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EU Competition Law and Democracy in the Shadow of Rule of Law Backsliding

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I. Introduction

Competition is a vital component not only of functioning market economies but also of democratic legal and political systems. In Europe, one of the key questions so prominently advanced by the Ordoliberal School was how democratic repercussions of concentrated economic and political power should be addressed. Scholars in this school proposed a constitutional framework in which competition law plays a central role in safeguarding a pluralistic competitive process and maintaining a democratic society. The role of competition as a fundamental institution of a legal system has since remained a salient concept. It influenced the drafters of the Treaty of Rome, and its central role in creating democratic political systems was restated in the 1993 Copenhagen accession criteria of the European Union (EU).

By taking a historical and constitutional law perspective, this chapter argues that competition law has emerged in Europe as a key component of public policy-building and developed as a quasi-constitutional foundation of liberal democracy. Over the past seven decades, EU competition law has become a powerful institution to defend markets across Europe, to safeguard European undertakings' freedom of economic activity and to support consumers' choice. Crucially, this fundamental role of competition law has been transplanted into all EU Member States as a component of their economic policies. Today, however, the authority of EU competition law is being critically challenged by national economic policies that question neoliberal ideas of free trade and market competition, as well as by

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the backsliding of certain Member States on their commitment to the rule of law and democracy in the EU.

The central question in this chapter is therefore whether and how EU competition law as a legal and policy instrument can and should shape responses to the challenges of rising political populism and growing political and corporate concentration. How does the current constitutional crisis in some Member States impact the overall enforcement of EU competition law? And how can EU constitutional principles uphold an effective competition enforcement system?

In order to answer these questions, Section II of this chapter conceptualises competition law as a core element of a democratic legal and political system that strives to maximise its citizens' welfare. It then moves on to explore the fundamental role of competition law in governing the relationship between markets and democracy in the European integration project. Section III analyses the way this fundamental relationship has been transplanted into the EU Member States. Section IV follows this process of Europeanisation through enlargement and modernisation in 2004 and explores the challenges that the new enforcement framework of EU competition law has entailed from 2004 on. Section V discusses selected cases in Hungary that illustrate how formal and informal institutions of EU and national competition law have been undermined in ensuring effective competition and market oversight. In that light, Section VI analyses the central institutional premise of EU competition law: the role of the Commission and national competition authorities in protecting competition and citizens' economic rights and the implications when their roles are set aside and undermined by national measures. This section finishes by analysing how core constitutional principles must be upheld to ensure effective enforcement of EU competition law. The chapter closes with conclusions.

II. The Constitutional Value of EU Competition Law

A. Competition as a Fundamental Component of Democracy

Competition is a precious good which is an active ingredient of both functioning market economies and democratic legal and political systems. At the constitutional level, competition defines the boundaries of public power,[1] and by dispersing economic power it ensures the integrity and impartiality of political institutions, as it makes interest capture less likely. Thriving competition imposes checks and balances on private as well as on public market power and guarantees an inviolable sphere of private activity.[2] The democratic value of competition goes beyond

[1] T Prosser, *The Limits of Competition Law* (Oxford, Oxford University Press, 2005).

[2] E Deutscher and M Stavros, 'Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus' (2016) 11 *Competition Law Review* 181, 188; F Böhm, 'Democracy and Economic Power in

its expected positive economic effects; it is competition as a process that satisfies aggregate preferences in society and promotes citizens' welfare.[3] Competition law safeguards the competitive process in the interest of all market players and curbs overarching economic power that threatens the basic idea of a democratic society: safeguarding autonomy and freedom of choice for equally empowered citizens who exchange their commodities in free markets.[4]

Hence, economic rights to participate in markets on equal terms can be associated with rights to freedoms and economic opportunities as laid down in political rights language in national constitutions. This conceptualisation rests on the idea that the economic order is understood as the counterpart of the democratic order in which the former guarantees consumer sovereignty and the latter ensures participatory rights of citizens. The idea that competitive markets promote consumer sovereignty is traced back to William Harold Hutt's 1936 book.[5] Hutt's core argument for consumer sovereignty centres on its role in promoting political and social stability: 'The consumer is sovereign when, in his role of citizen, he has not delegated to political institutions for authoritarian use the power which he can exercise socially through his power to demand (or refrain from demanding)'.[6] Hutt paid little attention to the achievement of market efficiency but addressed issues concerning the exercise of power in a free society as these concerned sovereignty.[7] In Hutt's definition of consumer sovereignty, consumers are also citizens whose autonomous decision-making is safeguarded by competitive markets. In light of this definition, I propose to use the term citizen welfare as an analytical lens to examine the relationship between democracy and competition law and enforcement. The term was originally coined by Firat Cengiz in her work on collective worker action and competition law.[8] Following Cengiz's argument, citizen welfare takes into account that, in complex modern societies, individuals have multiple overlapping social, economic and political roles and identities.[9] Under a citizen welfare standard, competition authorities and courts should be able to look at how a specific behaviour in question affects citizens as a holistic group, rather than focusing on the interests of the narrow category of consumers along the lines of the consumer welfare test in a given market. The citizen welfare standard resonates with the view that preservation of economic freedom through competition rules is a precondition for democracy, as it safeguards against political and regulatory

Cartel and Monopoly in Modern Law [1961]' in DA Crane and H Hovenkamp (eds), *The Making of Competition Policy: Legal and Economic Sources* (Oxford, Oxford University Press, 2013) 273.

[3] A Ayal, 'The Market for Bigness: Economic Power and Competition Agencies' Duty To Curtail It' (2013) *Journal of Antitrust Enforcement* 221, 231.

[4] ibid 231.

[5] WH Hutt, *Economists and the Public: A Study of Competition and Opinion* (Michigan, Jonathan Cape, 1936) 257.

[6] WH Hutt, 'The Concept of Consumers' Sovereignty' (1940) 50 *The Economic Journal* 66.

[7] J Persky, 'Retrospectives: Consumer Sovereignty' (1993) 7 *Journal of Economic Perspectives* 183.

[8] F Cengiz, 'The Conflict Between Market Competition and Worker Solidary: Moving from Consumer to a Citizen Welfare Standard in Competition Law' (2021) 41 *Legal Studies* 73.

[9] ibid 76–77.

capture.[10] It also resonates with legal and political theory on how markets can contribute to democratic societies.[11] Thus, markets are said to multiply possibilities for meaningful economic participation by offering a plurality of options and safeguarding the freedom of self-determination (consumer sovereignty).[12] For example, competition law is particularly relevant in safeguarding the governance of strategically important sectors in society, such as utilities (energy, telecoms, waste)[13] and media markets,[14] or in counteracting corruption by controlling bid-rigging.[15] The citizen welfare lens is well reflected in the historical roots of competition law in Europe,[16] and in US antitrust laws.[17]

B. Competition Law as the Constitutional Charter of EU Law

The fundamental role of competition law in governing the relationship between markets and democracy has been a core part of the EU integration project from its early days. Constitutionalised at the EU level, it developed into the central pillar of the integration project.[18] Even though competition law in the EU (and globally) has mainly been interpreted along economic rationales, its historical roots clearly show that it was drafted to promote democracy and understood as a fundamental constitutional value.[19] In Europe, the ideology that competition law has a potential role in promoting democracy originated from the Ordoliberals who influenced

[10] Ayal, 'The Market for Bigness' (n 3 above); Deutscher and Stavros, 'Exploring the Ordoliberal Paradigm' (n 2 above).

[11] G Tagiuri, 'Can Supranational Law Enhance Democracy? EU Economic Law as a Market-Democratizing Project' (2021) 32 *European Journal of International Law* 57.

[12] ibid; H Dagan and H Heller, *The Choice Theory of Contracts* (Cambridge, Cambridge University Press, 2017) Introduction.

[13] L Hancher and CH Jones, *EU Energy Law Volume II: EU Competition Law and Energy Markets* (Deventer, Claeys and Casteels, 2019).

[14] K Bania, 'The Role of Media Pluralism in the Enforcement of EU Competition Law' (*PhD Thesis, European University Institute, 2015*).

[15] A Sanchez-Graell, *Public Procurement and EU Competition Rules* (Oxford, Hart Publishing, 2011).

[16] F Maier-Rigaud, 'On the Normative Foundations of Competition Law – Efficiency, Political Freedom and the Freedom to Compete' in D Zimmer (ed), *The Goals of Competition Law* (Cheltenham, Edward Elgar, 2012) 152; L Pace and K Seidel, 'The Drafting and the Role of Regulation 17: A Hard-Fought Compromise' in K Patel and H Schweitzer (eds), *The Historical Foundations of EU Competition Law* (Oxford, Oxford University Press, 2013) 66.

[17] The targeting of economic power was a strong point in favour of intervention in the early days of United States antitrust. The promotion and preservation of democracy was one of the goals of the drafters of state and federal antitrust law: SW Waller, 'Antitrust and Democracy' (2019) 46 *Florida State University Law Review* 807.

[18] M Ioannidis, 'Europe's New Transformations: How the EU Economic Constitution Changed During the Eurozone Crisis' (2016) 53 *Common Market Law Review* 1237; C Joerges, 'The European Economic Constitution and Its Transformation Through the Financial Crisis' (2015) 47 *ZenTra Working Paper in Transnational Studies* 1; C Joerges, 'Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation' (2014) 15 *German Law Journal* 985.

[19] Maier-Rigaud, 'On the Normative Foundations of Competition Law' (n 16 above) 166. Pace and Seidel, 'The Drafting and the Role of Regulation 17' (n 16 above).

European competition law and its enforcement framework.[20] Emerging from the bitter historical lessons of how uncontrolled concentration of economic power can undermine the social and political preconditions of democracy, Ordoliberals warned of the dual danger of accumulated economic power undermining both the economy and democracy.[21] Their concern with economic power emanated from the risk that such power transgresses to the political sphere.[22] In their view, by being incorporated in a constitutional economic order, competition had an instrumental value, as it would allow only democratically legitimised economic and political power in society and would in turn entail good economic outcomes.[23] Importantly, the process of competition had to be protected from intervention by both the state, which could be tempted to instrumentalise it, and private economic power, which could manipulate it for its own benefit. When states regulated the process of competition they had to do so in a 'neutral' way and thus this mechanism required quasi-constitutional rules.[24]

These Ordoliberal ideas influenced the development of the German[25] and the European[26] competition law systems. In both, specific features of Ordoliberal thinking, such as the focus on individual rights and the rule of law, provided an apt basis for the structure and strengths of law, as well as enforcement institutions.

The Ordoliberal positions were particularly well suited to the project of EU integration, as they could justify the primacy of EU law and combine it with an 'economic constitutional' content. The theory of an economic constitution advocated a framework order which was to guarantee economic freedoms but, at the same time, to control them legally through the competition law system.[27] This law-based order committed to the rule of law and economic freedoms helped the Community to acquire legitimacy in the foundational period of the EU[28]

[20] Maier-Rigaud, 'On the Normative Foundations of Competition Law' (n 16 above) 137.

[21] ibid.

[22] ibid 139, 163.

[23] ibid 140–41. L Miksch, 'Wettbewerb als Aufgabe Grundsätze einer Wettbewerbsordnung' (1949) 62 *Weltwirtschaftliches Archiv* 48.

[24] L Zingales, 'Towards a Political Theory of the Firm' (2017) 31 *Journal of Economic Perspectives* 113.

[25] Eucken and Böhm of the Freiburg School of Economics had a formative influence on the development of post-war competition law regulation in Germany. They advocated the idea that freedom of action had to be protected not just from state intervention but also from self-destructive commercial forces. Therefore, the state was required to impose a regulatory framework. Moreover, Ludwig Erhard, who was minister of Economic affairs between 1949–63 and chancellor between 1963–66 advocated a strong competition regime as a cornerstone of the democratic order. Erhard considered a strong competition policy as embodying political and economic liberalism because its purpose was to defend citizens against an authoritarian threat coming from more powerful actors. A Künzler and L Warlouzet, 'National Traditions of Competition Law: A Belated Europeanisation through Convergence?' in Patel and Schweitzer, *The Historical Foundations of EU Competition Law* (n 16 above); F van Waarden and M Drahos, 'Courts and (Epistemic) Communities in the Convergence of Competition Policies' (2002) 9 *Journal of European Public Policy* 913; L Erhard, *Prosperity Through Competition* (New York, Praeger, 1958).

[26] Patel and Schweitzer, *The Historical Foundations of EU Competition Law* (n 16 above) Introduction.

[27] CH Joerges, 'The Law in the Process of Constitutionalising Europe' (*EUI Working Paper 04/2002*).

[28] Patel and Schweitzer, *The Historical Foundations of EU Competition Law* (n 16 above) 1–2. Joerges, 'The Law in the Process of Constitutionalising Europe' (n 27 above).

and contributed to its 'constitutional' character.[29] In this process of supranational constitution building, competition law took centre stage.[30] Consequently, in the Ordoliberal view, protection of the competitive process must be seen in fact as an implementation of Article 2 of the Treaty on the European Union (TEU), which lists, among others, the EU values of democracy, equality, rule of law and respect for human rights. These values form an 'untouchable core' of EU law.[31] When states join the EU, they commit to the EU's economic and legal order, which as a 'constitutional charter' explicitly includes the system of undistorted competition. Accordingly, by joining, Member States commit to the values of EU law as laid down in Article 2 TEU as well as a mutual promise that in the enforcement of competition law, they recognize and respect the EU's values and objectives. However, unlike the Article 2 TEU values, which are constrained by the EU's limited competences to legislate and enforce, EU competition law is an exclusive competence of the EU with powerful tools and a track record of enforcement. Compliance with Article 2 TEU is fundamental for the EU's functioning, as this forms the basis of Member States' mutual trust of each other's compliance with EU law, including competition law. This mutual trust applies in particular to promoting the EU's values and respecting European fundamental rights, but it also conveys an assurance that each other's governments – and judiciaries – will apply EU law fairly and evenly. In its Sped-Pro judgment, discussed below, the General Court recently confirmed that compliance with the fundamental values of Article 2 TEU applies to the enforcement mechanisms of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).[32] This judgment is an important reminder of the fundamental connection between democracy and competition law.

III. Competition Law and Policy Gaining Ground in the EU and its Member States

A. Europeanisation of National Competition Laws as an Instrument for Strengthening Democracy

Despite the robust foundation at the EU level, it was not until the 1980s that national legislators and policymakers recognised the need for a solid competition

[29] Patel and Schweitzer, *The Historical Foundations of EU Competition Law* (n 16 above) 10.

[30] Joerges, 'The Law in the Process of Constitutionalising Europe' (n 27 above).

[31] N Lavranos, 'Revisiting Article 307 EC: The Untouchable Core of Fundamental European Constitutional Law Values and Principles' in F Fontanelli, G Martinico, and P Carrozza (eds), *Shaping Rule of Law through Dialogue: International and Supranational Experiences* (Groningen, Europa Law Publishing, 2009).

[32] Case T-791/19 *Sped Pro v Commission* [2022] EU:T:2022:67, para 85.

law system.[33] Beyond the widespread tendency to take more effective action against distortions of competition, most EU Member States not only drafted or modified their competition laws but also established an institutional setting with a high degree of independence and transparency.[34] International competition increased with the emergence of neoliberal policies in Western Europe and the globalisation process. Accompanied by the emergence of international networks of experts in competition policy, this process progressively strengthened competition policies across Europe.[35] The growing importance of these developments, and the convergence of experiences of national legislators, resulted in a gradual 'Europeanisation'.[36] National legislators began to turn their attention to European competition law, and convergence emerged with adoption of the legal principle of safeguarding competition as a focus of national economic policy, combined with the reformulation of statutory assessment criteria. Moreover, in many Member States the institutions for assessment of anticompetitive practices became more influential and independent.[37] With this favourable ideological and political context as backdrop, the rise of powerful EU competition policy took place starting in the 1980s. Neoliberalism, coupled with a personal leadership at Directorate General IV responsible for competition at the EU Commission, qualified majority decision-making after the Single European Act of 1986, and the support of the supranational Court of Justice affirmed the Commission's powers and the role of competition law.[38]

By the late 1990s, successful market integration and the process of EU constitutionalisation combined with solid supranational enforcement mechanisms led to a strong legal and policy field. This was coupled with increasing Europeanisation of competition norms at the Member State level. Competition law became a 'common core' of the EU and its Member States.[39] Unlike the Article 2 TEU values, which draw on the shared legal and constitutional traditions of the Member States,[40]

[33] Künzler and Warlouzet, 'National Traditions of Competition Law' (n 25 above) 119–20.

[34] ibid 117.

[35] Drahos and Van Waarden showed that the most important channel for the influence of EU competition law on national competition law in the Member States was an expert community and the development of competition case law. The decisional practice of the EU Commission and case law of the Courts have created foundational principles and set legal limits to national laws. This epistemic community functioned as a channel of information exchange, learning, imitation, and for the explicit transfer of legal concepts and arguments, thus contributing to convergence: van Waarden and Drahos, 'Courts and (Epistemic) Communities' (n 25 above).

[36] Europeanisation is understood as 'the reorientation or reshaping of politics in the domestic arena in ways that reflect policies, practices or preferences advanced through the EU system of governance': I Bache and A Jordan, 'Europeanisation and Domestic Change' in I Bache and A Jordan (eds), *The Europeanisation of British Politics* (London, Palgrave Macmillan, 2006) 30.

[37] Künzler and Warlouzet, 'National Traditions of Competition Law' (n 25 above) 112.

[38] L Warlouzet 'The Rise of European Competition Policy, 1950–1991: A Cross-Disciplinary Survey of a Contested Policy Sphere' (*EUI Working Paper RSCAS 2010/80*, 2010) 17.

[39] M Drahos, *Convergence of Competition Laws and Policies in the European Community: Germany, Austria, and Netherlands* (Hague, Kluwer, 2002).

[40] KL Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) 39 *Yearbook of European Law* 3, 20.

competition law was centrally established and developed with far-reaching powers unmatched in any other EU policy area.[41] By pursuing market integration as a public policy goal, EU competition law has acted as a vehicle for the proliferation of democracy and the rule of law.[42]

B. The Copenhagen Criteria and Enlargement to CEECs: Restating the Link between Democracy and Competition Law

An explicit restatement of competition law as a building block of market economies and democratic societies was formulated in the governance mechanism of the accession process for the Central and Eastern European countries (CEECs) from the late 1990s to the 2004 enlargement. The legal and institutional framework of EU accession and the legal basis for aligning domestic competition laws with that of the EU were laid down in bilateral agreements between the EU and the candidate CEECs.[43] These agreements and the associated White Paper[44] contained the legal and economic conditions of accession, such as establishment of a functioning market economy, adherence to the various political, economic and monetary aims of the EU, as well as the capacity to cope with competitive pressure and market forces within the EU. These so-called 'Copenhagen criteria'[45] played a key role in both the CEECs' accession and in their economic transformation and democratisation. Europeanisation of the competition rules interacted with market, constitutional and institutional reforms and was considered to enhance both the overall economic wellbeing and the political stability of the candidate countries.[46] Accession to the EU thus exercised significant

[41] Warlouzet (n 38 above) 1.

[42] SM Ramirez Perez and S van de Scheur, 'The Evolution of the Law on Articles 85 and 86 [Articles 101 and 102 TFEU]: Ordoliberalism and its Keynesian Challenge' in Patel and Schweitzer (eds), *The Historical Foundations of EU Competition Law* (n 16 above).

[43] The Europe Agreements were concluded with Hungary and Poland in December 1991, with Romania, Bulgaria, the Czech Republic and Slovakia in February 1995, with Estonia, Latvia and Lithuania in February 1998 and Slovenia in February 1999: KJ Cseres, 'Accession to the EU's Competition Law Regime: A Law and Governance Approach' (2014) 7 *Yearbook of Antitrust and Regulatory Studies* 31.

[44] Commission, 'Preparation of the associated countries of Central and Eastern Europe for integration into the Internal Market of the Union' (White Paper) COM(1995) 163 final.

[45] The Copenhagen criteria were established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995. The Copenhagen criteria are now reflected in Art 2 TEU which also represents the most important condition to be fulfilled before joining the EU, as hinted at in Art 49 TEU.

[46] F Schimmelfennig and U Sedelmeier, 'Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe' (2011) 11 *Journal of European Public Policy* 661. Transposition of the competition and state aid *acquis*, effective enforcement of these rules and strengthening of the administrative capacity through well-functioning competition authorities were among the obligations of the candidate countries: Cseres, 'Accession to the EU's Competition Law Regime' (n 43 above).

influence in shaping the competition law regimes in the CEECs that joined the EU in 2004, 2007 and 2013.[47]

The CEECs' accession period has widely been seen as a massive process of Europeanisation that was effective because these countries' strong desire to 'return to Europe' accorded the EU unprecedented power to influence their development.[48] Their adoption of EU rules was governed by strong EU conditionality,[49] which acted as a crucial incentive for political transformation. Hence, the Copenhagen criteria were a first explicit declaration of the intimate relationship between democracy and EU competition law and the latter's central role in acquiring EU membership. However, there are good reasons to revisit Europeanisation in the CEECs. Certain areas of the 'enlargement acquis', such as democracy, rule of law and administrative capacity, were part of the EU's accession conditionality but are not, or only to a limited extent, part of the EU acquis and thus cannot be legally enforced in the new Member States.[50]

Following accession, the competition law provisions of the bilateral agreements and EU conditionality were replaced by the EU's internal governance model: Regulation 1/2003 for Articles 101 and 102 TFEU and Regulation 139/2004 for merger control.[51]

C. Merger Control

Before moving to discuss the period after 2004, a brief note is warranted about the role of merger control in Europe. Merger control monitors concentrations in markets and assesses the magnifying or reducing economic power of the merging firms. At the same time, merger control has political and social consequences for citizens. It is a legal instrument that can decentralise economic power and enable economic opportunities for firms by encouraging a democratic political order. Concentrated economic power can reinforce the political

[47] F Cafaggi and others, 'The Europeanisation of Private Law in Central and Eastern Europe Countries (CEECs): Preliminary Findings and Research Agenda' (*EUI Working Paper 15/2010*).

[48] M Matlak, F Schimmelfennig and T Woźniakowski, (eds), *Europeanization Revisited: Central and Eastern Europe in the European Union* (Florence, European University Institute, 2018).

[49] Schimmelfennig defines conditionality as a direct mechanism of Europeanization. F Schimmelfennig, 'EU External Governance and Europeanization Beyond the EU' in D Levi-Faur (ed), *The Oxford Handbook of Governance* (Oxford, Oxford University Press 2012).

[50] Matlak, Schimmelfennig and Woźniakowski, *Europeanization Revisited* (n 48 above).

[51] Cseres, 'Accession to the EU's Competition Law Regime' (n 43 above); KJ Cseres and A Outhuisje, 'A Parallel Enforcement and Accountability: The Case of EU Competition Law' in M Scholten and M Luchtman (eds), *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability* (Cheltenham, Edward Elgar, 2017); KJ Cseres, 'Competition Law Enforcement Beyond the Nation-State: A Model for Transnational Enforcement Mechanisms?' in HW Micklitz and UA Weschler (eds), *The Transformation of Enforcement: European Economic Law in a Global Perspective* (Oxford, Hart Publishing, 2016).

power of capital and directly impact citizens' economic as well as non-economic interests, such as fundamental rights related to media pluralism or access to reliable information.[52]

While in the post-Second World War period many states considered mergers to be strategically important to safeguard their industries as a protective device against resource distribution to foreign firms, in 1989 various political and economic factors enabled the adoption and implementation of EU legislation on ex ante control of mergers. Merger regulation is today the principal instrument by which competition authorities control the structure of an industry.[53] As the EU treaties contained no rules on merger control, the rules were laid down first in Regulation 4064/89 and later in Regulation 139/2004.[54] Originally the EU Merger Regulation (EUMR) had the objective to control corporate reorganisations so that they did not result in lasting damage to competition in the internal market and to permit effective monitoring of all concentrations by considering their effects on the structure of competition in the EU.[55] Today a concentration is prohibited if it significantly impedes effective competition in the common market or in a substantial part of it.[56] The monitoring of mergers is shared between the Commission and the Member States by reference to quantitative criteria.[57] However, not all Member States have a merger control regime. The Commission has central and exclusive competence over mergers with a Community dimension, but Member States apply their national competition laws to mergers that do not meet that threshold.[58] Conversely, the Commission has no competence under the EUMR where the concentration does not have a Community dimension. However, the allocation of jurisdiction is subject to some corrective mechanisms and exceptions.[59] Hence, Member States still retain

[52] C Banasiński and M Rojszczak, 'The Role of Competition Authorities in Protecting Freedom of Speech: The PKN Orlen/Polska Press Case' (2021) 18 *European Competition Journal* 424.

[53] G Monti, *EC Competition Law* (Cambridge, Cambridge University Press, 2007) 246.

[54] On the fierce and long debate on EU merger control see L Warlouzet, 'The Centralization of EU Competition Policy: Historical Institutionalist Dynamics from Cartel Monitoring to Merger Control (1956–91)' (2016) 54 *Journal of Common Market Studies* 725.

[55] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L395/1, Recitals 5 and 6; Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1 (Merger Control Regulation).

[56] Merger Control Regulation (n 55 above) Art 2.

[57] Criteria are based on both the worldwide and Community aggregate turnover thresholds of the merging parties. ibid Art 1(2).

[58] The so-called 'exclusivity principle'. Merger Control Regulation (n 55 above) Art 21; M Harker, 'Cross-Border Mergers in the EU: The Commission v the Member States' (2007) 3 *European Competition Journal* 503.

[59] The so-called two-third rule in Art 1(2)(3). Referrals from and to the Member States Arts 9 and 22. Art 21(4) of the EUMR stipulates the exception to the Commission's exclusive competence over these mergers. The provision allows Member States to intervene in merger proceedings that have been authorised by the Commission. As such, the legal framework of the EUMR currently only allows for negative state intervention. Á Sipiczki, 'Protecting Against Protectionism – The Case of Merger Control' (*Master Thesis, University of Amsterdam 2020*).

broad powers to authorise national champions and provide populist support to public interest national law provisions.[60]

IV. Post-Modernisation Challenges: Effective Enforcement of EU Competition Law in a Decentralised System

Regulation 1/2003 established a decentralised enforcement framework and delegated an active role for national actors to enforce Articles 101 and 102 TFEU. Regulation 1/2003 created a system of parallel competences between the Commission, the national competition authorities (NCA) and national courts, and obliged the national enforcers to apply EU and national competition laws simultaneously.[61] This enforcement system relies on a mix of substantive EU provisions and national procedural laws and institutional designs.[62] Hence, the challenge concerning the enforcement of Articles 101 and 102 TFEU is that it relies on the effective administrative enforcement of the treaty rules by national administrative authorities and procedures embedded in diverse political and institutional settings.[63] Some have praised the success of the decentralised enforcement system in developing a shared sense of competition policy and culture among the Member States, particularly through the European Competition Network (ECN).[64] However, decentralised enforcement has also been criticised regarding outward pulls from the Member States towards their national legal systems[65] and centripetal pushes from the Commission towards more centralisation.[66]

[60] A Jones and J Davies, 'Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate' (2014) 10 *European Competition Journal* 453.

[61] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L01/1, Art 3.

[62] KJ Cseres, 'Rule of Law Challenges and the Enforcement of EU Competition Law, A Case-Study of Hungary and Its Implications for EU Law' (2019) 14 *Competition Law Review* 319–39.

[63] O Brook and KJ Cseres, 'Member States' Interest in the Enforcement of EU Competition Law' in M Varju (ed), *Between Compliance and Particularism: Member State Interests and European Union Law* (New York, Springer, 2019); Cseres and Outhuisje, *Law and Enforcement by EU Authorities* (n 51 above).

[64] W Wils, 'Ten Years of Regulation 1/2003 – A Retrospective' (2013) 4 *Journal of European Competition Law and Practice* 293; H Kassim and K Wright, 'The European Competition Network: a European Regulatory Network with a Difference' (*European Consortium for Political Research, 2010*).

[65] Cseres, 'Rule of Law Challenges' (n 62 above) 319–39. Brook and Cseres, *Between Compliance and Particularism* (n 63 above). Sipiczki, 'Protecting Against Protectionism' (n 59 above). M Borgers, 'Putting the "Trust" in Antitrust: The Impact of the Rule of Law Crisis on Trust between National Competition Authorities Under Regulation 1/2003' (*Master Thesis, Amsterdam Centre for European Law and Governance 2021*).

[66] S Wilks, 'Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?' (2005) 18 *Governance* 431. G Monti, 'Independence, Interdependence and Legitimacy: the EU Commission, National Competition Authorities, and the European Competition Network' (*EUI Working Paper Law 01/2014*).

The motive for decentralisation reflected a political objective of bringing 'the decision-making process closer to citizens' by allowing consumers to address national enforcers.[67] Thus, decentralisation was seen as an important component to provide stronger and more democratic political support to the EU competition policy.[68] However, there were concerns that bringing decision-making closer to citizens carried the inherent risk that Member States would implement their own national interests within the EU legal and governance framework. It was feared that decentralisation would enable national governments to influence the outcome of enforcement, creating a risk of re-nationalising EU competition law.[69]

The shortcomings of the multilevel enforcement system were to some extent remedied by the European Competition Network Plus (ECN+) Directive,[70] which aims to empower NCAs to be more effective enforcers of competition law by laying down minimum harmonisation rules for NCAs' powers of investigation, decision-making (notably fining) and enforcement. Article 4 of the ECN+ Directive sets minimum safeguards for NCAs' independence and requires accountability to governments and parliaments.

The influence of Member States has been demonstrated, for instance, in the enforcement of Article 101 TFEU by the adoption of national procedural measures limiting the enforcement of Article 101, or by the application of the substantive provisions of the article in ways that have brought its enforcement in line with national interest.[71] For example, Member States can adopt substantive legislation that explicitly limits EU competition rules, such as Germany's national Federal Forests Act, which was amended to exclude agreements between the federal states and other forest owners fixing prices and restricting sales (by-object restrictions of competition) from the scope of national competition law, and effectively also from the scope of EU competition law by setting a presumption that they are justified under Article 101(3) TFEU.[72] Moreover, not all NCAs have an independent status as administrative authorities. Although some NCAs are institutionally, financially

[67] Commission, 'White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty' COM(1999) 101 final 9–10.

[68] ibid 10, 21.

[69] German Monopolies Commission, *Cartel Policy Change in the European Union? On the European Commission's White Paper of 28th April 1999*, 1st edn (Baden-Baden, Nomos Verlagsgesellschaft, 2000); B Baden and I Maher, 'Networking Competition Authorities in the European Union: Diversity and Change' in CD Ehlermann and I Anatasiu (eds), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities* (Oxford, Hart Publishing, 2002) 204. These concerns were addressed by the Commission in various soft law documents as well as by promoting a 'more economics-based approach' and reframing Art 101(3) as an objective tool to support economic assessment so that the possibility for national enforcers to apply Art 101 TFEU would remain limited. Commission, 'Notice on cooperation within the Network of Competition Authorities' (Notice) [2004] OJ C101/3; Brook and Cseres, *Between Compliance and Particularism* (n 63 above).

[70] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L11/3.

[71] Brook and Cseres, *Between Compliance and Particularism* (n 63 above).

[72] Federal Forestry Act of 2 Mai 1975 (as amended) (*Bundeswaldgesetz*), Section 46 (2); German Competition Authority, Decision B1-72/12 of 9 July 2015 (Round timber in Baden Württemberg).

and politically independent of their governments, others are considerably less so.[73] The provisions of the ECN+ Directive remain limited, for example, concerning de facto independence and accountability, not addressing the broader constitutional context of competition law enforcement.[74]

Concerning merger control the challenges have been similar, though not identical, due to the different allocation of competences between Member States and the Commission. The challenges of globalisation and the 2008 economic crisis motivated growing intervention by public authorities in the economy and raised questions regarding the role of competition policy.[75] After the adoption of the EU Merger Regulation, Member States gradually adopted and reformed their merger laws. These reforms pursued three objectives: to put independent agencies in charge of merger control enforcement, to make procedures predictable and transparent, and to adopt competition-based review criteria. Still, the new rules have not completely eliminated political influence.[76]

As Member States tried to recover from the financial and economic crisis, popular backlash against foreign control of key national businesses grew and a clash manifested between proponents of open market economies and those of protectionism.[77] A central concern remained how could EU law balance the EU law goals of undistorted competition against sensitive national interests expressed in protectionist measures.[78]

V. Under-Enforcement of Competition Law in Hungary

This section discusses selected cases from Hungary to illustrate how a national government can systematically undermine the values and institutions of the rule of law.[79] As checks and balances disappear, so too does rule of law control over the enforcement of competition law. The cases concern various regulatory measures enacted by the Hungarian government to exempt economic activities in often strategically important sectors of the economy from the pressures of competition.[80]

[73] M Guidi, 'Delegation and Varieties of Capitalism: Explaining the Independence of National Competition Agencies in the European Union' (2014) 12 *Comparative European Politics* 343. KJ Cseres, 'The Implementation of the ECN+ Directive in Hungary and Lessons Beyond' (2019) 12 *Yearbook of Antitrust and Regulatory Studies* 55.

[74] Cseres, 'Rule of Law Challenges' (n 62 above).

[75] D Geradin and I Girgenson, 'Industrial Policy and European Merger Control – A Reassessment' (*Tilburg University Discussion Papers 53/2011*).

[76] ibid.

[77] Jones and Davies, 'Merger Control and the Public Interest' (n 60 above).

[78] ibid 446.

[79] European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded [2018] OJ C433/66.

[80] State intervention and increasing state ownership further reduced competition and increased state control over strategic sectors and resources including finance and banking, land and water

Politicising the competitive process to support national economic interests has been a widespread practice of the Hungarian government since winning the elections in 2010.[81] A transformation of the constitutional system in the ensuing years resulted in economic regulation in which the accumulation of political power led to accumulation of economic power in the hands of a few.[82] The rate and scope of constitutional re-engineering of Hungary's economic governance systematically undermined key legal rules and independent institutions of the functioning Hungarian market economy.[83]

A. Public Procurement and Cartels

A fundamental concern relates to cartels, specifically legislation exempting certain transactions from review under the competition rules. Here, two high-profile cases merit discussion: the renationalisation of the waste management market and the so-called 'Watermelon cartel'.

The restructuring of the Hungarian waste management market took place under the supervision of the National Waste Management Agency,[84] which was responsible for managing the system of public contracts concluded with economic operators for waste management services.[85] The tender for renationalisation of the national waste management market was won by a specific group of Hungarian undertakings in 2013, but the government excluded the incumbents, largely foreign-owned undertakings, by restricting the issuance of operating licences to undertakings that were controlled by the state or local councils.[86] The Hungarian

management. M Varju and M Papp, 'The Crisis, Economic Patriotism in Central Europe and EU Law' in L Antoniolli, L Bonatti and C Ruzza (eds), *Highs and Lows of European Integration: Sixty Years After the Treaty of Rome* (New York, Springer, 2018).

[81] M Papp and M Varjú, 'The Crisis, National Particularism and EU Law: What Can We Learn from the Hungarian Case?' (2016) 53 *Common Market Law Review* 1647 and Cseres, 'Rule of Law Challenges' (n 62 above).

[82] G Gyori, *Hungarian Politics in 2021* (Budapest, Policy Solutions, 2022) Chapter 4.

[83] As the OECD recently acknowledged, 'the pro-competitive regulatory framework is little used. The competition authority is not sufficiently active in sectors with high risk of collusion, with few market studies and decisions.'

[84] The autonomous agency was shut down by Government Decree No 322/2014 and its functions were transferred to the National Environmental Authority. In April 2016, the National Waste Management Coordination and Asset Management Corporation was established to collect the fees, manage assets and debts, and to coordinate information on waste management public services provided by local government or by the State (Government Regulation No 69/2016). Papp and Varjú, 'The Crisis, National Particularism and EU Law' (n 81 above).

[85] The Hungarian waste market is regulated by Act CLXXXV of 2012 (Waste Disposal Act) on waste. It is a market with strong public service obligations and is characterised by increasing State- and other public ownership in certain segments. The Act implemented the EU Waste Framework Directive (Directive 2008/98/EC) and other EU legislation on waste with significant delay. The infringement procedure against Hungary was ultimately order in case C-310/12 *Commission v Hungary* [2013] EU:C:2013:556.

[86] Act CLXXXV of 2012 (Waste Disposal Act), Art 81. Papp and Varjú, 'The Crisis, National Particularism and EU Law' (n 81 above) 1661.

competition authority (GVH) suspected that the group of Hungarian undertakings had coordinated the actual bids, thus bid-rigging the public procurement procedures. When the GVH started its investigation, the Hungarian Parliament changed the relevant legislation on the financial grounding of the central budget to exclude the applicability of the competition rules concerning illegal conduct in public procurement procedures conducted in the years 2012–13. The legislation and exemption were instrumental in the authority's decision to close the investigation in 2015 due to the absence of 'public interest' in continuing.[87]

Another case – one which was harshly criticised – is that of the Watermelon cartel, in which legislation was introduced exempting allegedly anticompetitive practices from the enforcement of competition rules.[88] In 2012, the GVH initiated a competition supervision procedure against a number of Hungarian melon producers, the Hungarian Melon Association and the inter-branch organisation for fruits and vegetables. The issue concerned an alleged restrictive agreement on a 'fair' minimum price that would be charged from July 2012 for watermelons produced in Hungary and that would restrict the distribution of imported watermelons. The alleged agreement was initiated by the Ministry for Rural Development, which wanted to secure a fair standard of income for farmers through the action.[89] After the GVH started its investigation, the Hungarian Parliament adopted an amendment to the Act on Inter-branch Organisations[90] stating that subject to the approval of the Minister for Agriculture and Rural Development, an otherwise restrictive agreement in the agricultural sector could be exempted from the prohibition in Hungarian competition law. In addition, the amendment stated that the GVH must (a) suspend imposing a fine for anticompetitive practices in violation of Article 11 of the Competition Act or Article 101 TFEU conducted in respect of agricultural products and (b) call the involved parties to act in compliance with the applicable laws.

The amendment had substantial consequences. While the GVH had vigorously enforced competition rules, and most notably the cartel provision in the agricultural sector, before 2012,[91] it terminated its proceedings in the case after the

[87] Decision of the Hungarian Competition Authority, Vj-67/2014/59.

[88] Decision of the Hungarian Competition Authority, Vj-62/2012.

[89] Press Release, 'Termination order was issues – the end of the watermelon saga': www.gvh.hu/en/press_room/press_releases/archive/press_releases2013/8198_en_termination_order_was_issued__the_end_of_the_watermelon_saga.

[90] Act CLXXVI of 2012 (Agricultural Organisations Act) on inter-branch organisations and on certain issues of the regulation of agricultural markets adopted on November 19, which amended Act CLXXXV of 2012 (Waste Disposal Act). Art 18/A(1) provided that: 'The infringement of Section 11 of the Competition Act cannot be established in case of agricultural products if the distortion, restriction or prevention of competition resulting from an agreement according to Section 11 of the Competition Act does not exceed what is necessary for an economically justified, fair income, provided that the actors of the market affected by the agreement are not debarred from benefiting from such income and that Art 101 TFEU was not applied.'

[91] The GVH also closed its investigation in the *Sugar cartel* case in which it suspected that sugar producers had regularly coordinated their market behaviour with respect to prices, divided their industrial and retail purchasers and shared information related to the quantities sold. Hungarian Competition Authority, Decision Vj-50/2009/226, para 132.

minister found that the conditions for the exception were met.[92] Previously, price-fixing and market-sharing decisions of agricultural associations were among the most frequent type of cartel cases.[93] While a 2012 ECN study on the food sector showed that in the period 2004–11 the GVH was one of the eight most active enforcers among the Member States,[94] according to a 2018 Commission study, Hungary investigated only a single case in the agricultural sector in the period of 2012–17.[95]

Despite strong criticism of the exemption from academia,[96] international organisations[97] and the GVH,[98] the European Commission did not question the exemption itself. Focused only on the provisions that precluded the GVH from imposing fines where trade between Member States is affected, the Commission merely issued a reasoned opinion requesting Hungary to ensure effective enforcement of competition law.[99] Threatened by a possible infringement procedure against Hungary, the Hungarian Competition Act was changed in 2015, clarifying that the GVH may impose sanctions, including fines, when the agreement infringes EU competition law.[100] The Commission accordingly closed the case in 2015 without further action.

B. Merger Control: Public Interest Exemption

Debates about the conflict between achieving efficiency considerations and public interest policy objectives through competition have intensified in recent years as governments have more frequently intervened in markets of significant national

[92] Hungarian Competition Authority, Decision Vj-62/2012, paras 13–15, 42–46 and 56–57.

[93] Hungarian Competition Authority, Decision Vj-199/2005/246; Hungarian Competition Authority, Decision Vj-69/2008/538; Hungarian Competition Authority, Decision Vj-89/2003/58.

[94] European Competition Network, 'Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector' (2012): www.ec.europa.eu/competition/ecn/food_report_en.pdf.

[95] Commission, 'Accompanying the document Report from the Commission to the European Parliament and the Council the application of the Union competition rules to the agricultural sector' (Staff Working Document) SWD(2018) 450 final, 33.

[96] B Csépai, 'The Ceasefire is Over' (2015) 36 *European Competition Law Review* 404; T Toth, 'The Fall of Agricultural Cartel Enforcement in Hungary' (*Competition Law Research Centre 17/2013*).

[97] Á Pina, 'Enhancing Competition and the Business Environment in Hungary' (*OECD Economics Department Working Papers 1123/2014*).

[98] Hungarian Competition Authority, Decision Vj-62/2012, paras 70–72, GVH, 'The GVH suggests enforceable ethical rules to the agricultural sector' (2009).

[99] In this opinion the Commission emphasised that since 2004 the Commission and the national competition authorities share parallel competences for the enforcement of EU competition law. They cooperate in the European Competition Network to exchange information and inform each other of proposed decisions to ensure an effective and consistent application of EU competition rules. Commission, 'April infringements package: main decisions' (Memo) COM(2014).

[100] Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practice (Competition Act), Art 93/A. (5) paras (1)–(4) shall only apply to a case, if the necessity of the application of Art 101 of the TFEU does not arise. The necessity of the application of Art 101 of the TFEU shall be established by

importance using a variety of tools, including arranged mergers and foreign investment rules.[101] A 2016 Report of the Organisation for Economic Co-operation and Development (OECD) shows that merger exemptions on public interest grounds were common in other OECD countries, too, but they were implemented only after a full merger review by competition authorities and based on clear and explicit public interest grounds.[102]

In 2013, a new provision, Article 24/A, was introduced in the Hungarian Competition Act. The provision states that the Hungarian government 'may, in the public interest, in particular to preserve jobs and to assure the security of supply, declare a concentration of undertakings to be of strategic importance at the national level'. For these types of concentrations, no GVH authorisation is required. Moreover, the decision can be taken in a government regulation without proper reasoning and is not subject to judicial review. Since 2013, the government has approved 40 merger cases, in the energy, finance, telecommunications, IT and transport sectors, without the competition authority having authorised them on the basis of their impact on competition. For comparison, in Germany, since the ministerial authorisation procedure was inserted in the German competition law in 1970, there have been 23 applications for ministerial approval, of which only nine were granted.[103]

The risk such exceptions pose becomes especially tangible in two cases in Hungary: a 2018 merger case related to media pluralism and a 2023 telecommunications case concerning the acquisition of Vodafone Hungary by telecommunications company 4iG and the Hungarian State.[104] In the first case, the government issued Decree 229/2018,[105] creating a media conglomerate said to be of 'national strategic importance in the public interest', and it called for a merger affecting hundreds

the Hungarian Competition Authority in its competition supervision proceeding pursuant to Art 3(1) of Council Regulation (EC) No 1/2003 (n 61 above), before making the final resolution. GVH, 'Annual Report' (2015).

[101] OECD, 'Public interest considerations in merger control' DAF/COMP/WP3(2016)3 (2016) 14.

[102] In many jurisdictions (FR, GER, IT, NL, UK) the government (usually the minister of the economy) has the power to intervene in merger control. Such intervention is often ex post as it follows the competition authority's own assessment and is based on public interest clauses which allow the competition authorities' decision to be overruled. OECD, 'Public interest considerations in merger control' (n 101 above).

[103] OECD, 'Public interest considerations' (n 101 above) 15.

[104] At the beginning of 2023, the Hungarian government in its Government Decree No 2/2023 declared the acquisition of Vodafone Hungary by 4iG and by the Hungarian State as being of national strategic interest and exempted it from national merger control. Assessments showed that in the past the Hungarian government had already declared a number of telecom mergers of 'national strategic importance', which enabled 4iG to effortlessly acquire two big telecommunication companies in 2021–22 without fearing any control of compliance with the applicable competition rules. These completed mergers already resulted in very concentrated markets. See on this TGL Profs, 'TGL Profs urge DG Competition to review acquisition of Vodafone Hungary': www.thegoodlobby.eu/2022/12/19/the-good-lobby-profs-urge-dg-competition-to-review-planned-acquisition-of-vodafone-hungary-by-4ig-and-the-state/.

[105] Government Decree No 229/2018.

of broadcasters, online and print publications to be exempt from competition rules.[106] The merger comprised a foundation to which ten companies donated their media outlets, resulting in control and operation of nearly 480 publications by a publisher known for loyalty to the Hungarian prime minister. The foundation could be viewed as a massive concentration of advertising and readership, which up until then was not allowed to be formed. The exemption of the merger of the media companies from competition rules produced a large-scale concentration of political power, aggravating the already shrinking space for media pluralism in the country.[107]

A link has frequently been made between the unprecedented level of state capture of Hungary's media ecosystem and the general elections of 2022 and is argued to have contributed to another landslide victory of the Fidesz party.[108] State capture of the media is also a reoccurring theme of the rule of law reports issued by the European Commission, including the latest of 2022.[109]

Empirical evidence suggests that protectionist state intervention in merger control is not efficient in the long run and often has considerable welfare-reducing effects. There are thus significant political and economic reasons why state intervention in merger control should be minimised and should only be used where it genuinely aims at the protection of narrowly defined public interests.[110]

VI. The Relevance of Competition Authorities: Defending Citizens' Welfare

A. The Role of Competition Authorities

The Commission and the NCAs, as 'public enforcers', have a central and fundamental role in guaranteeing effective enforcement of competition law across the EU, which is why the curtailing of the competition authority's competence in Hungary is so significant. They are the 'driving institutional motor behind effective implementation of competition policy'[111] and form essential pillars for

[106] Hungarian Competition Authority, Decision B/961/2018.

[107] E Brogi and others, 'Assessing Certain Recent Developments in the Hungarian Media Market Through the Prism of the Media Pluralism Monitor' (*Centre for Media Pluralism and Media Freedom 01/2019*).

[108] International Press Institute, 'Mission Report: Media Freedom in Hungary Ahead of 2022 Election' (Vienna, 2022).

[109] The country chapters of the Commission's rule of law report are available at: https://commission.europa.eu/publications/2022-rule-law-report-communication-and-country-chapters_en.

[110] Sipiczki, 'Protecting Against Protectionism' (n 59 above) 12.

[111] I Maher, 'The Institutional Structure of Competition Law' in M Dowdle, J Gillespie and I Maher (eds), *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* (Cambridge, Cambridge University Press, 2013) 61.

'proper enforcement'[112] of the EU competition rules. Competition authorities are technocratic expert organisations that are 'required to separate politics from administration',[113] and they must be legally and functionally separated from market parties and from the legislative and executive powers. Their independence has traditionally been justified by the technical complexity of the regulated markets and thus the need for expert decision-making.[114]

In Europe, the blueprint for effective enforcement and institutional design was laid down by the Ordoliberals, and first implemented in the German competition law system in the 1950s. As part of their philosophy of competition and democracy, as discussed above, the Ordoliberals envisioned a specific procedural and institutional framework for enforcing substantive competition rules. The monopoly office would be a highly independent and autonomous entity with sole responsibility for enforcement. It was not to form part of the state bureaucracy, in order to prevent political influence.[115] Its actions and decisions would be subject to review by regular courts for their conformity with an economic constitution guaranteeing yet legally controlling market freedoms. This model left no room for the executive in the sense of government.[116] The independent monopoly office was regarded as a *sine qua non* of the modern *Rechtsstaat*, as essential as a highest court.[117] The Ordoliberals envisioned a quasi-judicial office that was solely guided by the application of judicial methods to authoritative texts. Accordingly, the monopoly office had to be a strong institution with significant enforcement authority and having sufficient resources to operate quickly and decisively, to attract and maintain well-qualified personnel and to effectively demand compliance.[118]

The Ordoliberal vision of a competition authority was principally implemented in Germany when it designed its own *Bundeskartellamt*, which enjoys a high level of independence from the ministerial bureaucracy. The role of the Bundeskartellamt in the German economy and legal and political system is well illustrated in Gerber's argument that, '[T]he GWB was not just another law, and the Bundeskartellamt was not just another administrative office. Together, they symbolized rejection of a failed regime and belief in a democratic alternative.'[119] Crucially, the independence and autonomy of the Bundeskartellamt originates from its internal organisation and procedures, which protect it from any political

[112] Council Regulation (EC) No 1/2003 (n 61 above) Recital 6.

[113] DA Crane, *The Institutional Structure of Antitrust Enforcement* (Oxford, Oxford University Press, 2011).

[114] Maher, 'The Institutional Structure of Competition Law' (n 111 above).

[115] The ordoliberals' conviction that the office had to be autonomous was related to their experience during the Weimar period when the capacity of cartels and large corporations to eviscerate attempts at control by putting political pressure on the executive branch.

[116] D Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford, Oxford University Press, 2001) 254.

[117] ibid.

[118] It thus needed career specialists with a high level of economic and legal training, and they had to be largely protected from outside political or pecuniary influences.

[119] Gerber, *Law and Competition in Twentieth Century Europe* (n 116 above) 282.

influence. Its decisions are taken by so-called 'decision sections' whose procedures largely follow a judicial model. Decisions are taken on the basis of juridical principles and procedures and must be carefully justified in writing by reference to the GWB and existing case law. This leaves little to no room for administrative discretion. The juridical nature of the Bundeskartellamt is reflected in its special status, as it is placed outside the regular administrative hierarchy with the statute making its decisions reviewable by the regular courts.[120]

When the enforcement of EU competition law was negotiated in 1961, Germany was the only Member State in which competition law had played a key role in the development of the national legal and economic order. Therefore, the German experience was particularly influential in the formulation of Regulation 17/62, and Germany's normative model of a centralised, independent, quasi-judicial competition authority significantly influenced the EU model.[121] The fact that competition became a powerful component of European integration and the development of the internal market was due to the institutional and procedural setting enshrined in Regulation 17/62. In the European Commission, DG IV (now DG Competition) stood out among the DGs because of its autonomy, judicial functions and the direct influence it could exert on the economy in the common market.[122] This institutional structure closely resembled Ordoliberalism, in that it revolved around the concept of a 'strong state' in which the task of government was to provide, protect and reliably enforce non-discriminatory general rules of the game for economic and social interaction without intervening in the process or becoming a player itself. The economic constitution is aimed not merely at preventing the accumulation of private economic power but also at prohibiting political interventions by any measures meddling with market mechanisms.[123] Over the past six decades, the strength of EU competition law has primarily been the result of this highly centralised and independent institutional decision-making as established in 1962, as well as the extensive enforcement powers of the Commission. It has guaranteed uniformity and coherence, provided legal certainty for firms and proved valuable for developing experience, expertise and authority in a sensitive

[120] ibid 282, 286, 287.

[121] According to Seidel and Pace, Germany's judicial approach and confinement to competition-related assessment criteria served as a strong and comprehensive dogma from its very beginning. Furthermore, the persistence and success of the Bundeskartellamt with respect to the enforcement of these policies meant that German officials could rely both on a refined theoretical doctrine, and on a growing body of experience as compared to its neighbours. Pace and Seidel, *The Historical Foundations of EU Competition Law* (n 16 above) 66.

[122] Seidel and Pace, *The Historical Foundations of EU Competition Law* (n 16 above) 66. Competition in the Common Market. Speech by H von der Groeben, Member of the Commission of the European Economic Community, during the debate on the draft regulation pursuant to Arts 85 and 86 of the EEC Treaty in the European Parliament (Strasbourg, 19 October 1961).

[123] K Horn, 'Ordoliberalism: Neither Exclusively German Nor an Oddity. A Review Essay of Malte Dold's and Tim Krieger's Ordoliberalism and European Economic Policy: Between Realpolitik and Economic Utopia' (2021) 35 *The Review of Austrian Economics* 547.

supranational setting.[124] The defining characteristic of DG Competition reflects a strong German influence and Ordoliberal view of competition law as part of an economic constitution guaranteeing market freedoms and the importance of *Rechtsstaat* values over *ad hoc* political decision-making.[125]

B. Testing Constitutional Principles in Effective Competition Law Enforcement

Competition law is often seen as a distinctive area of law, as it depends on economic theory to define most of its substantive content and it is functional in nature.[126] While both these characteristics put it at some distance from traditional conceptions of the rule of law, rule of law remains key to guard against arbitrary use of government power and to safeguard individual rights including in competition law cases. Hence, its instrumental nature does not preclude it from a rule of law scrutiny that seems indispensable regarding the challenges in the decentralised enforcement of Articles 101 and 102 and merger control as analysed above.

With decentralisation, the institutional design and autonomy of all the NCAs became crucial for enforcement of Articles 101 and 102 TFEU, as EU law enforcement came to rely on members states' procedures and administrative capacity. Despite the diversity of Member States' institutional settings as based on the principle of procedural and institutional autonomy,[127] the NCAs remain subject to a number of fundamental obligations under EU law. First is their obligation of cooperation with the Commission and other NCAs, founded 'on equality, respect, and solidarity and especially on the idea that Member States accept that their enforcement systems differ but nonetheless mutually recognize the standards of each other's system as a basis for cooperation'.[128] The decentralised system rests on the implicit safeguarding of mutual trust and sincere cooperation,[129] in which all trust each other in making use of their investigative and fining powers in order to deter uncompetitive conduct.[130]

[124] C Harlow and R Rawlings, *Process and Procedure in EU Administration* (Oxford, Hart Publishing, 2014) 199.

[125] ibid.

[126] Maher, *Asian Capitalism and the Regulation of Competition* (n 111 above) 424.

[127] Case 33/76 *Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] EC:C:1976:188, para 5.

[128] Joint statement of the Council and the Commission on the functioning of the Network of competition authorities, https://competition-policy.ec.europa.eu/system/files/2021-07/joint_statement_en.pdf, Point 7.

[129] The decentralised enforcement framework relies heavily on the principle of 'sincere cooperation' laid down in Art 4(3) TEU and imposed on national courts and governments acting as agents of EU law.

[130] Opinion 2/13 of the Court of Justice of the European Union [2014] EU:C:2014:2454, paras 167–68.

This principle, as mentioned above, has now been confirmed by the General Court in its Sped-Pro judgment.[131] Herein, the court addressed rule of law issues to be considered when assessing whether a national competition authority is capable of effectively enforcing competition law and adequately safeguarding a complainant's rights.

Referring to its own case law developed in the area of the European Arrest Warrant (EAW),[132] the General Court found that, just as in the area of freedom, security and justice, the cooperation between the Commission, the competition authorities of the Member States and the national courts for the purposes of applying Articles 101 and 102 TFEU is based on the principles of mutual recognition, mutual trust and loyal cooperation.[133] According to these principles, each of these authorities and courts must presume that, save in exceptional circumstances,[134] all the others respect Union law and, more particularly, the fundamental rights recognised by that law.[135] Meanwhile, the Commission must take account of the additional condition of rule of law backsliding concerns when deciding to reject complaints and allocating cases.[136] Hence, the General Court's judgment marks an important milestone in the interpretation of these principles in EU competition law. It shows that the lack of independence of NCAs, analogous with the lack of judicial independence of authorities issuing the EAW, can justify the suspension of cooperation between Member States.

This is even more so considering the fact that the European Commission and NCAs have 'court-like' functions[137] as they protect the legal position of undertakings as well as citizens' rights to economic activity and free choice in markets.[138]

[131] Case T-791/19 *Sped Pro v Commission* (n 32 above).

[132] 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. 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. Case C-216/118 *Criminal proceedings against LM* [2018] EU:C:2018:586.

[133] Case T-791/19 *Sped Pro v Commission* (n 32 above) paras 81–88.

[134] Exceptional circumstances doctrine is a two-step test that has been developed by the CJEU in the specific context of the EAW. The CJEU introduced this fundamental rights exception in Aranyosi and Căldăraru (Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* 2016] EU:C:2016:198). The rebuttal of the presumption of mutual trust serves to refuse execution of the EAW on the basis of possible fundamental rights violations in the issuing State. Therefore, the 'exceptional circumstances doctrine' and 'fundamental rights exception' in the EAW can be used interchangeably, as the law stands at present.

[135] Case T-791/19 *Sped Pro v Commission* (n 32 above) para 88.

[136] The Court concludes that respect for the principles of the rule of law is a relevant factor that the Commission had to take into account in determining the most appropriate competition authority to investigate a complaint and before rejecting a complaint for lack of an EU interest, to ensure that the national authorities are in a position adequately to safeguard the complainant's rights, para 92.

[137] K Wright, 'The "Judicial", the "Administrative" and Consistent Application After the Decentralisation of EC Antitrust Enforcement' (2009) European Union Studies Association Eleventh Biennial International Conference; I Maher, 'Juridification, Codification and Sanction in UK Competition Law' (2000) 63 *Modern Law Review* 544.

[138] In Germany this originated from the private law orientation of competition law that viewed competition law as a matter of rights and individual freedoms. Gerber, *Law and Competition in Twentieth Century Europe* (n 116 above) 286.

As such, effective enforcement of competition law not only is crucial for safeguarding undistorted competition within the internal market, but also forms part of effective judicial protection as laid down in Article 19 of the Charter of Fundamental Rights (CFR), relevant to both defendants and victims in the competition context.[139]

Furthermore, the Member States must use their sovereign powers to maximise the effectiveness of Articles 101 and 102 TFEU enforcement.[140] The principle of effectiveness, which is a central element of Regulation 1/2003 and Directive 2019/01, requires that Member States do not render the implementation of EU law impossible or excessively difficult. Moreover, they must ensure that the rules they establish or apply do not jeopardise the effective application of Articles 101 TFEU and 102 TFEU.[141] The principle of effectiveness also forms a legal basis to adopt independence requirements in EU law concerning competition and other regulatory authorities, as can be seen in the ECN+ Directive.[142] Accordingly, competition authorities' power to challenge conduct deemed hostile to competition, particularly when that conduct is by politically powerful actors, is an essential measure of their political standing. Consequently, even if competition authorities' formal independence is guaranteed,[143] 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.[144]

The courts have on various occasions emphasised the obligations Member States have on the basis of the principle of effectiveness, which 'demands the availability of 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' (emphasis added).[145] Additionally, in the Schenker case, the General Court considered the circumstances in which an NCA can decline to impose fines for the violation of Article 101 TFEU.[146]

[139] Charter of Fundamental Rights of the European Union [2000] OJ C364/1, Art 19. N Dunne, 'Convergence in Competition Fining Practices in the EU' (2016) 53 *Common Market Law Review* 453.

[140] Case C-429/07 *Inspecteur van de Beslatingdeinst v X BV* [2009] EU:C:2009:359, paras 21. See also paras 34–39 on the link between effective enforcement and loyal cooperation. M Sousa Ferro, 'Institutional Design of National Competition Authorities: EU Requirements' (*University of Lisbon Law School 01/2017*).

[141] Case C-453/99 *Courage Ltd v Bernard Crehan* [2001] EU:C:2001:465, para 29; Case C-308/19 *Consiliul Concurenței v Whitelalnd Import Export SRL* [2021] EU:C:2021:47, para 46; Case C-360/09 *Pfleiderer AG v Bunderkartellamt* [2011] EU:C:2011:389, para 24.

[142] M Sousa Ferro, 'Institutional Design' (n 140 above) 118. Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU [2019] OJ L158/125, Recital 80.

[143] Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practice (Competition Act), Arts 33, 35, 38. Cseres, 'Rule of Law Challenges' (n 62 above).

[144] See for a detailed discussion on how de facto independence has been undermined in Hungary, Cseres, 'Rule of Law Challenges' (n 62 above).

[145] Dunne, 'Convergence in Competition' (n 139 above). The authorities designated under Art 35(1) of Regulation No 1/2003 (n 61 above) must ensure that those Treaty articles are applied effectively in the general interest: C-439/08 *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, ljsbereiders en Chocoladebewerkers (VEBIC) v Belgium* [2010] EU:C:2010:739, para 56.

[146] Case C-681/11 *Schenker and others v Bundeswettbewerbsbehörde* [2013] EU:C:2013:404, paras 46–47, 49.

Therefore, effective enforcement principally relates to the deterrent effect that national sanctioning systems have on the conduct of market operators.[147] Undertakings should be deterred from engaging in anticompetitive conduct fearing prosecution and the obligation to pay a fine.[148] Such a deterrent effect is absent in a situation in which Articles 101 and 102 TFEU are systematically under-enforced. The interdependent nature of decentralised enforcement means that even where most NCAs engage in effective enforcement, the failure of some to apply Articles 101 and 102 TFEU undermines the system.[149]

The general deficiencies as analysed above 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.[150] Such a systemic failure of an NCA to enforce Regulation 1/2003, given the risk this poses to the system of enforcement, should therefore be sufficient to suspend cooperation under Regulation 1/2003. Practically, such a suspension would mean that the other NCAs would no longer mutually recognise the concerned national system as able to effectively enforce Articles 101 and 102 TFEU, with the consequence that cases would be reallocated from such an NCA to other NCAs to ensure that Article 101 and 102 TFEU are enforced.[151] Moreover, on the basis of Article 11 (6) of Regulation 1/2003, the Commission can intervene if there is a serious risk of incoherence by relieving the national competition authority of its competence to act. It has, however, so far not made use of this possibility.

The same principles, however, may warrant a separate note with regard to merger control, in which no parallel application of the merger rules and no cooperation takes place among the NCAs and the Commission. This raises the crucial question of what is effective merger enforcement across the EU. More specifically, we might ask whether the systematic failure of a Member State to review mergers according to its competition rules qualifies as a distortion of competition in the common market and jeopardises the overall enforcement of competition law in the EU.

Even though the principle of effectiveness is not a central element of Regulation 139/2004 as it is in Regulation 1/2003, and even though public interest exceptions to the control of mergers are widely accepted across the EU and beyond, a disproportionately frequent and broadly construed application that eliminates competition-based scrutiny in each case is contradictory to the principle of loyal cooperation under Article 4(3) TEU. It also raises questions as to

[147] C Veljanovski, 'A Statistical Analysis of UK Antitrust Enforcement' (2014) 10 *Journal of Competition Law and Economics* 711.
[148] ibid.
[149] ibid.
[150] Case T-791/19 *Sped Pro v Commission* (n 32 above), paras 85–86.
[151] Borgers, 'Putting the "Trust" in Antitrust' (n 65 above).

the Member State's commitment to the EU values and to EU objectives such as undistorted competition in the internal market. Moreover, it risks directly harming citizens' welfare in strategically important sectors of the economy that, due to the frequent use of merger exceptions, are left to become more concentrated and less focused on citizens' economic interests.

VII. Conclusions

The protection of open and competitive markets is a fundamental economic right of citizens in all jurisdictions with a solid competition law system. Consumer welfare, as the generally accepted goal of competition law, only captures the economic dimension of such a fundamental right. Shifting the focus of enforcement to citizen welfare, this chapter argued, serves to deepen and broaden the policy goal of competition law enforcement. It is reminiscent of how markets contribute to democratic societies by guaranteeing meaningful economic participation for firms and safeguarding the plurality of options for citizens.

This chapter traced the fundamental connection between democracy and competition law in EU law as laid down by the Ordoliberal school. It then went on to analyse how this connection has been implemented by German legislators and later by officials drafting the EU treaties and their procedural framework. More importantly, this foundational link has not just remained in the supranational legal order, but has been transplanted into all the EU Member States through the process of EU integration. In fact, it is not merely a constituent of EU integration and the EU legal order, but also forms a value commonly shared by all Member States. Like the EU constitutional principles and the EU values laid down in Article 2 TEU, the EU competition rules seek to control excessive and arbitrary use of power. While the constitutional rules focus on monitoring public power, competition rules can keep private (or public) economic power in check. In this sense, competition law complements the protection provided by constitutional law to the effective protection of citizens' fundamental rights by making sure citizens (economically) benefit from the functioning of open and competitive markets. This fundamental complementarity was more recently confirmed in the Sped-Pro judgment which determined that, like national courts, NCAs must be independent in order to effectively protect individuals' rights. This judgment is especially important in light of the fact that while competition law forms an exclusive competence of the EU with far-reaching enforcement powers, its constitutional power can be threatened and undermined by Member States' systematic attacks on the rule of law and democracy. It confirms the constitutional relevance of NCAs, which have court-like functions and as such are key actors in upholding individual citizens' and undertakings' economic rights.

The Sped-Pro judgment verifies that when an NCA systematically fails to enforce or under-forces the rules laid down to protect the value of competition, as in the cases from Hungary referenced in this chapter, such a legal system endangers the functioning of markets and the protection of undertakings and citizens at the national and EU level. The current EU legal system has the tools to remedy such crisis situations, but solutions need to be sought and applied broadly across subdisciplines of EU law and across various Commission DGs. This compound analytical lens was once the foundation of EU integration and the EU's legal order. The history of EU integration has presented few more important moments than the present when this compound lens needs to be convincingly and urgently applied.