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# The Commission's missed opportunity to reclaim competition law for the Rechtsstaat

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06 Dezember 2022

On 30 November 2022, the European Commission took two important decisions in order to protect the EU budget against possible breaches of the rule of law in Hungary. First, the Commission concluded that the conditions for applying the Conditionality mechanism under Regulation 2020/2092 in Hungary remain and Hungary needs to take further and more credible action to eliminate the remaining risks for the EU budget. Just as a short reminder, the Conditionality mechanism enshrined in Regulation 2020/2092 was originally designed in 2020 as part of a post-pandemic crisis recovery package, to protect European taxpayers from frauds. On 27 April, the Commission officially triggered the conditionality mechanism against Hungary and on 18 September, it has proposed to suspend 65 percent of the cohesion funds while demanding the implementation of 17 key measures.

Second, the Commission has assessed Hungary's Recovery and Resilience Plan under the Regulation on the Recovery and Resilience Facility (RRF), a large fund involving grants and low-interest loans available to EU Member States upon presentation and approval of national plans. Hungary had submitted its national plan for the recovery fund on 12 May 2021, but the Commission now decided (while approving Hungary's RRP) to freeze the disbursement of the RRF money to the government and Hungary until a full and effective implementation of 27 "super milestones" has taken place. The above mentioned 17 remedial measures, together with other rule of law reforms related to judicial independence, as a clearly defined set of 27 "super milestones" should resolve the breaches putting the EU budget at risk in Hungary.

## The Commission's super milestones

The Commission Decision is accompanied by a massive almost 200 pages Annex which contains a long chapter on Governance and public administration (pages 94-107) listing the milestones that demand key institutional reforms in order to improve the resilience of the economy through strengthening the fight against corruption and the independence of the judiciary. This chapter comprises in total 38 measures including the much discussed 17 "rule of law" and "anti-corruption" measures that have been "inherited" from the Conditionality mechanism under Regulation 2020/2092 that proved to be insufficiently fulfilled by Hungary by 19 November 2022.

Among the requisite milestones, improved competition in public procurement features prominently as an indispensable measure to prevent irregularities, including fraud, corruption, or conflict of interest for the functioning of an internal control system (point 59 Commission Decision). The measures the Commission demands is a comprehensive set of actions that should increase competition and improve transparency in public procurement. These include the development of a monitoring tool assessing the share of public procurement procedures resulting in single bids, the development and putting in place of a performance measurement framework to regularly assess the efficiency and cost effectiveness of public procurements, a support scheme to facilitate the participation of micro-, small- and medium-sized enterprises in public procurement procedures and an electronic public procurement system that should facilitate the independent oversight and analysis of competition in public procurement. Besides these actions, the reasons for limited competition in the sectors with the lowest levels of competition must be detected. The overall goal of these measures is to reduce the share of procurement procedures with a single bid and to facilitate the public oversight of the public procurement system. These measures translate into five milestones that should be effectively implemented before the submission of the first payment request.

These measures and the overall conditionality-based approach of the Commission are steps in the right direction.

The measures address longstanding criticism concerning the lack of competition in Hungary's public procurement system, which has been regularly pointed out by both the Council and the Commission since 2014 , most recently in its [2022 country-specific recommendations](#).

The Commission's milestones are also an illustration of the premise that competitive markets contribute to democratic societies by enabling multiple possibilities for meaningful economic participation by offering firms unrestricted access to markets and a plurality of options for citizens while safeguarding their autonomy to choose. This conceptualization rests on the idea that the economic order is a crucial counterpart to the democratic order where the former guarantees consumer sovereignty and the latter participatory rights of citizens.

## **Milestones sidestepping the real risks in the Hungarian legal infrastructure**

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The setting up of new monitoring and reporting tools, new measurement frameworks and the adoption and implementation of a comprehensive action plan implies the adoption of special regulation and frameworks that are needed to create and 'grow' competition, which is indeed generally seen as the role of regulation which prescribes the desired outcome for the market.

However, the Commission's approach demands the creation of another layer of regulation and monitoring system from a Member State who has been a champion of instrumentalizing law and law making for the constitutional re-engineering of its economic governance. What has been coined by Bátory as Hungary's "creative compliance" with EU obligations, by seemingly following and complying with EU norms while in fact not giving up its original political objectives has largely been overlooked by the Commission. Moreover, the old lessons of EU conditionality mechanisms during the enlargement rounds of 2004 and 2007 should caution the Commission of Hungary's path dependency of relying on noticeable and direct statutory enactments of substantive law creating "the world of dead letters" that are characterized by politicized transposition processes and systematic enforcement problems coupled with weak civil society. In fact, the Commission's approach sidesteps two crucial questions: first, how effective and credible control of competition in public procurement should be guaranteed in Hungary, and second, how government-created distortions of competition and regulatory barriers to access public procurement markets should be addressed.

## **Effective and credible control of competition in public procurement**

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Safeguarding and maintaining competition in markets is not the role of regulation and specific regulators, but should be left to competition laws and competition authorities. Competition law is the legal instrument to ensure that the valuable process of the market mechanism is protected by removing unnecessary restrictions on competition and by preventing significant reduction of competition.

In an earlier blog, I have argued that proper and active enforcement of competition rules is a key component of respecting the rule of law and protecting the sound financial management of EU funds. Safeguarding competition and effectively enforcing competition rules must be complementary to fighting corruption since both areas of the law aim to correct dysfunctions in market mechanisms. For this reason, I argued that the Commission should have addressed the lack of effective competition (cartel) law enforcement in public tender procedures in Hungary under the Conditionality Regulation. This argument holds for the Commission's decision taken now on the RRF. Various reports in the past noted that the Hungarian Competition Authority (HCA) does not make active use of the competition rules and it is not sufficiently active in sectors with high risk of collusion. In the period of 2002 to 2010, the HCA started 18 cartel investigations in public procurement procedures, with a yearly average of 2.25 cases. In the period of 2010 to 2022 the HCA started only 17 investigations with a yearly average of 1.4 cases. Since 2018, just one investigation has been started. This is a significant fall in the number of investigations since 2010 and an incomprehensible gap between the high number of irregularities in public procurement cases and the low number of investigations in public procurement procedures. On the basis of the empirical data demonstrating high number of irregularities in public tender procedures the number of investigations of the HCA should have at least remained the same as in the period

of 2002-2010 (2.25 yearly average) or even increased. The HCA's failure to act directly affects public spending and thus the management of EU budget by tolerating collusion among undertakings which creates one of the main threats for the integrity of public procurement processes.

## **Instrumentalizing the law to reduce competition**

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The Commission leaves the Hungarian government's longstanding and successful strategy of instrumentalizing the law and regulatory measures to intervene in markets, including public procurement, and distort competition unaddressed. If the Commission aims at creating more competitive public procurement markets, it must clearly and explicitly address those law-created distortions of competition that so far remained under the radar of any EU assessment.

Over the past years, the Hungarian government has systematically used the path of law-making to restructure sectors of the economy and to override market mechanisms while often providing artificial advantages to crony firms. Reducing competition in this way leads to higher prices and in these cases forming cartels (collusion) is easier or is more profitable when the market concentration is higher. This is, to my understanding, exactly the risk the Commission wants to be eliminated. However, in Hungarian markets relatively unknown firms can become within the course of just one year one of the largest operators through acquiring this position by continuously escaping competition law assessment due to, for example, the exception laid down in Article 24 of the Hungarian Competition Act, that enables the Hungarian government to declare mergers to be in the "national strategic interest".

The frequent application of such wide and *ex ante* public interest exceptions in Hungarian merger control has created highly concentrated markets in various sectors and has the particular risk of isolating the Hungarian markets from the rest of the internal market one step at a time. The exclusion of competition law assessment by the HCA has already taken place in 36 cases since 2013, which is a high number in a relatively short period of time in comparison with other countries. Mergers in the area of energy, financial, telecommunications, IT and transport sectors were approved by the Hungarian government, without having the HCA authorize them on the basis of their impact on competition.

The risk of such exceptions is especially tangible concerning the rule of law in media mergers as well as telecommunications cases that are closely related to and where the economic activities in these sectors are all interconnected in a complex supply chain.

## **The missed opportunity to reclaim the importance of competition law in the *Rechtsstaat***

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These two concerning issues boils down to the argument that the Commission should have demanded a full and effective role of the Hungarian Competition Authority in protecting the EU budget. This is even more so considering the fact that competition authorities have 'court-like' functions as they protect the legal position of undertakings as well as citizens' rights to economic activity and free choice in markets. It could have straightforwardly required a milestone on monitoring the priority setting practices of the HCA in public procurement cases and a critical assessment of laws, regulations and government decrees that are capable of distorting competition.

The Commission seems to remember how to make markets work for people when it addresses the contribution of competition policy to a fair, green and digital Europe, but it seems to turn a blind eye when rule of law values are at stake. In doing so, the Commission overlooks the constitutional value of competition and competition law tools that can define the boundaries of public power and by dispersing economic power ensures the integrity and impartiality of institutions. The democratic value of competition is beyond its expected positive economic effects – it is competition as a process that satisfies aggregate preferences in society and promotes citizens' welfare. Competition rules and principles will not solve the rule of law problem in Hungary, but neglecting their salience in combatting corruption, the accumulation of economic power and in this indirect way their contribution to democratic societies is another missed opportunity from the Commission.

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