremental socio-economic and political problems<sup>16</sup>.

### 1.3 Other legal instruments

The PCA and the subsequent launch of the European Neighbourhood Policy set the foundations for further and deepened cooperation between Moldova and the EU. Consequently, various significant documents have been drafted that lay out the strategic objectives, which are based on commitments to shared values and the effective implementation of political, economic, and institutional reforms, such as the Country Strategy Papers, the European Commission's Communications, the Action Plan and Country Reports, the ENP Strategy, the resolutions and declarations of the European Parliament, as well as documents adopted on the national level. The most important documents will be briefly described hereinafter.

#### Country Strategy Papers for Moldova

The Country Strategy Paper 2004-2006 for Moldova<sup>17</sup> and the National Indicative Program established the strategic framework and the planning of EU assistance during 2005-2006. It described the EU approach and objectives, and the priority fields of EU cooperation with Moldova. The Attachment III of this document listed the competition law field as one of the new partnership perspectives and priorities for action.

Another Country Strategy Paper, issued for the years 2007-2013<sup>18</sup>, provided for the objectives of EU cooperation with Moldova, outlined the political, economic, social and environmental situation, described the lessons learned and outlined EU assistance priorities.

#### EU/Moldova Action Plan

The EU/Moldova Action Plan<sup>19</sup> was signed on 22 February 2005 for a 3-year period, and it did not replace, but rather, complemented the PCA. Thus, the Action Plan was not only a roadmap for Moldova to approach the European Union, but also a program of political and economic reforms that the Moldovan authorities themselves engaged to carry out.

The Action Plan invited the Republic of Moldova to "enter into intensified political, security, economic and cultural relations with the EU, enhanced cross border co-operation, and shared responsibility in conflict prevention and conflict resolution. One of the key objectives of this action plan will be to further support a viable solution to the Transnistrian conflict." Moreover,

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<sup>15</sup> Wallace, (2003, p.20)

<sup>16</sup> Zagorski, (2002, p. 11)

<sup>17</sup> Available at [http://eeas.europa.eu/moldova/csp/csp04\\_06\\_nip05\\_06\\_en.pdf](http://eeas.europa.eu/moldova/csp/csp04_06_nip05_06_en.pdf)

<sup>18</sup> Available at <http://www.enpi-info.eu/library/content/moldova-country-strategy-paper-2007-2013>

<sup>19</sup> Available at [http://eeas.europa.eu/enp/pdf/pdf/action\\_plans/moldova\\_enp\\_ap\\_final\\_en.pdf](http://eeas.europa.eu/enp/pdf/pdf/action_plans/moldova_enp_ap_final_en.pdf)

the implementation of the Action Plan was intended to advance the approximation of Moldovan legislation to EU norms, set the foundations for economic integration, and enhance trade and investment, thereby contributing to sustainable development.

Among the main priorities outlined in the Action Plan were: sustained efforts towards the resolution of the Transnistrian conflict, further strengthening the stability and effectiveness of institutions that guarantee democracy and the rule of law, reinforcing administrative and judicial capacity, so as to ensure the independence and impartiality of the judiciary, effectively fighting against corruption, respect for human rights and fundamental freedoms, including the rights of persons belonging to national minorities, ensuring a transparent and predictable investment climate and business conditions, implementing the privatisation program, etc.

Most of these objectives and actions were solely Moldova's responsibility, although 14 referred explicitly to the EU, and 40 referred to both the EU and Moldova; therefore, some observers consider that, despite the rhetoric employed, the EU-Moldova Action Plan was not a bilateral document, because there were only a few obligations undertaken by the EU<sup>20</sup>.

The benefit of the Action Plan, compared to the PCA, was the distinct section on the settlement of the Transnistrian conflict. Through the Action Plan, the EU committed itself to support the settlement of the Transnistrian conflict and to consider ways to strengthen its engagement<sup>21</sup>.

The Action Plan provided a separate section on competition policy. It stipulated that the Moldovan anti-trust legislation and control regime must be adequate and compatible with the EU. Moldova must "assess the effectiveness of the current legislative framework" (Competition law of 2000), which must include "respect for the principles of non-discrimination, transparency and procedural fairness", and it must "ensure the enforcement of the competition law". In particular, this was possible by establishing the National Agency for the Protection of Competition as provided in the law of 2000, as a politically independent institution. In favour of the competition agency, on the one hand, adequate legal powers have to be ensured; including decision-making powers, the right to conduct investigations on its own initiative, to issue enforcement orders and to impose effective sanctions (e.g. fines). On the other hand, adequate human and financial resources, as well as the training of staff in the competition administration had to be guaranteed.

Paragraph 37 of the document indicated the need to implement commitments on State aid under Article 48/2.2 of the Partnership and Cooperation Agreement, by developing full transparency in the field of state aid. Therefore, the Moldovan authorities were required to "establish a binding, uniform definition of State aid which is compatible with that of the EU (either by legislation or autonomous government act) and establish full transparency as regards State aid granted in Moldova, in particular by (i) drawing up a complete list of aid grantors, (ii) creating a national mechanism for centralising all information on state aid granted in Moldova, with a view to drawing up annual reports on the amounts, types and recipients of aid"<sup>22</sup>.

The idea of the Action Plan was to guide the work between the EU and Moldova. In regards to monitoring, the joint bodies, established under the Partnership and Cooperation Agreement, were to advance and monitor the implementation of the Action Plan.

Below are several pieces of legislation, which reflect some of the Moldovan authorities' efforts in regards to implementing provisions of the Action Plan.

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<sup>20</sup> *Buşcaneanu, (2006, p. 26)*

<sup>21</sup> *Ibid, p.32*

<sup>22</sup> Available at [http://eeas.europa.eu/enp/pdf/pdf/action\\_plans/moldova\\_enp\\_ap\\_final\\_en.pdf](http://eeas.europa.eu/enp/pdf/pdf/action_plans/moldova_enp_ap_final_en.pdf)

- Presidential Decree no. 957-III of 13 November 2002 on the establishment of the National Commission for European Integration<sup>23</sup>;
- Law of the Republic of Moldova no.151-XVI of 8 June 2006 on the abolition of the visa regime for citizens of member states of the European Union, the United States, Canada, Switzerland and Japan<sup>24</sup>;
- Law no.168-XVI of Moldova on 15 June 2006, according to which all laws and regulations, pending their approval, should be submitted to experts to determine their compatibility with EU law<sup>25</sup>;
- Moldovan Parliament Decision no. 84-XV of 28 February 2003 on the establishment of the Commission for European Integration of the Parliament of Moldova<sup>26</sup>;
- Moldovan Parliament Declaration on a political partnership for achieving European integration (24 March 2005)<sup>27</sup>.

The Action Plan served as a strong impetus for reforms, although there are some who are of the opinion that, during the implementation of the Action Plan process, Moldova failed to make significant progress. In particular, they were referring to the independence of the judiciary, the fight against corruption, and the respect for media freedom<sup>28</sup>, and that often, the political elites rhetorically commit to “shared values” in negotiations with Commission officials, but reverse the commitment in domestic politics<sup>29</sup>.

The ENP and the Action Plan brought a new dynamic to relations between the EU and Moldova; extended, specified and detailed their cooperation opportunities; updated the areas of dialogue; contributed to a more operational, visible and participative EU engagement in Moldova; added more elements of conditionality, especially with regard to political dialogue and reform. They also brought Moldova into a different spatial perspective based on the European neighbourhood and proximity concepts. Apart from this, the ENP and the Action Plan also caused Moldova to be more receptive, responsive, and responsible with regard to European values and standards in a broad spectrum of areas. With all of its objective and inherent deficiencies, this new attitude of the Moldovan authorities has been proven by the ways in which they engaged in the implementation of the EU-Moldova Action Plan, a process, which was crucial to the European destiny of Moldova<sup>30</sup>.

#### **1.4 The Association Agreement between the EU and the Republic of Moldova**

After a radical change of power in 2009, when the communist government was replaced by a democratic one, the political dialogue between the Republic of Moldova and the EU experienced qualitative changes. The government has continuously expressed its accession desiderates in accordance with Article 49 of the Lisbon Treaty, and it has made significant steps and invested major efforts in implementing reforms. Based on this coherent and substantial progress, a visa liberalisation dialogue with Moldova was opened in June 2010, and a Visa Liberalisation Action Plan was established. Finally, on 28 April 2014, Moldova became the first Eastern Partnership country to be granted a visa-free regime to the Schengen area.

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<sup>23</sup> Available at <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=291170>

<sup>24</sup> Available at <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=316512>

<sup>25</sup> Available at <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=316667>

<sup>26</sup> Available at <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=309668>

<sup>27</sup> Available at <http://old.parlament.md/news/25.03.2005/>

<sup>28</sup> Emerson, (2007, p. 24)

<sup>29</sup> Baltag, (2014, p. 53)

<sup>30</sup> Bușcaneanu, (2006, p. 39)



### The Association Agenda between the European Union and the Republic of Moldova

The Association Agenda, signed on 26 June 2014, establishes a set of jointly agreed priorities for the period of 2014–2016, which are aimed at preparing for the implementation of the Association Agreement, including the Deep and Comprehensive Free Trade Area (DCFTA).

The Association Agenda replaces the European Union – Republic of Moldova European Neighbourhood Policy Action Plan of 22 February 2005. It creates a practical framework for achieving political association and economic integration between the EU and the Republic of Moldova. The Association Agenda includes priorities such as, *inter alia*, strengthening the capacity of institutions guaranteeing democracy and the rule of law, further reforming the justice sector, ensuring respect for human rights and fundamental freedoms, the gradual convergence of foreign and security policy, effective cooperation on settling the Transnistrian conflict, cooperation on justice, freedom, and security, and economic cooperation. The Association Agenda also incorporates economic and trade elements, including a dedicated DCFTA chapter and cooperation in a number of sectors, such as energy, transportation, employment, and social policy.

The Agenda also covers matters related to competition, stating “the parties will work together to prepare the implementation of the competition chapter of the future Association Agreement and the related reforms. This cooperation will include work to: ensure that the Republic of Moldova’s institutional framework and its administrative capacity guarantee the effective implementation of the competition legislation and strengthen dialogue on the experience of enforcing legislation in this area, as well as on other legislative developments related to competition, including by providing training for the authorities and ad-hoc expert advice on the general enforcement of state aid rules<sup>31</sup>.”

### Association Agreement between the EU and the Republic of Moldova

The Association Agreement between the EU and the Republic of Moldova<sup>32</sup> represents the closest political and economic cooperation instrument with the EU that Moldova has ever had; it was initialled on 29 November 2013 and signed on 27 June 2014. The parties began negotiations (in total, 14 rounds) in 2010 and completed them on 25 June 2013. This document represents the legal recognition of the European route taken by Moldova.

The main objectives of the Agreement are to promote political association and economic integration, to strengthen the political dialogue, to contribute to the strengthening of democracy and to political, economic, and institutional stability in the Republic of Moldova. Moreover can be added: to support and enhance cooperation in the areas of justice, freedom and security, to support Moldova’s approximation of its legislation to that of the European Union, to establish conditions for enhanced economic and trade relations leading towards the Republic of Moldova's gradual integration into the EU Internal Market.

A special Chapter (10 under Title V - Trade and Trade-related Matters) is dedicated to competition. According to Article 334:

*“The Parties recognize the importance of free and undistorted competition in their trade relations. The Parties acknowledge that anti-competitive business practices have the potential to distort the proper functioning of markets and undermine the benefits of trade liberalization.”*

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<sup>31</sup> Available at <http://www.mfa.gov.md/agenda-de-asociere/>

<sup>32</sup> Available at [http://eeas.europa.eu/moldova/assoagreement/assoagreement-2013\\_en.htm](http://eeas.europa.eu/moldova/assoagreement/assoagreement-2013_en.htm)

Furthermore, Article 335 stipulates that each party shall have comprehensive competition laws that concern “anti-competitive agreements and concerted practices and anticompetitive unilateral conduct of undertakings with dominant market power and which provide effective control of concentrations” and maintain independent authorities to enforce the abovementioned laws, observing the principles of procedural fairness and the right of the undertakings to a defence.

According to Article 336, the parties are entitled to maintain or designate state monopolies and public undertakings or to entrust undertakings with special or exclusive rights according to their respective laws, as long as these entities are subject to competition laws. Furthermore, Article 337 establishes a platform for cooperation, coordination and the exchange of information between the competition authorities of the EU and Moldova, in order to improve the implementation of competition law and the provisions of the Association Agreement, and to hinder anti-competitive conduct or transactions.

The Association Agreement shall “enter into force after the Parties ratify or approve it in accordance with their internal procedures”. The Moldovan Parliament approved it on 2 July 2014.

The supervision and monitoring of the application and implementation of the agreement shall be delegated to an Association Council consisting of the members of the Council of the European Union, the European Commission, and the Government of the Republic of Moldova.

Nevertheless, according to a Moldovan official, “the Association Agreement with the EU is not our final objective. It just means that we can move much further”.

## **2. National legislative background**

### **2.1 Development of a legal and institutional framework for a market economy and competition law**

Having been part of Romania from 1918 to 1944 (with some intermittence), Romanian legislation was also applicable to the current territory of the Republic of Moldova.

The first normative act which referred to competition was the Law on unfair competition of 18 May 1932. This Law provided for a restrictive explanation of “unfair competition”, considering it to be the usage, in trade, of brand names, logos, special designs or wrapping, false indications of origin that might cause confusion with legitimate rights which had been previously acquired. An act of unfair competition was also considered “the production, import, export, deposit, [and the] sale of goods which provide false information regarding their origin”. These acts, committed with intention, were criminally punished, and the judgment indicated the “immediate annulment of the labels, stamps, packaging, and advertisement”. Moreover, while only the aggrieved party could exercise an action for damages, the Ministry of Justice and Commerce, the Ministry of Finance, the Chamber of Industry and Trade, as well as any other organisation responsible for defending professional interests also could exercise an action for the termination or elimination of competition. This law had a very case-to-case and occasional character, because it only referred to acts of unfair competition, confusion and false indications of origin.

Another legal act, the Decree for regulation and control of cartels of 10 May 1937, introduced preventive measures to obstruct monopolistic agreements. The power of exercising control was given to a specialised body within the Ministry of Industry.

During the socialist period (1944-1989), state monopolies and rigid planning of the economy were instituted. According to the Encyclopaedia of Soviet Law, planning “is the answer



to the inherent contradictions of capitalism, which result in anarchic development, the competitive struggle and periodic economic crises<sup>33</sup>". Therefore, from 1928 on, "the economy of the USSR [] operated within the framework of five-year plans". The plans were characterised by a centralised and fixed nature, with decisions on production, distribution, fixing prices and investments strictly established by the state. Thus, no competition would have been possible among enterprises, which were all owned by the state. Private economic activity was not permitted, except for personal needs, and the major economic activity was conducted by state-owned enterprises within a centralised system. Some steps to ease the centralised economy and to permit elements of a market into the Soviet Union were announced in the late 1980s in accordance with the new socio-economic policy called 'perestroika'. Finally, the Soviet planned economy proved to be incompatible with the increasingly rapid pace of development that was specific to other industrialised countries.

Starting with the fall of communism and the transition to a market economy, new regulations were adopted which were intended to restrain the abusive exercise of competition in the national market, but also in the external exchange of goods and services.

After the declaration of independence, various reforms began to be implemented. The government focused its efforts on the de-monopolisation of the economy by privatisation and price liberalisation, the introduction of private ownership and the promotion of trade. Unlike other CIS countries, Moldova did not have any pre-USSR laws from which to draw, and thus, it was effectively starting from scratch in its evolution of a competition environment<sup>34</sup>.

During the early 90s, there was a poor understanding of the market economy; however, major steps have been taken in this respect. There were still many Soviet legislative acts in force, in particular, the Civil Code enacted in 1964.

In 1990, the Moldovan Parliament adopted Decision no. 186 of 25 July 1990 on the concept of the transition to a market economy of the Moldovan Soviet Socialist Republic. This document stated that the then status of the economy was complicated, which was primarily due to the insufficient flexibility of state regulation in the sectors of the national economy, and the lack of complexity and consequence in carrying out economic reforms. Therefore, a decision was made "on the transition to [a] market economy as a model for management and [as the] main measure for [the] economic recovery of the country". The Government had the obligation to draft the structure, mechanisms and new policies for the transition to a market economy, to draft laws, train civil servants, create private enterprises, etc.

Another act under which exports and imports of goods and services were allowed to be performed by any person or legal entity, either as a state or private company, was the Law no.188-XII on regulating the import and export of goods and services, which was adopted on 26 July 1990<sup>35</sup>.

Further, the Republic of Moldova adopted a series of laws designed to restore market economic relations. In principle, these acts have poorly regulated the new emerging relationships; however, their adoption inspired optimism.

By Law no. 459 of 22 January 1991 on property<sup>36</sup>, the third type of property – private

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<sup>33</sup> *Feldbrugge, (1985, p. 588)*

<sup>34</sup> *Hristev, (2005, p. 453)*

<sup>35</sup> Abrogated in 2000, available in Romanian at <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=313327>

<sup>36</sup> Abrogated in 2007, available in Romanian at <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=312832>

property – was introduced. The law stated that the “establishing by the state, of any form of restrictions or advantages depending on the type of property is forbidden”. The norms also regulated the right to private property and the exercise of the right to private property established in Chapter III.

The first and most comprehensive document, which exclusively referred to competition was Government Decision no. 2 of 4 January 1991 on the urgent measures of the de-monopolisation of the national economy of the Moldovan Soviet Socialist Republic. It stipulated that the ministries, departments and other bodies of the state administration shall concentrate their efforts to “deter the existing structures of state administration and prevent situations that would lead to the formation of new monopolies; support the private producers of goods, private initiative; enterprises, institutions and structures of the market economy; accelerate the decentralised distribution of financial and material resources that contribute to the liquidation of monopolistic structures in the production and commodity circuit; provide legal protection to consumers and manufacturers against state and market monopolies”<sup>37</sup>. The decision also referred to limiting the abuses committed by legal entities with a dominant position in the market; prohibiting the conclusion of illegal agreements between economic entities that would prevent the normal operation of the market and the development of competition. It would harm the interests of the society and citizens; prohibiting discriminatory or favourable conditions, if such conditions restrict competition; and acts of vicious competition.

Law no. 627 of 4 July 1991 on privatisation<sup>38</sup> established the legal mechanism for regulating the transformation of state property and administrative units in private property, and determines the basic notions, goals, and methods of privatisation, the powers of the body authorised to carry out the privatisation and the peculiarities of post-privatisation activities.

Furthermore, the Government adopted Decision no. 361 of 24 July 1991 on urgent measures for stabilising the economy and creating the infrastructure of a market economy in the Republic of Moldova.<sup>39</sup> This document indicated the need to create a competition environment in the Republic of Moldova. It stated that the Government shall “create legal, organisational, and socio-economic conditions for the development of citizens’ and collective business, train and support the management personnel of enterprises and land properties by means of denationalisation and privatisation, creating a competition environment based on de-monopolisation of the economy and various forms of ownership”.

Law no. 845 of 3 January 1992 on entrepreneurship and enterprises<sup>40</sup> represents a miniature commercial code, because it regulates entrepreneurial activity and establishes the circle of persons who can perform it.

Due to the authors’ poor expertise and understanding of market economy principles or unsuccessful attempts to reproduce the provisions of some European states without adapting them to the Moldovan realities, these normative acts were soon amended or replaced. Further, new laws were adopted on joint stock companies, cooperatives, and production business cooperatives, insolvency, the protection of competition, capital markets, investments in entrepreneurial activity, and various other legal norms. The adoption of the Civil Code in 2003 was of particular importance, because it included unified private law norms, regulating, *inter alia*, the rules of entrepreneurial activity and the legal status of different types of businesses.

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<sup>37</sup> Available in Romanian at <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=300051>

<sup>38</sup> Available in Romanian at <http://lex.justice.md/viewdoc.php?action=view&view=doc&id=313321&lang=1>

<sup>39</sup> Available in Romanian at <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=301362>

<sup>40</sup> Available in Romanian at <http://lex.justice.md/viewdoc.php?id=311735&lang=1>

## 2.2 Development of competition law

### 2.2.1 Law on limiting monopolistic activity and the development of competition of 1992

The first law, which regulated the relations between undertakings and state bodies, was Law no. 906 of 29 January 1992 on limiting monopolistic activity and the development of competition<sup>41</sup>. The limitations on monopolistic activity included: the non-admission of abuses of a dominant position in the market, such as creating obstacles to entering the market, introducing discriminatory conditions in contracts, etc. It also included prohibiting agreements which limit competition between undertakings that have a dominant position in the market if these agreements limit or may limit competition (by dividing the market, or removing or limiting access for a third party); and establishing prices, tariffs, discounts, etc. The state bodies are prohibited from adopting acts or taking actions in order to limit the independence of or limit competition between undertakings.

In 1992, the state body regulating anti-monopolistic activities was the Ministry of Economy, which was responsible for developing measures to create market relations that were based on developing entrepreneurial activity and competition, preventing, limiting, and suppressing monopolistic activity, and the observance of anti-monopolistic legislation and anti-monopolistic activity of undertakings.

In cases involving the violation of these provisions by an undertaking or a state institution, the Ministry of Economy would issue a disposition that forced them to liquidate the breach, to restore the original situation, to terminate or modify the contract or agreement, or to cancel or modify the illegal act.

The Ministry of Economy examined cases of infringements of the abovementioned law based on the declarations of undertakings, state administrative bodies, evidence provided by the competent prosecutor's office and by the court, on its own initiative. The disposition of the Ministry could be appealed in a court, which could declare it integrally or partially null.

In conclusion, it can be stated that the provisions of this law indicate that they were mainly based on concepts of the Community of Independent States, as they were conceived on a rather statist economy, because the Ministry of Economy was empowered to regulate the contracts of undertakings with a dominant position in the public utilities sector<sup>42</sup>. Moreover, the law provided no definition of competition, monopoly or other terms pursuant to which it operates. It presented a rudimentary description of monopolistic activity, and the prevention and limitation of monopolistic actions.

### 2.2.2 Law on the protection of competition of 2000

Law no. 1103-XIV of 30.05.2000 on the protection of competition<sup>43</sup> provided a broader regulatory state policy in the competition field, stating that the "State recognises fair competition as one of the fundamental factors of the development of the economy. In [the] competition field, the state promotes a policy of ensuring the free entrepreneurship activity and protection of fair competition".

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<sup>41</sup> Abrogated in 2012, available in Romanian at <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=311742>

<sup>42</sup> *Toderiță, (2012, p.4)*

<sup>43</sup> Abrogated in 2012, available in Romanian at <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=312910>

This normative act built on the law on limiting monopolist activity by making a clear distinction between the abuse of a dominant position, anti-competitive agreements, unfair competition, and the activities of public administration authorities to limit competition. It enshrined the prohibitions for undertakings with a dominant position and the types of agreements, which were interdicted. It also listed the acts of unlawful competition and the actions of the public administration authorities, which were considered to limit competition.

The law institutionalised the first competition authority in the Republic of Moldova – the National Agency for the Protection of Competition, which was to be responsible for “promoting the state policy in the field of competition; preventing, limiting and suppressing anticompetitive activity and exercising state control over [the] observance of legislation on [the] protection of competition and advertising”.

The Agency was entitled to adopt decisions in cases involving the violation of competition law and to impose fines upon undertakings for anticompetitive activity. Its staff enjoyed free access to the spaces and territories of the public administrative authorities, undertakings, legal entities and individuals, and based on a written request, it could gain access to and receive the necessary documentation. The in force Code of administrative offences of 1985 poorly regulated the liability for violating the legislation on the protection of competition; it envisaged an insignificant fine for the failure to execute or the late execution of the dispositions of the state antimonopoly body, or for the failure to submit information or the submission of false information to that body. In addition, the Criminal Code of the Republic of Moldova, dated 18 April 2002, contained provisions establishing criminal liability and penalties for the limitation of competition and unfair competition. The law also regulated the process of adopting, enforcing, and appealing the decisions of the National Agency for the Protection of Competition. Together with the law, the Parliament also adopted a Regulation of the National Agency for the Protection of Competition, which indicated the main tasks, functions, management, budget, and transparency of the activity.

The main drawbacks<sup>44</sup> of this law included the lack of a clear methodology for determining a dominant position in the market, the insufficient regulation of cartels and the lack of uniform and mandatory provisions on state aid.

However, the Agency was not created, *de facto*, until 2007, when the Parliament appointed the head of the Agency; this represented one of the obstacles to the implementation of competition policies for many years.

### **2.2.3 Law on competition of 2012**

Following a long process of drafting, public consultations, and parliamentary debates, the new Europeanised Law on competition no. 183 was finally adopted on 11 July 2012<sup>45</sup>. Many of the provisions contained in its 95 articles are a novelty for Moldova. The main purpose of the law was to align the domestic competition law norms with EU legislation on competition law. According to the European Commission Joint Staff Working Document “Implementation of the European Neighbourhood Policy in Republic of Moldova: Progress in 2012 and recommendations for action”, the competition law “follow[s] EU rules closely”<sup>46</sup>.

The drafting of the new competition legislation has been supported by the EU-funded Twinning Project, “Support to implementation and enforcement of competition and State aid

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<sup>44</sup> *Toderiță, (2012, p.6)*

<sup>45</sup> Available in Romanian at <http://lex.justice.md/md/344792/>

<sup>46</sup> SWD (2013) 80 final, p. 13

policy”<sup>47</sup>, with the participation of experts from the competition authorities of Austria, Latvia and Romania.

The preamble of the law indicates that:

*“The present law transposes the provisions of articles 101-106 of the Treaty on the Functioning of the European Union as of 25 March 1957, EC Regulation No.1/2003 as of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, published in the Official Journal of the European Union No. L 1 as of 4 January 2003 and partially the (EC) Regulation No. 139/2004 of the Council as of 20 January 2004 on the control of concentrations between undertakings, published in the Official Journal of the European Union No. L 24 of 29 January 2004.”*

According to Article 1, “the law establishes the normative framework of the competition protection, including [the] prevention and counteract[ing] of the anticompetitive practices and unfair competition, of carrying out economic concentrations on the market, regarding the activity and competence of the Competition Council and the liability for infringing the legislation in the competition domain.” It applies to undertakings, which are registered in Moldova and in foreign countries, and to individuals and local central public administration authorities that, by their actions or inactions, restrict, prevent, or distort competition. Such actions may/could be actions performed within or outside the territory of Moldova if they produce or may produce legal effects in Moldova.

The law provides thorough definitions of many of the most important institutions with which it deals. In regards to anticompetitive agreements, notions such as the prohibition of hard-core cartels and anticompetitive agreements of minor importance have been added. In fact, the provisions, which prohibit anti-competitive agreements mirror Article 101 TFEU, adding two more types of restraints – bid rigging and restricting market access, and those involving a refusal to deal. Article 6 of the law lists the exemptions for anti-competitive agreements. On the other hand, “for economic sectors where the competition is restricted or does not exist and in exceptional circumstances, such as: crisis situations, major imbalance between demand and supply, the Government is entitled to order and/or enforce temporary measures to prevent or even block excessive price increase”<sup>48</sup>.

The concept of concerted practices, however, has not been further clarified in the new law. In the past, the National Agency for the Protection of Competition has encountered significant difficulties in substantiating its concerted practice scenarios before the courts<sup>49</sup>.

In regards to dominant positions, the former presumption of dominance when holding 35% of the shares in a relevant market has been replaced by a presumption of dominance when holding 50% of the shares<sup>50</sup>. There is a separate chapter of the law, which details the method of establishing the relevant market. Moreover, the new legislation abolishes the regime of *ex ante* dominance determination and brings it into the ambit of the Competition Council’s investigations into alleged abuses of a dominant position and merger control<sup>51</sup>. Article 102 is faithfully reflected in Article 11 of the law, with several exceptions. While Article 102 TFEU covers unfair purchase and selling prices, the Moldovan law addresses two distinct types of conduct: (1) imposing, directly or indirectly, unfair purchasing or selling prices, or other unfair trading conditions; and (2) charging

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<sup>47</sup> <http://www.ncu.moldova.md/pageview.php?l=en&idc=581>

<sup>48</sup> Article 3, par. (4)

<sup>49</sup> Svetlicinii, (2013, p. 212)

<sup>50</sup> <http://turcanlaw.md/news/the-new-competition-law-has-been-adopted>

<sup>51</sup> Svetlicinii, (2013, p. 213)



excessive or predatory prices, with the aim of driving out competitors. Several scholars imply that these provisions have been drawn from the Romanian competition law<sup>52</sup>.

The law also prohibits the following actions or inactions regarding competition restriction, as well as prevention or distortion by the authorities and central or local public administration institutions: the “limitation of [an] undertaking’s rights to purchase or commercialise; [the] setting [of] discriminatory conditions or [the] granting [of] privilege[s] to [an] undertaking’s activity, [if it is] not provided for by the law; [the] setting [of] interdictions or restrictions, which are not provided for by the law, related to the activity of undertakings; imposing, directly or indirectly, [] undertakings to associate or concentrate, irrespective of the form”<sup>53</sup>. The only exception from this provision might apply in cases involving the elimination of the consequences of natural calamities and disasters, and the prevention of epidemics.

This law also stipulates the acts constituting unfair competition, such as the disparagement of competitors, incitement by a competitor to terminate a contract, acquiring and/or illegal use of a competitor’s commercial secrets, stealing a competitor’s clients and creating confusion.

The merger control field has been newly regulated by the obligation of the merging companies to obtain, prior to the merger, permission from the Competition Council. This should be the case if the cumulative turnover of the merging companies exceeds 25 million MDL for the year prior to the merger, and if there are at least two merging companies, each with a total turnover of over 10 million MDL for the year prior to the merger<sup>54</sup>. The laws also describe the steps, which are taken by the Competition Council in the process of notifying the parties, investigating and assessing economic concentrations, calculating the aggregate turnover, and issuing decisions.

The provisions on the relevant market are also new for the Republic of Moldova. The Law on competition describes the main goals, objectives, time limitations, and the fundamental principles of the relevant market definition. It also establishes the procedure for establishing the relevant market, the types of evidence and the manner of calculating market shares.

The attributions, functioning, and structure of the Competition Council are also described in detail. It regulates the investigations, the procedure of carrying out inspections, the rights and obligations of Competition Council employees, and the rights and obligations of the persons subject to inspections, the exercise of defence rights, the regime of documents and information contained in the files of the Competition Council, the hearings of the parties and other legal or natural persons, the decision-making process and communication. It also regulates the manner of the execution of decisions and prescriptions, the observance of the execution of the measures applied, the general rules of individualisation, the determination of fines for competition law infringements. Finally, it is to name that the deeds deemed to be the infringement of the procedural and material norms of competition legislation, the establishment of the base level of fines for infringements, the payment of penalties, the limitation periods for the application and the enforcement of sanctions and the leniency policy are regulated too.

Some of its conceptual distinctions from the previous law on the protection of competition include: the more complex and detailed approach of the new law, the high degree to which EU legislation is transposed, the detailed explanations of horizontal and vertical agreements, the “test” for determining the dominant position of an undertaking or a group of undertakings. Moreover, it is to name the very well regulated procedure for notifying the Competition Council and the introduction of the leniency policy.

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<sup>52</sup> Chivriga, (2013, p.5), Svetlicinii,(2013 p. 214)

<sup>53</sup> Available in Romanian at <http://lex.justice.md/md/344792/>

<sup>54</sup> <http://turcanlaw.md/news/the-new-competition-law-has-been-adopted>

Some<sup>55</sup> consider that the very detailed provisions of the law should be reflected in secondary legislation, such as regulations and internal guidelines. Any potential amendments to this law, deriving from the Competition Council's further experience might be, therefore, difficult to carry out, because it would require the Parliament to vote.

Finally, it can be stated that this approximation of a "Competition Code" is generally fairly well adjusted to the relevant EU competition rules and principles. It is one of the most progressive pieces of legislation, as it introduces new attitudes, principles, procedures, and mechanisms, which with the Competition Council will have to deal.

#### 2.2.4 Other related legislation

In addition to the Law on competition, there are various other Moldovan legislative acts, which regulate different types of social relations from a broader or narrower perspective.

According to Article 9, para. (3) of the Constitution of the Republic of Moldova<sup>56</sup>, "the national economy is based on the interaction of market forces, also on free economic initiative and fair competition". Article 126, para. (1) provides that "the economy of the Republic of Moldova is a socially-oriented market economy based on the coexistence of freely competing private and public properties". Moreover, the state must ensure "the freedom of trading and of entrepreneurial activity, the protection of loyal competition, the setting up of an appropriate framework for developing all factors capable of stimulating production".

The Criminal Code<sup>57</sup>, in Article 246, regulates the limitation of fair competition and sets a penalty of a fine or imprisonment of up to three years. Article 246<sup>1</sup> lists acts of unfair competition that are punishable with a fine or by imprisonment of up to one year for individuals, and for legal entities, a fine with the deprivation of the right to practice certain activities for a period of 1 to 5 years.

The Code on Contraventions<sup>58</sup> provides in Article 330<sup>1</sup> that hindering the legitimate activity of the Competition Council will result in a fine applied to individuals or to officials. Article 330<sup>3</sup> refers to infringements related to state aid, and Article 265 refers those related to advertising.

The Government Decision on the regulation of the monopolies of state and public administration bodies<sup>59</sup> lists the state monopolies and natural monopolies, as well as the government bodies empowered to regulate them.

Another newly adopted legal document is the Law on State Aid<sup>60</sup>. The law provides the legal framework for the authorisation, monitoring and reporting of state aid beneficiaries in all sectors of the economy except for agriculture, in order to maintain a normal competitive environment. Under this law, the duties of authorising, monitoring, and reporting state aid are attributed to the Competition Council.

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<sup>55</sup> Svetlicinii, (2013, p. 210-211)

<sup>56</sup> Adopted on 29 July 1994, available at [http://ijc.md/Publicatii/mlu/legislatie/Constitution\\_of\\_RM.pdf](http://ijc.md/Publicatii/mlu/legislatie/Constitution_of_RM.pdf)

<sup>57</sup> No. 985 of 18 April 2002, available in Romanian at

<http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=331268>

<sup>58</sup> No. 218 of 24 October 2008, available in Romanian at

<http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=330333>

<sup>59</sup> No. 582 of 17 August 1995, available in Romanian at

<http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=296512>

<sup>60</sup> No. 139 of 15 June 2012, available in Romanian at

<http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=344389>

The Law on advertising<sup>61</sup> also regulates certain competition issues. Because the law is relatively outdated, the Ministry of Justice of the Republic of Moldova has submitted a new draft law for public discussion. Some provisions related to competition can also be found in the Law on state regulation of external commercial activity<sup>62</sup>, the Law on electronic communications<sup>63</sup>, etc. In addition to the legislation currently in force, there are a series of new regulations that have been adopted by the Competition Council, which are meant to detail and to “put flesh on the bones” of the recent legal provisions, which were all approved on 30 August 2013<sup>64</sup>:

- Merger Regulation approved by the Competition Council Decision No. 17;
- Regulation establishing dominance and the assessment of the abuse of a dominant position approved by the Competition Council Decision No. 16;
- Regulation on the assessment of technology transfer agreements approved by the Competition Council Decision No. 15;
- Regulation on the assessment of anti-competitive horizontal agreements approved by the Competition Council Decision No. 14;
- Regulation on the assessment of vertical anti-competitive agreements approved by the Competition Council Decision No. 13.

### 2.3 The competition authority

According to the Competition Law of the Republic of Moldova, the Competition Council (formerly the National Agency for the Protection of Competition<sup>65</sup>) is an autonomous public authority accountable to the Parliament, which aims to ensure the implementation and enforcement of competition law, state aid, and advertising. The Council is vested with discretionary, regulatory, prohibitive, intervention and inspection and sanctioning powers within the limits set by the law. Article 39 of the law enumerates the following main tasks that lie within the competence of the Competition Council:

- a) advocates the competition culture;*
- b) drafts the necessary normative acts for enforcing the legislation on competition, state aid and advertising, within the limits of its competence;*
- c) issues opinions on the draft normative and legislative acts which may have anticompetitive impact;*
- d) addresses the competent bodies as regards the incompatibility of other legislative and normative acts with the legislation on competition, state aid and advertising, within the limits of its competence;*
- e) opens investigation as regards anticompetitive practices, unfair competition and other infringements of the legislation regarding the competition, state aid and advertising, within the limits of its competence, provided for by the present law;*
- f) by decision of the Competition Council, ascertains the infringements of the legislation regarding the protection of competition, advertising and state aid, applies interim measures as to the termination of the infringements, denounces and enforces sanctions for the commitment of the infringements, within its competence;*
- g) adopts decisions of the economic concentrations covered by the present law;*

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<sup>61</sup> No. 1227 of 27 June 1997, available in Romanian at <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=311557>

<sup>62</sup> No. 1031 of 08 June 2000, available in Romanian at [http://lex.justice.md/document\\_rom.php?id=8C090AE4:D163223B](http://lex.justice.md/document_rom.php?id=8C090AE4:D163223B)

<sup>63</sup> No. 241 of 15 October 2007, available in Romanian at <http://lex.justice.md/md/327198/>

<sup>64</sup> Available in Romanian at <http://competition.md/official-documents/competition/legal-framework/instructions-and-regulations.html>

<sup>65</sup> <http://old.competition.md/index.php>



- h) authorises, monitors and reports the state aid;*
- i) initiates actions in front of the court on cases within its competence;*
- k) carries out other tasks in compliance with the legislation on competition, state aid and advertising, within the limits of its competence.”*

The Competition Council consists of:

- the Board;
- an executive body which has:
  - specialised and operational subdivisions;
  - territorial branches;
- the Plenum – a collegial decisional body which consists of 5 members;
- the Council of Experts – a consultative, non-permanent body.

According to Article 46, the Plenum of the Competition Council shall adopt the following administrative acts with the vote of a majority of the members present:

- decisions on individual administrative acts, which state the infringement of the legal provisions, apply corrective measures and adequate sanctions, and serve the notifications of economic concentrations;
- by dispositions, investigations are initiated of alleged infringements of legislation regarding competition, state aid and advertising;
- by prescriptions, interim measures are ordered, and the public authorities, as well as the persons assimilated to public authorities, are obligated to cease the infringement and/or to remove the negative effects, as well as to annul or modify the normative or individual act, carry out certain actions, or refrain from them.
- resolutions are normative acts by which the acts are adopted, modified or revoked in order to ensure the organisation and activity of the Competition Council.

The decisions and provisions of the Competition Council may be appealed by the parties within 30 days from the date of receipt in the competent administrative court.

The examination procedure is initiated ex officio or at the request of a party. If the complaint does not meet the requirements, the Competition Council may initiate an ex officio investigation. If the complaint meets the requirements, the Competition Council may request evidence from the complainant. The burden of proof lies on the Competition Council. Undertakings or associations of undertakings are required to provide documents requested by the Competition Council. If there are reasonable grounds to suspect a breach of competition law, the Competition Council Plenum has the right to order an investigation. The Competition Council Plenum may conduct inspections and has the right to enter rooms, transport means, examine records and documents, to seize or obtain copies or extracts, to seal rooms, registers, or documents, to ask any representative or employee for explanations, and to request information stored on computers. Hearings on the cases are conducted in closed meetings of the Competition Council Plenum. The Competition Council may decide to terminate the investigation of the case because no evidence has been produced or to adopt a decision or prescription. The Competition Council's decisions and instructions shall be provided in writing to the relevant persons within 10 days from the date of their adoption. They are published on the website of the Competition Council. The Competition Council's decisions and instructions shall be enforced within the indicated period. The persons concerned are obliged to inform the Competition Council about measures taken for the enforcement of the decisions

within the time prescribed therein. In the case of the failure to enforce the decisions within the specified time, the Competition Council shall dispose their forced enforcement.

Compared to the tasks and powers of the previous competition authority, the current body enjoys the power to impose sanctions in the form of fines calculated to not exceed 5% of the annual turnover of the undertakings concerned. This amount can fluctuate depending on the aggravating or mitigating circumstances enumerated by the law. Moreover, following the leniency program of the European Competition Network<sup>66</sup>, the law introduced immunity, the reduction of fines (A and B) and a sliding scale for the reduction of fines.

The new legislative framework will present a significant challenge to the newly established Competition Council. It remains to be seen whether the Competition Council's human, financial, technical and administrative resources will lead to a coherent and effective enforcement of competition rules in Moldova<sup>67</sup>.

### **3. Adjustment of the Republic of Moldova's competition law to European Union competition law**

#### **3.1 Legal instruments which provide for adjustment**

At the European Council in Copenhagen in June 1993, it was decided that accession would take place as soon as a country is able to assume the obligations of membership by satisfying the economic and political conditions. The existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union, and the ability to take on the obligations of membership, including adherence to the aims of political, economic, and monetary union, constitute further requirements for membership. Furthermore, the European Council in Madrid in December 1995 referred to the need, in the context of the pre-accession strategy, to create conditions for a gradual, harmonious integration of the applicant countries through the development of a market economy, the adjustment of administrative structures and the creation of a stable economic and monetary environment.<sup>68</sup>

Moreover, it clearly emerges that EU competition law and policy is a key element in any country's EU integration process and in the full range of trade and other agreements over the last twenty years between the EU and its partner countries<sup>69</sup>. In this context, given its European aspirations, over the years, Moldova has concluded several documents with the EU, which directly point to the adjustment of its competition legislation to that of the EU, thereby setting the necessary framework for the adjustment process.

#### **Partnership and Cooperation Agreement**

The Partnership and Cooperation Agreement between the Republic of Moldova and the EU encompasses the obligation of the Republic of Moldova to approximate its legislation to the EU. Article 50 of the PCA stipulates the following in paragraph 1:

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<sup>66</sup> Available at [http://ec.europa.eu/competition/ecn/mlp\\_revised\\_2012\\_en.pdf](http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf)

<sup>67</sup> Svetlicinii, (2013, p. 218)

<sup>68</sup> Van Miert, (1998, p. 1)

<sup>69</sup> Stuart, (2009, p. 13)

*“The Parties recognise that an important condition for strengthening the economic links between the Republic of Moldova and the Community is the approximation of the Republic of Moldova’s existing and future legislation to that of the Community. The Republic of Moldova shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community.”*

Paragraph 2 of the same Article indicates competition rules as one of the areas, which need to be approximated. Moreover, “the Community shall provide the Republic of Moldova with technical assistance as appropriate for the implementation of these measures, which may include, inter alia: the exchange of experts, provision of early information especially on relevant legislation, organisation of seminars, training activities and aid for translation of Community legislation in the relevant sectors.”

It seems that all the provisions related to the approximation of legislation of the PCA are of a very general nature and have no direct effect on establishing express rights and obligations for the legal domestic order.

Compared with the so-called Stabilisation and Association Agreements (SAAs), which the EU has recently signed with Western Balkan countries, it can be noted that the latter place more emphasis on economic integration in the EU and are not just limited to the establishment of trade relations with the EU, unlike the PCA. The SAAs have also imposed detailed and additional requirements relating to the approximation of competition law, intellectual property rights, and public acquisitions. Therefore, they go much further than the PCA, even if they are very similar<sup>70</sup>.

### EU/Moldova Action Plan

In the context of law adjustment, there are 39 references to legislation in the EU/Moldova Action Plan, including a number of specific requirements regarding the development and implementation of Moldovan competition law and policy, as well as its institutions, based on international and European standards. These requirements, while less legally binding than the PCA provisions, elaborate specific details and create specific priorities for the general gradual approximation commitments concerning competition law and policy in the PCA.<sup>71</sup>

Thus, chapter 38 sets forth the requirements to:

*“Implement, and build upon, commitments on anti-trust under Article 48.2.1. of the Partnership and Co-operation Agreement by ensuring adequacy and compatibility with the EU of the domestic anti-trust legislation and control regime.*

- Assess the effectiveness of the current legislative framework (competition law of 2000), including respect of the principles of non-discrimination, transparency and procedural fairness;*
- Ensure the enforcement of the competition law, in particular by:*
- Establishing the National Agency for the Protection of Competition provided for in the law of 2000, as a politically independent institution,*
- Ensuring adequate legal powers for the competition agency, including decision-making powers; the right to initiate an investigation on its own initiative, as well as enforcement orders and effective sanctions (e.g. fines)*
- Ensuring adequate human and financial resources, as well as the training of staff in the competition administration.”*

### National Development Strategy

The National Development Strategy of the Republic of Moldova for 2008-2011<sup>72</sup> represented the

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<sup>70</sup> Metodologia, p. 9-10

<sup>71</sup> Stuart, (2009, p.18-19)

<sup>72</sup> Adopted by Law no. 295 of 21.12.2007, available in Romanian at <http://lex.justice.md/md/326734/>

basis for the creation of policies related to priorities for the harmonisation of its national legislation with European legislation. The result of these policy-building activities was the design of clearly defined national priorities on the sectorial harmonisation of laws.

In particular, the Strategy committed Moldova to continue its efforts to translate the *acquis communautaire* into its national legislation and to ensure the consistent enforcement of the adopted European legislation. Moreover, it highlighted that, during the Strategy's implementation, the Government would pay special attention to issues identified in the Progress Reports developed by the European Commission under the European Neighbourhood Policy.<sup>73</sup>

As to the competition policy, it required the observance of the principles of fair competition, namely, in drafting a clear definition of state aid, types of aid, etc., and a new law for the protection of competition in line with international norms.

#### Government Activity Program: "European Integration: Freedom, Democracy, Welfare"

The Activity Program of the Government of the Republic of Moldova, "European Integration: Freedom, Democracy, Welfare" for 2011-2014<sup>74</sup>, set the following priority actions in respect of competition law:

1. Improve legal and institutional framework to ensure fair competition;
2. Develop and implement a legal framework on competition, approximated to EU legislation and EU recommendations that encourage collaboration between all representatives of the market and decision-makers in identifying and combating unfair competition by introducing sanctions for violations of legislation and the leniency program;
3. Strengthening the institutional capacity of the National Agency for the Protection of Competition to increase its efficiency and public accountability;
4. Ensuring fair competition in markets with monopolistic or dominant companies and encouraging the entry of new undertakings in these markets;
5. Reducing the state influence in highly competitive sectors, particularly through the denationalisation of state-owned shares.

#### DCFTA Action Plan

The Action Plan of the Republic of Moldova for the implementation of the Recommendations of the European Commission on establishing the Deep and Comprehensive Free Trade Area between the Republic of Moldova and the European Union, adopted by Government Decision no. 1125 of 14 December 2010<sup>75</sup>, established in Chapter 11 detailed key recommendations, actions to be carried out, deadlines and the responsible institution in the competition field. In 2011, the competition authority was required to draft and submit for adoption the new comprehensive law on competition and to redefine its role and its attributions, and to strengthen its capacities. Starting in 2012, it had to initiate the implementation of the new law, draft and implement a plan for the professional development of its staff, and draft guidelines on cartels, sanctions, leniency, vertical restrictions, merger control, abuse of dominant position and investigation methods.

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<sup>73</sup> Stuart, (2009, p.20)

<sup>74</sup> Available in Romanian at [http://www.mfa.gov.md/data/7203/file\\_487178\\_0.pdf](http://www.mfa.gov.md/data/7203/file_487178_0.pdf)

<sup>75</sup> Available in Romanian at <http://lex.justice.md/viewdoc.php?action=view&view=doc&id=341433&lang=1>

### Association Agreement

The Association Agreement also recognises the importance of the joint EU-Moldova ENP Action Plan in strengthening EU-Republic of Moldova relations and in helping to move the reform and approximation process forward, thus contributing to gradual economic integration and the deepening of their political association. This document contains 395 directives and regulations, which must be implemented into national law, thereby making Moldova a country with a more integrated *acquis communautaire*.

The adjustment of the Moldovan competition law has taken place over several years, mainly in the framework of the EU-funded project, “Support for the Implementation of Agreements between the Republic of Moldova and the European Union”, which was initiated in Chisinau in August 2008. Its overall objective was to assist the Moldovan authorities in implementing the priorities set out in the PCA and the Action Plan. One of the three components of the Project was to support the legal approximation<sup>76</sup> process in the Republic of Moldova as agreed in bilateral documents, as well as its effective implementation. On 29 March 2011, the Twinning Project, “Support the Implementation of Competition Policy and State Aid to Moldova<sup>77</sup>”, was launched. The timeframe of the project was 21 months, and its main partners were the Competition Council of Romania, the Federal Competition Authority of Austria, and the Competition Council of Latvia. The main objectives of the project were to:

- enhance the capacity of the National Agency for the Protection of Competition, in particular, the right to conduct investigations on its own initiative, to issue enforcement orders and to impose effective sanctions (such as fines);
- strengthen the enforcement of the new competition and State Aid legislation in line with commitments made by the Republic of Moldova in the framework of the PCA and the EU-Moldova Action Plan, targeting the competition authority, the judiciary and government officials;
- improve transparency concerning the granting of state aid in the Republic of Moldova;
- create a competition culture in the Republic of Moldova.

One of the main accomplishments and outcomes of this project was the development of a model structure of a national competition law in conformity with the *acquis communautaire*. In addition, key substantive provisions of a model structure of a national competition law, the organisation of the competition authority, and the development of the strategic matrix for actions for institutional development and a timetable for actions also have to be listed in this matter. These deliverables represented real and valuable help to the Moldovan competition authority and to the Government in the process of elaborating the draft law, building the capacity of the competition authority, organising training courses for different professionals on competition matters, etc.

### **3.2 Institutions**

In the Republic of Moldova, several bodies have been created whose main task, or one of their main tasks, is the adjustment of domestic norms to EU legislation.

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<sup>76</sup> The Moldovan legislation and doctrine does not make a distinction between the terms “adjustment” and “approximation”.

<sup>77</sup> <http://www.ncu.moldova.md/pageview.php?l=en&idc=581>

### Centre for the Harmonisation of Legislation

The Centre for the Harmonisation of Legislation was created in 2007 by Government Decision<sup>78</sup>. The Centre is a state institution subordinated to the Ministry of Justice with the aim of facilitating the process of the approximation of national legislation to EU legislation. The main tasks of the Centre are to<sup>79</sup>:

- monitor the harmonisation<sup>80</sup> of national legislation;
- prepare draft Annual National Plans for the Harmonisation of Moldovan legislation with EU law;
- coordinate the implementation of the National Plans;
- comment on the draft laws and regulations, which have European relevance, ascertain the compatibility of draft laws and regulations with EU law and draft compatibility statements;
- create and manage a database of national legislation, which has been harmonised with EU legislation;
- provide methodological assistance to central public administration authorities in harmonising legislation.

It is important to mention that the Centre has drafted Annual National Plans for the Harmonisation of Moldovan legislation with EU law since 2007. The Plan for 2011 provided for the drafting of the Competition law and a list of EU documents, which were to be incorporated in the law. The Plan also indicated the responsible institution, which was the competition authority, the draft law, the convergence table, the degree of compatibility with the EU acts and the draft law<sup>81</sup>.

### Parliamentary Committee for Foreign Policy and European Integration

This parliamentary body exercises control over foreign policy and European integration of the Government, coordinates the process of the adjustment of Moldovan legislation to European standards, initials treaties and other international instruments, and cooperates with the parliaments of other states and with inter-parliamentary bodies<sup>82</sup>.

### Competition Council

The Competition Council has been engaged in the process of adjusting the competition norms to European Union legislation. It has been the institution responsible for drafting the Competition law, and it has also invested impressive efforts in drafting secondary legislation. The adoption of this law contributed to a considerable improvement in the business environment by eliminating the authorisation procedure carried out by the competition authority for agreements that are likely to be competitive, rendering the merger controls more efficient through the implementation of

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<sup>78</sup> Government decision on the creation of the Centre for the Harmonisation of Legislation no. 190 of 21.02.2007

<sup>79</sup> <http://justice.gov.md/tabview.php?l=ro&idc=225>

<sup>80</sup> According to Romanian language terminology, the terms “approximation” and “harmonisation” have the same meaning. It should be noted, however, that competition law is not a matter for harmonisation under Articles 114-117 TFEU, because Articles 101 and 102 TFEU are directly applicable throughout the EU.

<sup>81</sup> The Annual National Plans of harmonisation are included in the database available on the website of the Ministry of Justice under the “Legislatia Nationala Armonisata”

<sup>82</sup> <http://www.parlament.md/StructuraParlamentului/Comisiipermanente/tabid/84/CommissionId/4/language/ro-RO/Default.aspx>

thresholds. Moreover, the procedure for the examination and investigation of anticompetitive practices about which it has been notified by undertakings and the transparency of the competition authority's activity<sup>83</sup> also has been improved. For the implementation of the law, the Competition Council has adopted six regulations, which are intended to contribute to the implementation of Moldovan competition norms in accordance with the EU:

- Regulation on the organisation and functioning of the Competition Council and the complaint template;
- Merger Regulation;
- Regulation on establishing dominance and assessing the abuse of dominance;
- Regulation on the assessment of technology transfer agreements;
- Regulation on the assessment of horizontal anticompetitive agreements;
- Regulation on the assessment of vertical anticompetitive agreements.

The latter 5 of these regulations transpose EU regulations, the European Commission's Communications and some of the ECJ case law.

### 3.3 The process of adjustment

With the launch of the Eastern Partnership in 2009, the EU stepped up its involvement in Eastern Europe and the South Caucasus. The offer of a closer relationship with its Eastern neighbours is contingent upon partner countries converging with EU norms and standards. Effective regulatory approximation in the economic field is therefore critical to anchoring the reform process in partner countries and to fostering further progress in the EU's relations with its Eastern neighbours.<sup>84</sup>

It seems that the system of EU rules was developed for market economies and is not easily transposed to Eastern partner countries, given their political, economic, and administrative context. In addition, the *acquis* is a fast-moving target that Eastern partners have found difficult to gauge, let alone to follow<sup>85</sup>. The levels of approximation promoted in the Eastern partner countries began to resemble those of candidate states, causing the approach to be rigid, complex, and technical. With DCFTAs, the EU has promoted a package of norms to be approximated with a limited scope for adjustments to the economic, social, and political context of the partner countries. Thus, paradoxically, the EU has increased the difficulty of approximation. It requires considerable short-term and medium-term effort and costs to be incurred by its Eastern partners, while the benefits are not uncertain, but are only likely to accrue in the longer term<sup>86</sup>.

The efforts of the Moldovan authorities have materialised in, first, the adoption by the Centre for the Harmonisation of Legislation of the Ministry of Justice in 2010 of a Methodology for the Harmonisation of Moldovan Legislation<sup>87</sup>, drafted together with the experts of the EU-funded Project "Support for the Implementation of Agreements between the Republic of Moldova and the European Union". It contains "best practices of several Member States and is intended to

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<sup>83</sup> Consiliul Concurenței, Raport, p. 8

<sup>84</sup> Study, Approximation of the national legislation of Eastern Partnership countries, p.4

<sup>85</sup> Id. p. 15

<sup>86</sup> Id. p. 21

<sup>87</sup> Available in Romanian at

[http://justice.gov.md/public/files/publication/Centrul\\_de\\_armonizare/Metodologia%20de%20armonizare%20a%20legislatiei%20RO.pdf](http://justice.gov.md/public/files/publication/Centrul_de_armonizare/Metodologia%20de%20armonizare%20a%20legislatiei%20RO.pdf)



represent a guideline to draft law authors on different methods to be used when drafting normative/legislative acts that are to be adjusted to the EU law<sup>88</sup>.

Moreover, the Government has adopted<sup>89</sup> a Regulation on the mechanism for the harmonisation of the legislation of the Republic of Moldova to European Community legislation. Therefore, the following stages must be observed in the law drafting process<sup>90</sup>:

1. Preliminary stage – identifying the institution responsible for the law drafting process. In the case of Competition law, the responsible institution is the competition authority;
2. Analytic stage – identifying and defining basic state priorities, international agreements (PCA or Association Agreement) or policy documents, translations in the Romanian language of the necessary EU legislative acts and their incorporation in the National Plan for the Harmonisation of Legislation. The provisions related to competition law have been listed above in sub-chapter 3.1.;
3. Transposition – national experts, with the assistance of EU experts, must draw up draft laws or propose amendments to the existent law to ensure their compatibility with EU legislation. In regards to the competition norms, the Moldovan specialists benefited from the comprehensive expertise of several foreign experts under the Twinning Project;
4. Implementation – work on the adequate implementation into practice and management of the effects in the existent institutional framework;
5. Credible enforcement – setting necessary measures for competent authorities (monitoring, inspection controls, corrective, and other measures) to ensure that the law is fully functioning and sector policy performance is improved.

According to Article 15 of the abovementioned Regulation, the proper transposition of EU legislation into national law may be done through

- a) direct transposition – the draft law which transposes the provisions of Community law must have the same legal effect as the implemented act, using, where appropriate, the legal language used by that act itself (or very similar language);
- b) domestic legislative creation – the draft domestic law uses the individual means at the state's discretion, creating the necessary framework for the enforcement of the Community act in strict compliance with its objective.

The following article indicates that the initiators of the normative acts shall introduce a statement in the law mentioning which of the two models has been used. In this regards, the preamble of the Moldovan Competition law currently in force states:

*“The present law transposes the provisions of articles 101-106 of the Treaty on the Functioning of the European Union as of 25 March 1957, EC Regulation No.1/2003 as of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, published in the Official Journal of the European Union No. L 1 as of 4 January 2003 and partially the (EC) Regulation No. 139/2004 of the Council as of 20 January 2004 on the control of concentrations between undertakings, published in the Official Journal of the European Union No. L 24 of 29 January 2004.”*

Before initiating the process, it is recommended that the authors become familiarised with the history of the adoption of this document by studying the European institution's proposals, opinions, various white or green papers, the case law of the European Court of Justice, its

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<sup>88</sup> Metodologia, p.5

<sup>89</sup> By Government decision no. 1345 of 24 November 2006

<sup>90</sup> Metodologia, p. 16-17



background, the reasons for its adoption, procedural issues, etc. It then should be included in the National Harmonisation Plan of the Ministry of Justice.

Upon drawing up the draft law, its initiators/co-initiators shall fulfil a Convergence Table and refer it to the Centre for the Harmonisation of Legislation and other public central administration authorities. Where there are differences between the draft domestic law and the transposed EU law, a separate note shall indicate the reasons for not fully transposing the European provisions, regardless of their type (economic, financial, social, etc.) and the respective arguments based on an appropriate impact analysis, studies or other documents.

*Table 1. Sample of a Convergence Table*

1. Title of the Community act, its subject and purpose					
2. Title of the domestic act, its subject and purpose					
3. Degree of compatibility					
4. Provisions and requirements of Community rules (article, paragraph)	5. Provisions of the domestic normative act (chapter, article, subparagraph, point etc.)	6. Differences	7. The reasons explaining why the draft is partially compatible or incompatible	8. Responsible institution	9. Deadline for ensuring full compatibility of the domestic act

*Source: Appendices to the Regulation on the mechanism of harmonisation of the legislation of the Republic of Moldova to the European Community legislation*

Moreover, the terminology used should be grounded in the European language. If any of the notions have already been defined by the national legislation, the authorities should ascertain whether they have the same meaning, and if not, the convergence table should indicate the steps to be taken to ensure full adjustment. The normative act which has been transposed should also be coherent with the domestic legal system. Therefore, if necessary, other laws shall be amended to avoid any conflict of norms<sup>91</sup>. The 137 page Convergence Table<sup>92</sup> drawn up by the Centre on the draft competition law concluded that it was compatible with EU legislation. It contains very few remarks on the differences, which mainly relate to the fact that the domestic law provides a broader scope or that certain provisions shall be later regulated by secondary legislation of the Competition Council. The adjusted document is afterwards submitted to the relevant ministries and to the Centre for the Harmonisation of Legislation, which drafts a Compatibility declaration for the respective document to EU legislation. Finally, the Ministry of Justice shall check the compatibility of the respective act with the Constitution and the legislative system, and submit it to the Government. However, the key challenge will be the actual implementation of the legal framework, which will rely on the political will of the respective governments to bear the related political and economic costs of taking control of hitherto unregulated competition.<sup>93</sup> That is why EU assistance is crucial for the partner countries to meet the treaty requirements.

### 3.4 Monitoring by the European Union

Moldova is currently regarded as a frontrunner when it comes to EU integration<sup>94</sup>. According to

<sup>91</sup> Metodologia, p.42-43

<sup>92</sup> <http://www.justice.gov.md/file/Centrul%20de%20armonizare%20a%20legislatiei/Baza%20de%20date/Materiale%202011/Acte/PNAL%202011/Pct%2035%20PNAL%202011/TC%20L%20concurrenta.pdf>

<sup>93</sup> Study on approximation, p. 15

<sup>94</sup> Baltag, (2014, p.7)

the European Integration Index 2013 for Eastern Partnership Countries,<sup>95</sup> Moldova was categorised as the best performer in terms of approximation, coming in first among the six Eastern Partnership members. The table below best illustrates this statement:

Table 2. Approximation rate of Eastern Partnership countries to the EU

Sector cooperation	Approximation indices (1=best performer; 0=worst performer)					
	Moldova	Georgia	Ukraine	Armenia	Azerbaijan	Belarus
Democracy	0.72	0.54	0.64	0.47	0.31	0.20
Rule of law	0.61	0.63	0.60	0.51	0.42	0.23
Justice, Freedom and Security	0.94	0.67	0.76	0.47	0.76	0.43
Trade and Economic Cooperation	0.71	0.54	0.72	0.54	0.57	0.38

Source: Baltag, Dorina; Bosse, Giselle, *The ENP as an instrument for building a security community? The case of Moldova*, Norwegian Institute of International Affairs, 2014, Working Paper 833

It seems that Moldova has made good progress, compared to other countries in the region. However, many reforms have been only partly implemented, and significant efforts need to be made to finalise these reforms.<sup>96</sup>

The monitoring of these reforms takes place through various opinions of the European institutions, reports and the perceptions of the general public.

The progress in adjusting its competition law legislation can be best visualised by the Progress Country Reports of the Republic of Moldova from 2008 to the present. Prior to 2008, the European Commission generally noted the legislative position from 1992 to 2000, and in particular, the fact that the National Agency for the Protection of Competition had not been established under the Law on the Protection of Competition of 2000. In the 2008 Progress Report<sup>97</sup>, the European Commission commented that “[t]here was good progress on competition policy through the establishment of the National Agency for the Protection of Competition as an independent authority in February 2007”. It is empowered to conduct investigations on its own initiative or upon complaint. A number of investigations were carried out in 2007, but to be fully operational, the agency would require additional budgetary means and trained personnel. In the 2009 Progress Report<sup>98</sup>, the European Commission noted that the National Development Strategy prioritised competition policy. It also noted that the draft law on Competition, prepared by the National Agency for the Protection of Competition was not approved, and it was sent back for re-examination. In the view of the Commission, the upgrading of the 2000 Law on Competition was necessary to allow the agency to perform better when investigating and prosecuting anticompetitive business practices, while at the same time ensuring legal guarantees and the right

<sup>95</sup> Available at [http://www.eap-index.eu/sites/default/files/EaP\\_Index\\_2013\\_0.pdf](http://www.eap-index.eu/sites/default/files/EaP_Index_2013_0.pdf)

<sup>96</sup> European Integration Index, p. 34

<sup>97</sup> Implementation of the European Neighbourhood Policy in 2008, Progress Report Republic of Moldova (European Commission, 2009)

<sup>98</sup> Implementation of the European Neighbourhood Policy in 2009, Progress Report Republic of Moldova (European Commission, 2010)

of defence for undertakings. In the 2010 Progress Report, it was stated that the work on the Competition law was ongoing<sup>99</sup>. The 2011 Progress Report<sup>100</sup> stated that “the Republic of Moldova prepared draft competition laws covering anti-trust and mergers as well as state aid. The Republic of Moldova will need to continue improving and effectively implementing the competition rules, including through the adoption of secondary legislation, and to clarify which authority is responsible for state aid control”. The 2012 Progress Report<sup>101</sup> indicated that the Parliament had adopted the new Competition law, which contains provisions on antitrust and mergers, closely following EU rules. Lastly, the 2013 Progress Report<sup>102</sup> provided that the Competition Council had made considerable progress in adopting the secondary legislation necessary to implement the competition law.

Moreover, various Moldovan-EU bilateral bodies have been created with the aim of providing assistance and monitoring the implementation of the EU *acquis*, such as, for example, the Interim Sub-Committee on Internal Market and Competition. This institution has been created based on the Association Agreement for Moldova, an Interim Committee to formulate recommendations and monitor the implementation of the obligations of the Republic of Moldova and the relevant reforms, *inter alia*, dealing with the internal market and competition<sup>103</sup>. The main tasks of this body include evaluating the progress of the approximation and the implementation of the legislation. The Parliamentary Committee for Foreign Policy and European Integration of the Republic of Moldova also has, among its main tasks, monitoring the adjustment of the domestic legislation.

It is, however, important to stress that the exercise of adjustment is not confined solely to the adoption of laws and regulations or to the establishment of the appropriate institutional structures. There must be a continued effort to ensure the enforcement of competition policy and to make competition policy widely known and accepted by all of the economic agents involved, i.e. by governments, companies and the workforce.<sup>104</sup> Consequently, there are still several issues to be tackled:

- the Competition Council must maintain sufficient qualified and well-trained staff;
- the Competition Council needs to be independent from political interference;
- high fluctuation in the staff of the departments of the Competition Council should be avoided;<sup>105</sup>
- civil servants from other market-related areas should become more familiarised with the competition provisions;
- the need to develop an enforcement capacity and a credible enforcement record<sup>106</sup>;
- the training of the judges who are to control the decisions of the council;
- the promotion of a competition culture in Moldova.

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<sup>99</sup> Implementation of the European Neighbourhood Policy in 2010, Country report: Republic of Moldova (European Commission, 2011)

<sup>100</sup> Implementation of the European Neighbourhood Policy in the Republic of Moldova Progress in 2011 and recommendations for action (European Commission, 2012)

<sup>101</sup> Implementation of the European Neighbourhood Policy in the Republic of Moldova Progress in 2012 and recommendations for action (European Commission Country Report, 2013)

<sup>102</sup> Implementation of the European Neighbourhood Policy in the Republic of Moldova Progress in 2013 and recommendations for action (European Commission Country Report, 2014)

<sup>103</sup> Metodologia, p. 127

<sup>104</sup> Van Miert, (1998, p. 6)

<sup>105</sup> Chivriga, (2013, p. 10)

<sup>106</sup> Stuart, (2009, p. 90-91)

In conclusion, it can be said that competition law and policy in the Republic of Moldova has undergone a fundamental reform in recent years. However, the absorption of the *acquis communautaire* includes more than the mere adoption of legal provisions. It is an elaborate process aimed at the fair implementation of these provisions at the level of the state institutions that must enforce these norms, but also at the level of the judiciary<sup>107</sup>. Therefore, there is still much effort that must be invested in promoting a competition culture in Moldovan society in the years to come, so that the adjusted legislation properly regulates the existing market relations.

## Conclusions

A healthy competitive market leads to increased productivity and competitiveness, decreased prices and costs, and enhanced innovation. In the Republic of Moldova, a systematically competitive environment has only recently begun to be built. Because of the decades in which there was a total absence of a market economy, it has been difficult to adapt to and learn new principles and values. However, the conclusion of the Association Agreement with the DCFTA provisions marked a point of no return in the Moldovan European integration trajectory.

Moldova is considered to be the "success story" of the Eastern Partnership. It seems that reforms initiated in multiple areas demonstrate the will of the current government to transform potentiality into action.

It has become clear that, in order to maintain and carry out further positive developments, a market economy characterised by healthy competition must be strengthened. The adjustment of the competition law and policy of the Republic of Moldova to conform with EU standards is a complicated and long lasting process, which must be adapted to local realities. While it is difficult to build a fully functional and modern legal system for competition overnight, some very important steps have already been taken.

The approximation to EU law and policy in the competition field ensures that the business environment in Moldova is fair and efficient in economic terms. Moreover, Moldovan consumers benefit from better choice, prices and quality. From a broader perspective, approximated competition law presents an opportunity for the promotion of free trade beyond national markets. In the case of Moldova, imports from the EU shall be facilitated, while some Moldovan exporters already enjoy the benefits of the EU single market.

For the immediate future, the Competition Council must increase its technical capacity and fortify inter-institutional coordination. The competition culture must also be improved within the business community and the public at large. Additional in-depth training courses for the legal professions and business representatives are needed and the training curriculum in higher education institutions should focus more on promoting a competitive environment.

The recently signed EU-Moldova Association Agreement will provide more opportunities as well. It will offer an important basis for mutual confidence in trade relations between the EU and Moldova, together with specific benefits for Moldovan businesses and consumers within the country's market economy, and will shape Moldova's reputation and improve its position as a trading partner with the European Union.

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<sup>107</sup> *Duculescu, (2006, p.123)*

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