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EU Competition Law Enforcement in the Shadow of the Rule of Law Crisis

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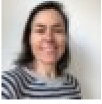

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16 Februar 2022

Mutual (Dis)trust

Last week, the General Court of the European Union, in its judgment T-791/19 Sped-Pro, recognized for the first time the impact that systematic rule of law deficiencies have on national competition authorities. The judgement is seminal in that it openly questions the ability of national authorities impacted by rule of law backsliding to effectively enforce EU law. The judgement also goes to the heart of explaining the pivotal constitutional role of competition law within the EU legal order.

The Sped-Pro case

The case concerns a complaint filed with the Commission in 2016 by the Polish company Sped-Pro against PKP Cargo, a company controlled by the Polish state. Sped-Pro submitted that PKP Cargo abused its dominant position on the Polish market for rail freight transport services on account of its alleged refusal to conclude a multi-annual cooperation agreement on market conditions.

In 2019, the Commission rejected Sped-Pro's complaint on the grounds that the Polish competition authority was best placed to examine it. Subsequently, the applicant brought an action before the General Court seeking annulment of the contested decision raising three arguments, alleging (1) a failure to have its case handled within a reasonable time and a failure to state reasons in the contested decision, (2) manifest errors in assessing the EU interest in pursuing the examination of the complaint and (3) breach of the principle of the rule of law in Poland. While the Court rejected the first two arguments of the applicant, it fully endorsed the argument that the systemic or generalised deficiencies of the rule of law in Poland and the lack of independence of the Polish competition authority and the national courts with jurisdiction in the field, must be considered by the Commission before rejecting a complaint for lack of an EU interest.

Case allocation mechanisms

In this case, the Court not only addressed rule of law issues as an element of effective competition law enforcement, but has also redrawn the otherwise clear jurisdictional mechanisms of case allocation, which govern the enforcement of competition law between the Commission and the Member States.

The allocation of cases between national competition authorities (NCA) and the Commission occurs within a framework of clear jurisdictional boundaries by seeking to find the best placed authority for enforcing Articles 101 and 102 TFEU, determined by various objective factors such as size and cross-border nature of the relevant behaviour and for mergers, is decided by reference to quantitative criteria.

Ever since the *Automec II* judgment*,* the Courts acknowledged that the Commission has broad discretion to reject complaints. The principles governing the Commission's margin of discretion when it decides to pursue a case or disregard it, have been broadly construed and entitle the Commission to classify complaints according to different degrees of priority based on the Union interest.

Rule of law concerns

The present judgement demands the Commission to take account of the additional condition of rule of law concerns when deciding on rejecting complaints and case allocation. By referring to case-law developed in the area of the European Arrest Warrant (EAW), the Court created a novel condition that "requires the Commission, before rejecting a complaint for lack of an EU interest, to ensure that the national authorities are in a position *adequately to safeguard* [emphasis added] the complainant's rights". The Commission must therefore investigate whether its decision to reject complaints puts complainants at risk of being subjected to investigations by national authorities compromised by rule of law backsliding. Furthermore, the Court seems to argue that uniform application of EU law must be protected against certain captured authorities, winding up the presumption of mutual trust that also governs competition law enforcement.

In doing so, the General Court draws on its own rulings pertaining to the application of the EAW. To recall, the mutual recognition and execution of EAWs was always based on "the high degree of trust and solidarity between the Member States" that national authorities would dutifully execute EU law. The nature of EU law based primarily on norms formulated at the EU level but executed by the Member States meant that membership in the Union premised that "each Member State shares with all the other Member states, and recognizes that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU." More simply put, the act of accession to the EU constitutes an act of recognition and acceptance of the values of the EU, and in equal measure a promise that these values will be respected whenever EU law is enforced.

The CJEU has since elaborated on the exceptional circumstances under which mutual trust can be suspended. Crucially, in its *LM* decision, which the Court now cited in Sped-Pro, the lack of judicial independence of authorities issuing EAWs was the object of concern. In such a situation, the Court ruled that systemic or generalized deficiencies in judicial independence should be assessed as part of the right to a fair trial, with the Charter forming the applicable standard of review. Where such deficiencies could be proven to a sufficient degree, cooperation with EAW requests could be suspended. It is this test of exceptional circumstances for compliance with the fundamental values of Article 2 TEU that the Court has now exported to the enforcement mechanisms of competition law.

Putting (mutual) trust into the enforcement of competition law

As we argued elsewhere, the protection of the competitive process in EU law must be seen as an implementation of Article 2 TEU, as competition law and democracy are intimately connected. However, unlike Article 2 values, which are seriously undermined by the EU's limited competences to legislate and enforce these values, competition law is an exclusive competence of the EU with powerful tools and track record of enforcement. This means on the one hand, that competition law is a robust constituent of the EU legal order that has been transferred to all Member States voluntarily and forms a shared value for all Member States. A fact recognized as much by the Court crowning competition law as one of the "fundamental provisions" of Union law together with the area of freedom, security and justice (AFSJ) and free movement law. On the other hand, competition law is equally threatened and undermined by systematic attacks of certain Member States on the rule of law and democracy.

Currently, enforcement of competition law is shared between the Commission and the NCAs and is based on a system of parallel competences. This creates a challenge as the enforcement of Articles 101 and 102 TFEU (partly) relies on the effective enforcement by national administrative authorities embedded in diverse political, institutional and procedural settings. Creating decentralised enforcement was an important component to provide more democratic political support to competition policy, however, with concerns that bringing decision-making closer to citizens carried the inherent risk that Member States would implement their own national interests within the EU enforcement framework. These concerns seem fully justified in Poland today as the Sped-Pro judgment demonstrates.

The judgement raises the question if the concerns of the Court should not compel the Commission to consider these issues in other jurisdictions facing similar rule of law concerns and to revisit its "hands-off" approach (*Si.mobil, AgriaPolska*), which enables the Commission to re-allocate cases to Member States' competition authorities.

The Hungarian case

Another jurisdiction that suffers heavily from rule of law backsliding is Hungary. Politicising the competitive process to support national economic interests has been a widespread practice of the Hungarian government since winning the elections in 2010. The drastic re-transformation of the constitutional system has fabricated a framework for economic regulation where accumulation of political power steadily leads to accumulation of economic power in the hands of a few. This new economic governance systematically undermined key legal rules and independent institutions of the functioning Hungarian market economy. Numerous cases show how legal and regulatory measures were enacted by the Hungarian government to exempt economic activities in strategically important sectors of the economy from the pressures of competition. For example, in the area of cartels, the government has enacted legislations to relax the control of cartel agreements and bid rigging and thus fails to prosecute corruption and selectively enables harmful cartels. An illustration was the legislative restructuring and renationalization of the Hungarian waste management market that excluded the applicability of the competition rules concerning illegal conduct in public procurement procedures. Likewise, the 2012 Watermelon cartel was initiated by the Ministry for Rural Development as an alleged restrictive agreement. But as a consequence of an amendment by the Hungarian Parliament to the Act on Inter-branch Organisations, it was exempted from the application of the Hungarian competition law.

An even more palpable concern for democracy is a 2013 amendment to the Hungarian merger review, which enables the Hungarian Government, on public interest grounds, to declare a concentration of undertakings of strategic importance at the national level. For such concentrations, no authorization of the Hungarian competition authority (GVH) is required and the decision can be taken in a government regulation without being subject to judicial review. Since 2013, 29 merger cases in strategically important sectors were approved by the government without any competition review by the GVH. Meanwhile, other jurisdictions have seen far lower rates of approval by ministerial mandate. The risk of such exceptions is especially tangible concerning a merger case in 2018 that relates to media pluralism and a recent case concerning telecommunications market enabling the acquisition of the majority of shares in a state-owned company.

Suspension of NCA cooperation

The rate and scope of constitutional re-engineering of Hungary´s competition law enforcement pose questions beyond the Hungarian context. As public enforcers of the competition rules, the Commission and the NCAs have a fundamental role in ensuring effective enforcement of competition law across Europe. Hence, Member States must use their sovereign powers to maximize the effectiveness of enforcing the Treaty’s competition rules.

Accordingly, competition authorities' power to challenge conduct deemed hostile to competition, particularly when that conduct is by politically powerful actors, is an essential measure to safeguard competitive markets. Even if competition authorities' formal independence is guaranteed, Member States should be barred from adopting legislative or other measures that *de facto* eliminate the independence of its NCA as the above Hungarian cases show. The Courts have on various occasions emphasized the obligations Member States have on the basis of the principle of effectiveness, which requires "sufficiently robust national enforcement structures so that Member States can discharge their overarching obligation to secure the meaningful application of EU law within the domestic system."

Effectiveness relates to the deterrent effect that national sanctioning systems have on the conduct of market operators. No deterrent effect will be realized in situations where competition rules are either sparsely enforced or not enforced at all. In this light, the general deficiencies to effectively enforce competition law, as shown in the selected Hungarian cases, form a clear risk to the fundamental rights of market players who are prevented from exercising their right to economic activity and equal access on the Hungarian market. Such a systemic failure of an NCA poses the risk to the overall system of competition law enforcement and should, therefore, be sufficient to suspend cooperation among NCAs. Practically, such a suspension means that other NCAs would no longer recognize the respective national system as effective enforcer with the consequence that cases would be re-allocated from such an NCA to other NCAs to ensure that the Treaty rules are enforced. Moreover, if there is a serious risk of incoherence, the Commission can intervene by relieving the NCA of its competence to act.

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