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### Rule of Law Challenges and the enforcement of EU competition law

*A case-study of Hungary and its implications for EU law*

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**THE COMPETITION LAW REVIEW**

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Rule of Law Challenges and the Enforcement of EU Competition Law: a case-study of Hungary and its implications for EU law

*KJ Cseres\**

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Politicising the competitive process in order to support national economic interests has been widespread practice of the Hungarian government since winning the elections in 2010. The re-transformation of the constitutional system has fabricated a framework for economic regulation where accumulation of political power has resulted in accumulation of economic power. The new framework of economic governance systematically undermined key legal rules and independent institutions of the Hungarian economy. The rate and scope of constitutional re-engineering of Hungary's economic governance framework and most notably the enforcement of competition rules pose questions beyond the Hungarian context on the current interplay of politics, law and economics as well as on the role of markets, states and the competitive process in EU competition law and policy. The article investigates the way "rule of law backsliding" has tarnished the young but effective competition law enforcement that developed in Hungary in the period after 1989 and analyse its broader implications for the (decentralized) enforcement of EU competition law. The article shows the relevance of promoting democracy and rule of law values as a goal of competition law as well as competition law as a fundamental institution of a democratic system. Hungary's case shows that the effectiveness of the decentralized enforcement system not only depends on safeguarding uniform and consistent application in the multi-level governance system but that its legitimacy depends on its compliance with Rule of Law values. As checks and balances disappear in Hungary, so does the rule of law control over law making and law enforcement, including the enforcement of competition law. The case of Hungary also warns that the recently adopted Directive on empowering NCAs to be more effective enforcers of Articles 101 and 102 TFEU does not provide the effective means and instruments NCAs need to successfully enforce EU competition rules.

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For the first time in its history the EU is facing a serious challenge of its Member States' commitment to the rule of law. The financial crisis brought to light the vulnerability of the neo-liberal economic model and national strategies globally shifted towards more inward-looking policies challenging neo-liberal ideas of free trade and market competition. The economic downturn corroded the legitimacy of democratic regimes and populist appeals gained ground. The impact of these developments on economic regulation and competition law enforcement has been significant in and outside of the

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EU and its Member States. Rising populism and economic nationalism both in the US and in the EU raised fundamental questions on how competition law and its enforcement should form part of the democratic process.

Politicising the competitive process in order to support national economic interests has been 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 has resulted in accumulation of economic power. The new framework of economic governance systematically undermined key legal rules and independent institutions of the functioning Hungarian market economy. The rate and scope of constitutional re-engineering of Hungary's economic governance framework and most notably the enforcement of competition rules pose questions beyond the Hungarian context on the current interplay of politics, law and economics as well as on the role of markets, states and the competitive process in EU competition law and policy.

The aim of the paper is to critically analyse the way "rule of law backsliding" has tarnished the young but effective competition law enforcement that developed in Hungary in the period after 1989 and analyse its broader implications for the (decentralized) enforcement of EU competition law. Using Hungary's example, the paper aims to demonstrate the relevance of promoting democracy and rule of law values as a goal of competition law as well as competition law as a fundamental institution of a democratic system.

The paper starts with analysing the relationship between competition law and politics, economic and political freedom and explain in more details how the influential Ordoliberal school of thought has conceptualized this relationship. The role of competition as an institution of a democratic political system was a salient concept that influenced not only the drafters of the Rome Treaty but also carry a meaningful message for legislators and policy makers today.

Against this background the paper examines the way competition law enforcement has been backsliding in Hungary through increasing state involvement, capturing administrative authorities, weakening judicial control, purposefully restructuring markets, introducing unpredictable and sometimes discriminatory regulations and ultimately decreasing the space for competition and competition law enforcement. The examples analysed in this paper show how basic tenets of the rule of law have been neglected or outright abolished in order to make economic choices in favour of local economic actors or specific sectors. Beyond analyzing how re-regulation of certain sectors decreased the room for competition law enforcement in Hungary the paper also examines how institutional design and most importantly, the independence and accountability of the Hungarian NCA (GVH) has been affected.

Hungary's example also warns the EU institutions, and especially the Commission, the guardian of fundamental rights and the rule of law, who could have been more effective on various instances when the same issues arise in the area of competition law.

## 1. THE RELATIONSHIP BETWEEN COMPETITION LAW AND POLITICS

### 1.1. Competition law and politics

The fact that competition law and enforcement is shaped and affected by its wider political environment is certainly not new. The interdependence of economic freedom and political freedom has long been acknowledged<sup>1</sup> and it is a historical fact that economic freedom and political freedom are intricately connected even though their relationship has been complex both historically and theoretically. What is common to both concepts is the idea of freedom from coercions by other individuals or governments.<sup>2</sup>

Competition law operates in a policy framework that corresponds to the economic goals of a political system and the goals of competition policy are selected on the basis of economic needs of society.<sup>3</sup> Setting these goals is part of a political bargaining process.<sup>4</sup>

The United States' antitrust law is often used as a prime example to illustrate this link. In the US, allocation of resources, appointment of antitrust officials and Supreme Court Justices as well as the possible use of lobbying and political influence in case selection and investigations well illustrate this link.<sup>5</sup> Already in 1979 former FTC chairman and antitrust scholar, Pitofsky cautioned that “massively concentrated economic power, or state intervention induced by that level of concentration, is incompatible with liberal, constitutional democracy.”<sup>6</sup>

Recently there have been several calls in the US to acknowledge that antitrust law had more than just an economic goal and that antitrust laws were meant to serve as a constitutional safeguard against the political dangers of unaccountable private power.<sup>7</sup> According to these commentators, weakening antitrust laws and their enforcement means that resistance towards concentration of economic power in the United States and arguably also globally is decreased.

The decreasing political salience of antitrust has been intensely discussed in the US and scholars explained the dramatic drop in the political importance of antitrust by analyzing the political values that underlie the antitrust laws. Waller and First argued that US

<sup>1</sup> Friedman, M. (1962). *Capitalism and freedom*. Chicago: University of Chicago Press.

<sup>2</sup> Wu W., Davis O.A. (2004) *Economic Freedom and Political Freedom*. In: Rowley C.K., Schneider F. (eds) *The Encyclopedia of Public Choice*. Springer, Boston, MA. p.163-164.

<sup>3</sup> Elzinga, K. G. (1977) The goals of antitrust: other than competition and efficiency, what else counts?, *University of Pennsylvania Law Review*, 125 (6) p. 1191-1213

<sup>4</sup> Baker, J.B (2005). *Competition Policy as a Political Bargain*, AAI Working Paper, p.2; Political influences are particularly robust in competition law due to the fact that decisions and policy measures have significant impact on market players. Gal, Michal, *Reality Bites (or Bits): The Political Economy of Antitrust Enforcement*. INTERNATIONAL ANTITRUST LAW AND POLICY, p. 605, Barry Hawk, ed., Juris Publishing, 2002; NYU, Law and Economics Research Paper No. 06-22.

<sup>5</sup> A. Ezrachi, *Sponge* (March 1, 2006). *Journal of Antitrust Enforcement* (2016) 1-26

<sup>6</sup> Robert Pitofsky *Political Content of Antitrust*, 127 *U. Pa. L. Rev.* 1051 (1979).

<sup>7</sup> T.Wu, *Be afraid of bigness, be very afraid*, Opinion, *New York Times*, November 10.2018. L.Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, *Journal of European Competition Law & Practice*, Volume 9, Issue 3, 1 March 2018, Pages 131–132

antitrust law has become too detached from its core ideals and entrenched as a bureaucratic specialty administered by technocrats and as such created what the authors called “antitrust democracy’s deficit”.<sup>8</sup>

EU competition law is an equally relevant example of how competition rules and the way the rules are enforced is politically determined. It embraces a regulatory field, where law, economics and politics interact in composite ways. A prominent feature of EU competition law is its role in safeguarding the political goal of integrating the European market. Market integration formed the conceptual and institutional framework of EU competition law. Market integration has been one of the major drivers of EU competition law since its inception, advancing political and economic goals. The goal of EU competition law has also been considered as to promote certain market freedoms desirable in a democracy.<sup>9</sup>

The close relationship between competition law, economics and politics was already intellectualized by the Ordoliberal school of thought in the 1930s. Their ideas were based on the interdependence of economic, legal and political order and the design of proper rules, i.e. establishing a constitutional economic order that would allow only democratically legitimized economic and political power in society. The competition law provisions in the EU Treaty have been claimed to be founded on the Ordoliberal concept of competition<sup>10</sup> and has formed the relevant standard for EU Courts to interpret EU competition rules.

## **1.2. Ordo-liberalism: the instrumental value of competition law**

The link between economic freedom and political freedom or more precisely, free society and stability of democracy has been the core tenet of the Ordo-liberal school of thought in Europe. They regarded economic freedom in a multidimensional way as private autonomy, freedom of choice for consumers and producers and freedom to compete. Economic freedom constitutes, pursuant to the idea of interdependence between the economic, social and political order, the precondition and counterpart of other fundamental and political rights. From this perspective, the exercise of economic freedom plays a similar role to that of political rights: it is essential for the good functioning of a democratic polity.

One of the key historical lessons so prominently advanced by the Ordoliberals was the concern of the repercussions of concentrated market power on the democratic functioning of society and the role competition policy plays in maintaining a free society.<sup>11</sup> Franz Böhm underlined that competition is not merely rooted in individual economic freedom, but in individuals’ use of their property rights guaranteed by a system

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<sup>8</sup> Harry First and Spencer Weber Waller ‘Antitrust’s Democracy Deficit’ (2012) 81(5) *Fordham Law Review* 2543, 2544

<sup>9</sup> F Böhm, ‘Rule of Law in a Market Economy’ in A Peacock and H Willgerodt (eds), *Germany’s Social Market Economy: Origins and Evolution* (Macmillan, Basingstoke 1989) 56–7;

<sup>10</sup> D.J. Gerber (2001) *Law and Competition in Twentieth Century Europe Protecting Prometheus*, OUP Oxford,

<sup>11</sup> Frank Maier-Rigaud, ‘On the Normative Foundations of Competition Law - Efficiency, Political Freedom and the Freedom to Compete’ in Daniel Zimmer (ed), *The Goals of Competition Law* (Elgar 2012) 166.

of private law. These rights are, however, limited by rules that determine the borderline between (lawful) competitive and (unlawful) anti-competitive market conduct. Accordingly, Ordoliberalists insisted that competitive markets must be based on the rule of law, more specifically on competition rules which the state must enforce by administrative and adjudicative means.<sup>12</sup>

In the Ordoliberal thinking economic freedom is a direct result of an appropriate market order and its intrinsic value lies in the political, human freedom. Economic freedom is seen as an essential basis for a democratic society and it reigns within a constitutionally constrained market economy. The existence of private economic power concentrations is not only economically problematic but also incompatible with a democratic society.<sup>13</sup> The core concern with private economic power emanates from the risk that such power transgresses from the economic to the political sphere where it potentially undermines not only the competitive order - resulting in negative repercussions in the economic sphere - but ultimately threatens the democratic polity.

Ordoliberalism stands on the basis of the application of the rule of law in the economy, with a focus on market mechanism, competition principle and the sole ordering principle of economic exchanges. At the same time, Ordoliberalism is premised on the strong state as the locus of its liberal governance, and holds that economic freedom derives from political authority.<sup>14</sup>

Ordoliberalism is grounded on the tradition of a state-centric neoliberalism, one that says that economic freedom is ordered freedom, one that argues that the strong state is the political form of free markets, and one that conceives of competition and enterprise as a political task.<sup>15</sup> However, it does not rely on state intervention through regulation but on judicially enforceable rules, courts as organs of national economic policy.<sup>16</sup>

### 1.3. Competition as an institution of democracy

The Ordoliberalist view of competition law has been much criticised as being formalistic, inefficient and unworkable *vis-à-vis* the more economic approach based enforcement of EU competition law.<sup>17</sup> However, these critics often simplified and narrowed down the

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<sup>12</sup> Behrens, Peter, The Ordoliberal Concept of 'Abuse' of a Dominant Position and its Impact on Article 102 TFEU Nihoul/Takahashi, Abuse Regulation in Competition Law, Proceedings of the 10th ASCOLA Conference Tokyo 2015, p.10.

<sup>13</sup> Maier-Rigaud, argued that this is also warranted by the fact that in the direct economic tenets of the ordoliberal approach, i.e., the goal of establishing complete competition, the political repercussions of market power have not attracted much scientific research in competition and appear to have simply vanished from the competition policy debate. Frank Maier-Rigaud (n 11) 147.

<sup>14</sup> Bonefeld, W. (2012) 'Freedom and the Strong State: On German Ordoliberalism', *New Political Economy* 17 (5), p. 633.

<sup>15</sup> Bonefeld, (2012)

<sup>16</sup> Liannos, I. Some Reflections on the Question of the Goals of EU Competition Law CLES Working Paper Series 3/2013, p.28.

<sup>17</sup> P Akman, Searching for the Long-Lost Soul of Article 82EC (2009) 29 *Oxford Journal of Legal Studies* 2,267-303 or L Lovdahl Gormsen, "The Conflict Economic Freedom and Consumer welfare in the Modernisation of Article 82 EC" [2007] *European Competition Journal* 3(2), 329-44. T Eilmansberger, 'How to Distinguish Good

ordoliberal ideas to the single concept of economic freedom and the freedom to compete. They have neglected its main concept on the interdependence of economic, political and social orders and its fundamental idea that economic freedom is indispensable to the democratic order of society.

More recently, it has been argued that this Ordoliberal idea of the direct link between competition and democracy as the normative underpinning of competition law is still influential in EU competition law.<sup>18</sup> Competition is an instrument to preserve free democratic society by eliminating market power, design or proper rules to establish a constitutional economic order that allows democratically legitimized economic and political power in society.<sup>19</sup>

Ordoliberals considered competition as a specific institutional form of the market, which was conducive to democracy and the rule of law<sup>20</sup> and emphasized that the efficiency-oriented nature of competition is only one goal and that there are other goals of competition such as ensuring a humane, free and democratic economic order.<sup>21</sup>

The original Ordoliberal aim of competition, i.e. establishing and preserving a free democratic society by eliminating market power, has been watered down, if not abandoned altogether.<sup>22</sup> However, it is exactly this 'lost role' of protecting democratic processes which is gaining significance today. Economic order needs to be seen as interdependent with the social political order and the concept of freedom has to be applied much *more* broadly to the democratic order of society not just to economic transactions and market participants.<sup>23</sup>

The next section will analyse the role of competition in the European integration project and the EU Treaties and its relationship with the rule of law as laid down in EU law.

## 2. EU COMPETITION LAW AND THE RULE OF LAW

Rule of Law principles are a prerequisite for effective competition law enforcement: the key component of such principles is that the enforcement authorities apply clear legal prohibitions to particular facts with sufficient transparency, uniformity and predictability so that private actors can reasonably anticipate what actions would be prosecuted and fashion their behaviour accordingly.<sup>24</sup> The law should be sufficiently specific and its

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from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Abuses' (2005) 42 CMLR 129.

<sup>18</sup> Deutscher, E. Makris, S. Exploring the ordoliberal paradigm : the competition-democracy nexus, Competition law review, 2016, Vol. 11, No. 2, pp. 181-214

<sup>19</sup> Frank Maier-Rigaud (n 11) 141,145.

<sup>20</sup> Deutscher & Makris (n 18)

<sup>21</sup> L. Miksch, Wettbewerb als Aufgabe - Grundsätze einer Wettbewerbsordnung (Verlag Helmut Küpper 1947) 212–217

<sup>22</sup> Frank Maier-Rigaud (n 11) 137.

<sup>23</sup> *ibid* 139

<sup>24</sup> ME Stucke, 'Does the Rule of Reason Violate the Rule of Law?' (2009) 42 UC Davis Law Review 1417.

enforcement predictable and fair.<sup>25</sup> The manifestation of this argument is also present in EU law, more specifically in Articles 2 and 3 TEU.

Article 2 enlists the values of the European Union and makes reference to democracy and the rule of law. Article 2 TEU requires that the enforcement of the EU competition rules necessary for the functioning of the internal market occur in accordance with Rule of Law principles.<sup>26</sup> Article 3 TEU indicates that the enforcement system is legitimate if it achieves its objectives - to guarantee that competition in the internal market is not distorted.<sup>27</sup> Accordingly, the enforcement of EU competition rules have to be effective to be legitimate and it must achieve this goal by guaranteeing Rule of Law values.

Compliance with rule of law values and the EU's economic and competition law framework based on a functioning market economy formed key requirements for EU membership set out in the so-called 'Copenhagen criteria'.<sup>28</sup> The Copenhagen criteria laid down the legal, economic and political requirements of the Central and Eastern European countries (CEECs) accession to the EU and played a key role in their accession process and in the economic transformation and democratization of these countries.<sup>29</sup>

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 various bilateral agreements between the EU and the candidate countries from Central and Eastern Europe (Europe Agreements). The Europe Agreements and the White Paper<sup>30</sup> contained the main legal and economic conditions of accession, such as the establishment of a functioning market economy, adherence to the various political, economic and monetary aims of the European Union, as well as the capacity to cope with competitive pressure and market forces within the EU. More specifically transposition of the competition and state aid *acquis*, effective enforcement of the competition and state aid rules and strengthening of the administrative capacity through well-functioning competition authorities were among the obligations of the candidate countries.<sup>31</sup>

The imposition of competition rules was considered to enhance both the overall economic wellbeing and political stability of a candidate country in the accession

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<sup>25</sup> E Fox, 'Rule of Law, Standards of Law, Discretion and Transparency' (2014) 67 *SMU Law Review* 795.

<sup>26</sup> R Nazzini, 'Fundamental Rights beyond Legal Positivism: Rethinking the *Ne Bis in Idem* Principle in EU Competition Law' (2014) 2 *J Antitrust Enforcement* 270, 282.

<sup>27</sup> *ibid* 282-283

<sup>28</sup> The Copenhagen criteria were established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995. Copenhagen criteria are now reflected in Article 2 TEU and which also represents the most important condition to be fulfilled before joining the EU, as hinted at in Article 49 TEU.

<sup>29</sup> It has been argued that democracy as a political framework for the economic transformation would reinforce the effectiveness of economic reforms, since political democracy is the optimal political institution for a functioning market economy. M. Olson, Dictatorship, Democracy, and Development, *The American Political Science Review* Vol. 87, No. 3 (Sep., 1993), 574-575)

<sup>30</sup> White Paper: Preparation of the associated countries of Central and Eastern Europe for integration into the Internal Market of the Union, COM (95) 163, May 1995

<sup>31</sup> Cseres, K. J. (2014). Accession to the EU's competition law regime: a law and governance approach. *Yearbook of Antitrust and Regulatory Studies*, 7(9), 31-66.

process.<sup>32</sup> Europeanization of these countries' laws has been interacting with market, constitutional and institutional reforms. The main mechanism for the adoption of EU rules and thus the enactment of competition rules was governed by strong EU conditionality,<sup>33</sup> which acted as a crucial incentive for political transformation. However, this no longer holds for current EU members.<sup>34</sup> Even though the Copenhagen criteria do include principles such as democracy and the rule of law, the EU has failed to transfer the same principles into its legislation and lacks a clear specification of these fundamental principles. It has been argued that the EU loses its transformative capacity once countries become full members.<sup>35</sup>

After accession, the competition law provisions of the bilateral agreements and EU conditionality are replaced by the EU's internal law and governance model as laid down in Regulation 1/2003 and the accompanying Notices.<sup>36</sup> Regulation 1/2003 delegated an active role for national actors and established a system of close cooperation between the European Commission and the national authorities. In the decentralized governance framework the NCAs and the Commission<sup>37</sup> act in a multi-level governance system composed of EU and national procedural laws.<sup>38</sup>

Over the past fourteen years public views praised the success of the decentralised enforcement system stating that decentralized enforcement increased the Europeanisation of competition rules across the Member States and developed a shared sense of competition policy and culture among the Member States.<sup>39</sup> However, the

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<sup>32</sup> Falkner and Treib 2008; Schimmelfennig, F. & Sedelmeier, U. (2004). Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe. *Journal of European Public Policy*, 661-679.

<sup>33</sup> Schimmelfennig defines conditionality as a direct mechanism of Europeanization. The EU disseminates its legal rules and governance by setting them as conditions that external actors have to meet in order to obtain candidate/ accession status or other rewards and avoid sanctions. Schimmelfennig, F., Sedelmeier, U. (2004) 670; F. Schimmelfennig, "EU External Governance and Europeanization Beyond the EU", [in:] D. Levi-Faur (ed.), *The Oxford Handbook of Governance*, Oxford 2012.

<sup>34</sup> Tanja A. Börzel & Frank Schimmelfennig (2017) Coming together or drifting apart? The EU's political integration capacity in Eastern Europe, *Journal of European Public Policy*, 24:2, 281.

<sup>35</sup> Schimmelfennig, F. & Sedelmeier, U. (2004). Dimitrova, A. L. and Steunenberg, B., 2004, "Conclusions: the 'end of history' of enlargement or the beginning of a new research agenda?", in *Driven to Change: The European Union's Enlargement Viewed from the East*, (Ed.) Dimitrova, A. L., pp. 179–193, Manchester University Press, Manchester; New York

<sup>36</sup> Cseres, K. J. (2014). Accession to the EU's competition law regime: a law and governance approach. *Yearbook of Antitrust and Regulatory Studies*, 7(9), 31-66.

<sup>37</sup> The Commission and the NCAs have parallel jurisdictions and they can both enforce Articles 101 and 102 TFEU without territorial limitations to their enforcement powers.

<sup>38</sup> In order to coordinate parallel proceedings between the Commission and the NCAs, Regulation 1/2003 established the European Competition Network (ECN) and laid down the rules of its core functions. Notice on cooperation within the Network of Competition Authorities [2004] OJ C 101/43.

<sup>39</sup> A Italianer, "The ECN, convergence and enforcement of EU competition law: achievements and challenges", 3 October 2014, Vilnius, Lithuania European Competition Day of the Lithuanian Presidency, available at [ec.europa.eu/competition/speeches/text/sp2013\\_08\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2013_08_en.pdf); WPJ Wils, "Ten Years of Regulation 1/2003 – A Retrospective" (2013) *Journal of European Competition Law and Practice*, published online 9 July 2013. B Lasserre, "The Future of the European Competition Network", St Gallen International Competition Law Forum ICF, 16 May 2014, available at [ssrn.com/abstract=2567620](http://ssrn.com/abstract=2567620); 'H Kassim and K Wright, "The European Competition Network: a European Regulatory Network with a Difference", Paper presented at ECPR Standing Group on

effectiveness of the decentralised enforcement has also been criticized arguing that there are centrifugal pulls from the Member States towards their national legal systems<sup>40</sup> and centripetal pushes from the Commission towards more centralization.<sup>41</sup>

The effectiveness of the decentralized enforcement system in Regulation 1/2003 depends on safeguarding uniform and consistent application in the multi-level governance system while the legitimacy of shared enforcement depends on its compliance with Rule of Law values. Compliance with rule of law values must be guaranteed by the NCAs and the Commission.

This article will demonstrate and argue that such a compliance is not guaranteed today. Hungary's case is a strong illustration of this argument as its government systematically undermines the values and institutions of the rule of law.<sup>42</sup> As checks and balances disappear, so does the rule of law control over law making and law enforcement, including the enforcement of competition law and ultimately EU competition law enforcement.

The case of Hungary also warns that the recently adopted Directive on empowering NCAs to be more effective enforcers of Articles 101 and 102 TFEU does not provide the effective means and instruments NCAs need to successfully enforce EU competition rules.

The following two sections will analyze Hungary's backsliding of competition law enforcement as a warning example that the decentralized enforcement may not work as effectively as it is acknowledged publicly and that the role of politics plays a crucial role in pushing NCAs towards ineffective or non-enforcement.

### 3. RULE OF LAW BACKSLIDING AND THE SHRINKING SPACE FOR COMPETITION LAW AND ENFORCEMENT IN HUNGARY

#### 3.1. Economic policy between 1989 and 2010

Before analysing current developments of competition law enforcement in Hungary a brief overview of how Hungarian economic policy, competition law and its enforcement developed between 1989 and 2010 will be set out.

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Regulatory Governance, Third Biennial Conference, Dublin, 17–19 June 2010, available at [regulation.upf.edu/dublin-10-papers/2E3.pdf](http://regulation.upf.edu/dublin-10-papers/2E3.pdf).

<sup>40</sup> KJ Cseres 'Competition Law Enforcement Beyond the Nation-State: A Model for Transnational Enforcement Mechanisms?' in H-W Micklitz and A Wechsel (eds), *The Transformation of Enforcement* (Hart 2015) 319–339.

<sup>41</sup> 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 2014/01 <[http://cadmus.eui.eu/bitstream/handle/1814/29218/LAW\\_2014\\_01.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/29218/LAW_2014_01.pdf?sequence=1)>; G Monti, 'Managing decentralized antitrust enforcement: 'Toshiba'' (2014) 51 *CMLRev* 261.

<sup>42</sup> European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL))

The 1980s and 90s were the formative years of the Hungarian competition law regime as well as the years of transition from centrally planned economy and socialist political system to market economy and democracy with the rule of law at its center.<sup>43</sup> The first Competition Act was enacted in 1984, which was a comprehensive law that included not only the prohibition of unfair market practices, but also a limited number of cartel rules and some rules governing consumer deception. The act could not be implemented due to ineffective enforcement and the lack of a competitive environment.<sup>44</sup> Yet, the undeniable achievement of the Act of 1984 was that it introduced basic legal terms and eased the creation of modern competition regulation after the transition.<sup>45</sup> The Competition Act No. LXXXVI of 1990 on the Prohibition of Unfair Market Practices was introduced when the introduction of market economy institutions and laws had just begun and the economy was still highly concentrated. It formed a cornerstone of economic legislation in the process of transition. Although the Competition Act of 1990 lived up to its expectations, by the second half of the 1990s it had become clear that its amendment was unavoidable. The new Act No. LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices entered into force on 1<sup>st</sup> January 1997 and has been in force with amendments since then.

The dominant position of competition law and policy during transition was also explained by the central role played by the Hungarian competition authority, the GVH (Gazdasági Versenyhivatal). The GVH had professionally well-prepared personnel who could successfully begin to enforce competition law. Most of the GVH's staff officials were experts in the field of market economy, competition law and had some knowledge of industrial organization. They exercised a considerable influence on the drafting process of the new Hungarian Competition Act in 1990 and later to make its enforcement effective. Furthermore, the GVH was created in a way that made it possible to preserve its independence from political influence and yet still be able to play an active role in the creation of public policies.<sup>46</sup>

In the process of transition competition law was key in creating a functioning market economy in Hungary. It supported and stimulated the economic changes and introducing competition law control mechanisms demonstrated Hungary's commitment to market economy, competition advocacy and fair market practices. In the transition period there was also strong support for the rule of law, as a reaction to and contrast to the socialist centrally planned and state owned and governed economic system.<sup>47</sup>

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<sup>43</sup> The first steps towards market economy started already in the early 80s with joining the IMF and the World Bank in 1982, whose assistance was crucial in remedying Hungary's macroeconomic problems as well as pushed Hungary towards liberalization and structural changes. Kovács, Cs. Reindl, A. The evolution of the Hungarian competition regime: 2 decades of dynamic change and continuity Mobilis in mobile, in: Building new competition law regimes. selected essays, Lewis, D. (ed.)Edward Elgar, 2013, pp.

<sup>44</sup> KJ Cseres, Competition law and consumer protection, Kluwer International, (2005)

<sup>45</sup> OECD Background report on the role of competition policy in the regulatory reform, Hungary, (2001)p.6

<sup>46</sup> Its staff consisted of both lawyers and economists, who understood how a market economy works. The prominent position of the GVH was also a result of the fact that it was the successor to the Price Control Office, which guaranteed a certain institutional continuity. OECD, *ibid*, p 2-3.

<sup>47</sup> Kovács & Reindl (n 43).

Hungary's accession to the EU was an undisputed aim and priority of each government, there was also a certain belief that any democratic or rule of law 'backsliding' would not be possible once the transformation was completed. The bilateral Europe Agreements and the Copenhagen criteria formed the cornerstone of Hungary's economic and political transformation.

By the mid-2000s, Hungary had become a functioning market economy and faced basically the same issues as other, developed market economies: dealing with long-term macro-economic stability, including the development of more sustainable solutions for healthcare and social security; injecting more competition into previously closed sectors such as postal, energy and rail transport.<sup>48</sup>

Even though Hungary's policy agenda continued to be shaped primarily by EU policies, the nature of EU influence changed, as Hungary's eagerness to implement EU policies was decreasing.<sup>49</sup> EU-related considerations became less powerful in Hungarian policy-making and EU-related considerations became less effective in deterring anticompetitive or protectionist measures.<sup>50</sup> In fact, Hungarian (social-liberal) governments of the 2000s have increasingly favoured interventionist policies<sup>51</sup> and Hungarian politicians started questioning the dominant neo-liberal economic thinking well before the financial crisis in Hungary.<sup>52</sup> After EU accession, increasing political influence went hand in hand with increasing skepticism in a competitive market economy and the neo-liberal policies.

### 3.2. Developments post-2010

Hungary responded to the financial crisis by adopting a policy which reinforced its mixed model of capitalism. The Hungarian economy evolved into a two-speed economy from the end of the 1990s and this asymmetrical structure has been maintained throughout the 2000s.<sup>53</sup> The economy was characterized on the one hand, by a highly competitive and technologically advanced export sector, largely foreign-owned and run. On the other hand, it had a large number of relatively small-scale, low productivity domestically owned manufacturing and service industries that have been less exposed to competition in the course of the transition process. This mixed market economy involved considerable state intervention in certain segments of the national economy and it continued to suffer from

<sup>48</sup> Ibid.

<sup>49</sup> This confirms 'the argument made by Börzel and Schimmelfennig that the EU was losing its transformative capacity once countries became full members Tanja A. Börzel & Frank Schimmelfennig (2017) Coming together or drifting apart? The EU's political integration capacity in Eastern Europe, *Journal of European Public Policy*, 24:2, 278-296, p.281.

<sup>50</sup> This was illustrated by increased calls for the regulation of large-scale retailers and domestic policy making becoming less market and competition oriented. Kovács & Reindl (n 43).

<sup>51</sup> Mihályi, P. (2015): A privatizált vagyron visszaállamosítása Magyarországon 2010 - 2014 (Renationalization of Privatized Assets in Hungary), MTA KRTK Műhelytanulmányok, MTDP 2015/7.

<sup>52</sup> Szanyi M. (2017) Impacts of the Crisis on the FDI-Led Development Model in Hungary: Emergence of Economic Patriotism or Shift from the Competition State to Patronage?. In: Havlik P., Iwasaki I. (eds) *Economics of European Crises and Emerging Markets*. Palgrave, Singapore, p.155.

<sup>53</sup> 2004 OECD Economic Survey of Hungary, p.109.

significant structural asymmetries.<sup>54</sup> Consequently, in certain sectors the scope of competition has been reduced and the efforts of liberalization often withheld or even reversed. This was especially the case in the public services sector. In the energy sector, for example, market mechanisms were replaced by strict price regulation or their operation was subjected to direct political discretion.<sup>55</sup>

The financial crisis hit Hungary especially hard. After the crisis of 2008, many CEE governments and Hungary in particular increased state intervention even when the crisis measures were already eased.<sup>56</sup> The policy direction adopted after the financial crisis, especially after the 2010 elections, maintained, and in certain respect deepened the structural asymmetry of the Hungarian economy. The export-oriented sectors remained subject to market mechanisms and competition. Sectors producing to the domestic market, mainly in the (public) services sector have been exempted from the pressures of competition by reserving economic activity for the State or local council owned economic operators.<sup>57</sup>

Regulation and law were intentionally used to restructure markets and to override market mechanisms. The preparation and application of regulation used in these processes often ignored even the most fundamental limitations posed by the rule of law.<sup>58</sup> The regulatory framework became unstable and regulatory changes were frequent and unpredictable. They were often introduced at short notice and without allowing the parties concerned a sufficient transition period.<sup>59</sup> Regulatory processes continue to be characterized by low transparency and reduced access for stakeholders to the process and limited accountability of public administration.<sup>60</sup>

In the next sections specific cases of exempting certain economic actors or sectors from the application of competition rules will be analyzed.

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<sup>54</sup> The dynamic export sector largely made up of foreign-invested firms. National investors and economic operators were restrained to the domestically oriented segments of the Hungarian economy, which were left untouched by foreign investors after the liberalization and privatization process of the 1990s. 2004 OECD Economic Survey of Hungary, M.Varjú, M. Papp, 'The crisis, national economic particularism and EU law: What can we learn from the Hungarian case?' (2016) 53(6) *Common Market Law Review* 1647.

<sup>55</sup> The Legal and Regulatory Environment for Economic Activity in Hungary: Market Access And Level Playing-field in the Single Market *A legal expert review report*, Lendület HPOPS, research group, 2017 Budapest.p.30, p.14.

<sup>56</sup> Éva Voszka (2018) Nationalisation in Hungary in the Post-Crisis Years: A Specific Twist on a European Trend?, *Europe-Asia Studies*, 70:8, 1281-1302, DOI: 10.1080/09668136.2018.1457137

<sup>57</sup> 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 management. Lendület HPOPS, research group, 2017 p.30

<sup>58</sup> N. Chronowski, M. Varju, Two Eras of Hungarian Constitutionalism: From the Rule of Law to Rule by Law, *Hague Journal on the Rule of Law*, 2016, Volume 8, Number 2, p.283.

<sup>59</sup> European Commission, Country Report, 2015, p.54.

<sup>60</sup> European Commission, Country Report, 2018, p.31/32. Empirical research on legislative process revealed several problematic aspects of regulatory quality. Regulatory impact assessments are not available for a significant number of laws or contain only limited information on the effects of new policies. Corruption Research Center Budapest, 2015, Impact Assessments, Public Consultation and legislation in Hungary 2011-2014, CRCB (2016), Report on the Quality of Hungarian Legislation – 2015; CRCB (2017a), Report on the Quality of Hungarian Legislation – 2016, CRCB, Budapest. <http://crbc.eu>

### 3.3. Public procurement

The low level of competition in public procurement has persisted for years. Empirical evidence suggests that the direct award of contracts continue to be extensively used.<sup>61</sup> The unstable regulatory environment has been one of the biggest barriers to doing business in Hungary, with insufficient stakeholder engagement and evidence-based policy making. Public procurement is still characterized by limited competition and transparency. The low level of competition and transparency in public procurement and the exemption of individual undertakings by way of legislation from the competition rules was at the heart of the restructuring and renationalization of the waste management market in Hungary.

#### 3.3.1. Waste collection case

The Hungarian waste market is regulated by Act 2012:CLXXXV 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, probably in view of the new restructuring of the market.<sup>62</sup>

The restructuring of the waste management market took place under the National Waste Management Agency,<sup>63</sup> which was responsible for managing the system of public contracts concluded with economic operators for waste management services.<sup>64</sup> The tenders advertised were won by a specific group of Hungarian undertakings. The GVH investigated the process under public procurement cartel charges, but closed the case in 2015 on account of the absence of “public interest” in continuing with the investigation.<sup>65</sup>

The tender was part of the re-structuring and re-nationalization of the national waste management market. The government excluded the incumbents, largely foreign-owned undertakings, by restricting the issuance of operating licenses to undertakings that were controlled by the State or local councils.<sup>66</sup> The GVH suspected that the group of

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<sup>61</sup> The lack of competition between economic operators and insufficient transparency in the procedures raise the costs of procurement and distorts the functioning of the market by excluding potential contractors. Hungary ranked among the lowest in market competition according to the weaknesses in institutional soundness and governance could weigh on the country's economic convergence. Corruption risks remain high and there are notable gaps in the measures taken to address the issue. IJ Tóth, M. Hajdú, Intensity of Competition, Corruption Risks and Price Distortion in the Hungarian Public Procurement – 2009-2016, Working Paper Series CRCB-WP/2017:2

<sup>62</sup> The infringement procedure against Hungary was ultimately Order in Case C-310/12 *Commission v. Hungary*, EU:C:2013:556.

<sup>63</sup> The autonomous agency was shut down by Government Decree 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 69/2016). Varjú, Papp (n 54) 1661.

<sup>64</sup> Act 2012:CLXXXV on waste.

<sup>65</sup> Vj/67/2014/59.

<sup>66</sup> Waste Disposal Act, Article 81. Varjú, Papp (n 54) 1661.

Hungarian undertakings had colluded to fix prices, coordinated the actual bids and had bid rigged the public procurement procedures.

After the GVH started its investigation, the Hungarian Parliament changed the relevant legislation, Act 2014:XCIX on the financial grounding of the central budget, which excluded the applicability of the competition rules concerning illegal conduct in public procurement procedures conducted in the years 2012–13. The new legal provisions provide that the license to carry out public service waste management services may only be issued to economic operators in State or local council ownership, in which the State or the local council must also enjoy rights concerning the appointment or dismissal of the majority of executive employees or members of the supervisory board.

This retrospective restriction of the application of competition law provisions is a clear example of the use of legislation to the benefit of individual undertakings favoured by the government and their exemption by legislation from unlawful conduct. The legislation and exemption were instrumental in the authority closing the investigation.

### **3.4. Exempting mergers of national strategic importance**

In 2013 a new provision was introduced in the Hungarian Competition Act. Article 24/A of the Competition Act says 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 authorization of the GVH is required. What more, the decision can be taken in a government regulation which is not subject to judicial review. Until 2018, 21 merger cases, in the area of energy, financial, telecommunications, IT and transport sectors were approved by government without having the Competition Authority authorizing them on the basis of their impact on competition.<sup>67</sup>

In November 2018 the government has declared the creation of a media conglomerate with Government Decree 229/2018<sup>68</sup> of “national strategic importance in the public interest,” and with the decree it called for exempting the merger affecting hundreds of broadcast, online and print publications from competition rules.

In its B/961/2018 Decision the GVH declared that it has no competence to conduct a merger control review.<sup>69</sup> The merger conglomerate was thus not scrutinized by the GVH due to Article 24/A. The merger comprised a foundation to which 10 companies donated media outlets. The foundation will control nearly 480 publications and whose operations will be run by a publisher known for his loyalty to the Hungarian prime minister. The foundation resembles a massive advertising and readership center which until now market rules did not allow to be formed. The merger of the media companies into the foundation and its exemption from competition rules reflects a largescale concentration of government power.

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<sup>67</sup> European Commission, Country report, Hungary, 2015.

<sup>68</sup> 229/2018. (XII. 5.) Korm. rendelet

<sup>69</sup> [http://www.gvh.hu//data/cms1039707/Osszefoglalo\\_B961\\_2018.pdf](http://www.gvh.hu//data/cms1039707/Osszefoglalo_B961_2018.pdf)

Even though the debate about the conflict between achieving efficiency considerations and public interest policy objectives through competition has intensified in recent years as governments more frequently intervene in markets of significant national importance through a variety of tools, including arranged mergers and foreign investment rules,<sup>70</sup> the present Hungarian rules on exempting mergers is unprecedented.

The exemptions are issued through government decrees and thus cannot be challenged in court and be submitted to a legal review. A 2016 OECD Report shows that merger exemptions on public interest ground are common in other OECD countries, too, but they are implemented only after full merger reviews by competition authorities and they are based on clear and explicit public interest grounds.<sup>71</sup> These exemptions are also likely to be quite rare. For comparison, Germany has exempted less than 10 mergers over the past 30 years. Hungary had put at least 21 exemptions in place between 2103 and 2018 as mentioned above. Most of these mergers in Hungary were relatively small and would probably have been cleared by the competition authority if subjected to a merger review. These types of merger exemptions create regulatory arbitrariness that weighs on investment incentives. Similar mergers should only be allowed on clear, limited and explicit public interest grounds.

### **3.5. The Watermelon case: exempting cartels in the agricultural sector**

Conceivably, the most criticized example of exempting allegedly anti-competitive practices by legislation from the enforcement of competition rules is the Hungarian Watermelon case.<sup>72</sup> This case also questions how effectively the ECN safeguards the enforcement of EU competition rules and whether the EU Commission could have played more forceful monitoring role.

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 (Hungarian Interprofessional Organisation for Fruit and Vegetables) concerning an alleged infringement of the prohibition on restrictive agreements. The parties had allegedly agreed, on a ‘fair’ minimum price that would be charged from July 2012 for watermelons produced in Hungary and that they would restrict the distribution of imported watermelons. The alleged agreement was initiated by the Ministry for Rural Development, who wanted to secure a fair standard of income for farmers through this action.<sup>73</sup>

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<sup>70</sup> OECD, Public interest considerations in merger control, DAF/COMP/WP3(2016)3,p.

<sup>71</sup> 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, DAF/COMP/WP3(2016)3,p.

<sup>72</sup> Case Vj-62/2012.

<sup>73</sup> [http://www.gvh.hu/en/press\\_room/press\\_releases/press\\_releases\\_2013/8198\\_en\\_termination\\_order\\_was\\_issued\\_the\\_end\\_of\\_the\\_watermelon\\_saga.html](http://www.gvh.hu/en/press_room/press_releases/press_releases_2013/8198_en_termination_order_was_issued_the_end_of_the_watermelon_saga.html).

After the GVH started its investigation, the Hungarian Parliament adopted an amendment to the Act on Inter-branch Organisations.<sup>74</sup> This amendment stated 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 of anti-competitive agreements under Hungarian competition law. The Minister must ensure that the restrictive agreement guarantees a fair income for the producers and that all market actors are equally allowed to join it.<sup>75</sup> In addition, the amendment stated that the GVH must (a) suspend imposing a fine for anti-competitive 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. If such parties fail to comply within the deadline set by the GVH, the GVH is entitled to impose a fine on them.

The amendment had significant consequences. In the *Watermelon* case, the GVH terminated its proceedings after the Minister had found that the conditions for the exception were met.<sup>76</sup> 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.<sup>77</sup> The GVH has been vigorously enforcing competition rules and most notably the cartel provision in the agricultural sector before 2012. In fact, price-fixing and market-sharing decisions of agricultural associations were among the most frequent type of GVH cartel cases.<sup>78</sup>

The ECN's 2012 study of the food sector shows that in the period 2004-2011 the GVH had investigated and closed 11 cases, which is a relatively high number and puts Hungary in the eight most active enforcers among the Member States.<sup>79</sup> According to a 2018 study by the Commission on application of the EU competition rules to the agricultural sector, Hungary investigated one single case in the agricultural sector in the period of 2012 and 2017.<sup>80</sup>

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<sup>74</sup> Act No.CLXXVI of 2012 on inter-branch organisations and on certain issues of the regulation of agricultural markets adopted on November 19, which amended Act CXXVIII of 2012.

<sup>75</sup> Agricultural Organizations Act, Article 18/Δ(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 Article 101 TFEU was not applied.”

<sup>76</sup> Vj-62/2012 paras 13–15, 42–46 and 56–57.

<sup>77</sup> Vj-50/2009 Sugar cartel, paragraph 132.

<sup>78</sup> Vj-199/2005 Egg cartel (2006), Vj-69/2008 Wheat mill products I (2010); Vj-89-2003/58 Hunting cartel (2004),.

<sup>79</sup> Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector

<sup>80</sup> COMMISSION STAFF WORKING DOCUMENT, 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 {COM(2018) 706 final}, Brussels, 26.10.2018 SWD(2018) 450 final p. 33

Despite heavy criticism of the exemption by both academia,<sup>81</sup> international organizations,<sup>82</sup> and by the GVH itself,<sup>83</sup> the European Commission had not questioned the exemption. It only focused on the provisions that did not allow the GVH to impose fines where the agreement affected trade between Member States. The European Commission issued a reasoned opinion requesting Hungary to ensure effective enforcement of competition law regarding agricultural products and to comply with its competition law obligations under EU law.<sup>84</sup>

In this opinion the Commission emphasized 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 (ECN) to exchange information and inform each other of proposed decisions to ensure an effective and consistent application of EU competition rules.<sup>85</sup> Threatened by possible initiation of an infringement procedure against Hungary, the Hungarian Competition Act was changed in 2015. Its new Article 93/A clarified that the GVH may impose sanctions, including fines, when the agreement infringes EU competition law. The 2015 amendment of the Competition Act introduced Article 93/A that explicitly stipulates that the provisions which regulate the specificities of agriculture and which were originally part of Act CXXVIII of 2012 on agricultural associations and on the regulation of certain issues concerning the agricultural markets (Act on inter-branch organisations) are only applicable if the primacy of the competition rules of the European Union do not prevail.<sup>86</sup> The Commission has accordingly closed the case in 2015 without further actions from the Commission.

The Commission's reasoning highlighted that an effective enforcement of Article 101 TFEU requires the imposition of effective and deterrent fines on undertakings that participate in cartels pursuant to Article 5 of the Antitrust Regulation 1/2003, the duty of cooperation according to Article 4(3) of the EU Treaty and the general EU law principle of effectiveness.

However, it has been argued that exactly these Treaty provisions and general principles could provide the legal basis for the Commission to further push its procedure against

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<sup>81</sup> Balázs Csépai, "The Ceasefire Is over," *European Competition Law Review* 36, no. 9 (2015): 404–5., 404-405; Toth, "The Fall of Agricultural Cartel Enforcement in Hungary.," 364-366.

<sup>82</sup> Álvaro Pina, "Enhancing Competition and the Business Environment in Hungary," 2014, [http://www.oecd-ilibrary.org/economics/enhancing-competition-and-the-business-environment-in-hungary\\_5jz2pwfr0nzq-en](http://www.oecd-ilibrary.org/economics/enhancing-competition-and-the-business-environment-in-hungary_5jz2pwfr0nzq-en), 16

<sup>83</sup> Vj-62/2012 watermelon (2013), para 70-72, GVH - The GVH suggests enforceable ethical rules to the agricultural sector, 29.9.2009

<sup>84</sup> [http://europa.eu/rapid/press-release\\_MEMO-14-293\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-293_en.htm)

<sup>85</sup> [http://europa.eu/rapid/press-release\\_MEMO-14-293\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-293_en.htm)

<sup>86</sup> Article 93/A. (5) Paragraphs (1)-(4) shall only apply to a case, if the necessity of the application of Article 101 of the TFEU does not arise. The necessity of the application of Article 101 of the TFEU shall be established by the Hungarian Competition Authority in its competition supervision proceeding pursuant to Article 3(1) of Council Regulation (EC) No 1/2003, before making the final resolution. GVH, Annual Report, 2015. [http://www.gvh.hu/en//data/cms1035410/gvh\\_ogy\\_pb\\_2015\\_a.pdf](http://www.gvh.hu/en//data/cms1035410/gvh_ogy_pb_2015_a.pdf)

Hungary.<sup>87</sup> Even though EU law does allow for derogations from the application of competition rules in the agricultural sector on the basis of Article 101(3) and block exemptions or on the specific CMO Regulation 1308/2013. On the basis of Article 210 of the CMO Regulation interbranch organizations that have been recognized by their respective Member States (Article 157) must notify their agreement to the Commission before implementation. However, even these agreements may not entail price fixing agreements.<sup>88</sup> The Commission's recent Report on the application of EU competition rules to the agricultural sector refers to the Hungarian case and the competition concerns it raised. It, however, concludes that the law was ultimately repealed following an infringement procedure by the Commission in 2015. However, the same provisions are now implemented in the Hungarian Competition Act.<sup>89</sup> An additional concern is that the decision of the minister is not open to judicial challenge. This concern will be further analyzed in section 4.6.2. on judicial accountability.

#### 4. INSTITUTIONAL QUESTIONS: INDEPENDENCE AND ACCOUNTABILITY

It is now well recognized that institutions are a critical and underappreciated driver of competition policy that interacts in many subtle ways with substantive rules and decisions.<sup>90</sup> Institutional embeddedness of legal rules involves important procedural and institutional complexities and irregularities that influence effective law enforcement.<sup>91</sup>

A stable and efficient legal framework, grounded on the principles of separation of powers and judicial independence, is widely seen improving economic growth.<sup>92</sup> However, the perceived quality and effectiveness of legal and political institutions in Hungary has been weak. The OECD's 2016 Economic survey, for example, established that Hungary performed poorly on the indicator of civic engagement and governance

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<sup>87</sup> Kim Lane Scheppele has argued that the Commission should become more creative in the way it brings its infringement actions so that they emphasise not just fly-specking acquis violations but point out broader patterns in the way that EU law is being undermined. The Commission can create a more general theory of these cases by showing that violations of the Charter of Fundamental Rights occur alongside acquis violations, or by bringing an action for failure of the Member State to engage in sincere cooperation under Article 4(3) TEU, or even by grounding an action in failure to uphold the values of Article 2 TEU directly. K. Lane Scheppele, 'Enforcing the basic principles of EU law through systematic infringement actions', in: *Reinforcing rule of law oversight in the European Union*, C.Cosa, D. Kochenov (eds.) 2016, CUP, pp.105-132.

<sup>88</sup> Report from the Commission on the application of the Union competition rules to the agricultural sector, COM (2018)706 final, p.12

<sup>89</sup> Report COM (2018)706 final, p.42.

<sup>90</sup> Crane, D.A., 'The Institutional Structure of Antitrust Enforcement,' Oxford University Press, 2011. Fox, E., 'Antitrust and Institutions: Design and Change,' 41 *Loy. U. Chi. L.J.* 473 (2009-2010)., Fox, E.M. and Trebilcock, M. J., 'The Design of Competition Law Institutions and the Global Convergence of Process Norms: The GAL Competition.', 2012. Hyman, D.A. Kovacic, W. E., 'Government Organization/Reorganization: Why Who Does What Matters.', GWU Legal Studies Research Paper No. 2012-70,

<sup>91</sup> Gerber, David J., 'Competition Law and the Institutional Embeddedness of Economics,' *Economic Theory and Competition Law*, Josef Drexler, ed., 2008. Available at SSRN: <http://ssrn.com/abstract=1306482>

<sup>92</sup> North, D. (1990), *Institutions, Institutional Change and Economic Performance*, Cambridge: Cambridge University Press. Rodrik, D., A. Subramanian and F. Trebbi (2004); *Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development*, *Journal of Economic Growth*, 9(2): 131-65.

and stated that there were serious concerns about constitutional changes and legislative practices in the proceeding years. Today Hungary ranks 60th among 137 countries in the institutional component of the Global Competitiveness Index, however, its institutions score much lower at 101th.<sup>93</sup> Over the years the ability of the Hungarian Competition Authority (GVH) to enforce and promote competition became also limited. The following sections will closer examine the institutional quality of the GVH focusing on independence and accountability.

#### 4.1. Independence

The independence of regulatory agencies has been traditionally justified, by the technical complexity of the regulated markets and thus the need for expert decision making. An agency should be insulated from short-term political pressures in order to adopt public policies based on expertise - i.e. to bring expertise-driven independent decision-making to the administrative state.<sup>94</sup> Accordingly, the concept of independence builds on the regulator's legal and functional separation from market parties and its independence from the legislative and executive powers.

While in the US the concept of independence traditionally implied the US President's limited interference in the operation of independent agencies and the need for expert decision making, in the EU the concept has been less clear-cut and developed mostly at national level independently from EU law requirements.<sup>95</sup>

EU law is considerably detailed concerning the concept of independence and the EU Courts emphasized the importance of independence in the context of regulated markets,<sup>96</sup> however, the Courts have, so far, not formulated general principles on the independence of regulatory authorities.<sup>97</sup> EU law requires regulators to be independent from political institutions, but it has not laid down the criteria of independence that regulatory authorities must meet. Neither did Regulation 1/2003 specify any sort of requirements on the formal independence of NCAs.<sup>98</sup> Article 35 of Regulation 1/2003 merely states that each Member State has to designate an NCA responsible for the

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<sup>93</sup> OECD, *Economic Surveys: Hungary*, 2014, p.29.. World Economic Forum, 2017-2018. <https://www.weforum.org/reports/the-global-competitiveness-report-2017-2018>

<sup>94</sup> Barkow, R. E., 'Insulating Agencies: Avoiding Capture Through Institutional Design.' *Texas Law Review*, 2010, 89, 15.

<sup>95</sup> It was in 1988, in Directive 88/301 on competition in the markets in telecommunications terminal equipment that the Commission introduced in Article 6 an obligation on the Member States to entrust the regulation of terminal equipment to a body independent from market parties active in the provision of telecoms services or equipment. This requirement was implemented in the 2nd liberalization package in energy and telecoms. Hanretty, Chris J. and Larouche, Pierre and Reindl, Andreas P., *Independence, Accountability and Perceived Quality of Regulators* (March 6, 2012). <https://ssrn.com/abstract=2063720> or <http://dx.doi.org/10.2139/ssrn.2063720>

<sup>96</sup> See Case C-202/88 *France v Commission* [1991] ECR I-1223, paras 51-52; Case C-18/88 *RTT v GB-Inno-BM* [1991] ECR I-5973, paras 25-26; Case C-82/07 *Comisión del Mercado de las Telecomunicaciones* [2009] ECR I-1265.

<sup>97</sup> Article 35 of Directive 2009/72 on electricity compels Member States to make the regulatory authority "functionally independent from any other public or private entity" and give it the autonomy to decide "independently of any public body".

<sup>98</sup> Case C-53/03 *Syfait* [2005] ECR I-04609, paras 31-36.

application of Articles 101 and 102 TFEU.<sup>99</sup> However, political independence of the NCAs is now to be implemented as one cornerstone of the Directive on ECN+. The Directive formulates minimum requirements of independence. It requires that an express provision is made in national law to ensure that when applying Articles 101 and 102 TFEU NCAs are protected against external intervention or political pressure liable to jeopardise their independent assessment of matters coming before them.<sup>100</sup> Article 4 of the Directive lays down specific rules concerning independence, most importantly that NCAs should be performing their tasks independently from political and other external influence. The proposal for the Directive was in fact justified among others, by the need to ensure that NCAs have the necessary guarantees of independence.<sup>101</sup> The proposal acknowledged that national law can prevent NCAs from being sufficiently independent and having effective tools to detect infringements and impose effective fines on companies for infringements of the EU competition rules.

## 4.2. GVH

The Hungarian GVH is a budgetary institution and is independent from the Government: it cannot be given instructions by any governmental institution but only by law. The President of the GVH is nominated by the Prime Minister, heard by the Hungarian Parliament and is appointed by the President of Hungary. The appointment lasts for six years (renewable) and this overlaps with the four-year period of the Government. The President of the GVH cannot be dismissed except in specific and very serious circumstances. The operation and financial management of the GVH is completely autonomous and constitutes a separate chapter in the central budget. Independence of the NCAs needs to be analysed through their institutional, personal and financial independence, both *de facto* and *de iure*<sup>102</sup> which largely differs across Member States.<sup>103</sup> Compared to many other competition authorities in the EU, for example the Netherlands ACM, the GVH is *de iure* more independent.<sup>104</sup> Its *de facto* independence can, however, be questioned. In the past ten years a number of cases, such as exemption of mergers of national strategic importance and the Watermelon case raised serious

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<sup>99</sup> The designated NCAs could, therefore, be administrative or judicial in nature. The Member States were obliged to set up a sanctioning system providing for sanctions which are effective, proportionate and dissuasive for infringements of EU law. Point 2 Network Notice.

<sup>100</sup> Recitals 14-16 Directive.

<sup>101</sup> Proposal for Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. 22.3.2017 COM (2017) 142 final p.3.

<sup>102</sup> S. Lavrijssen, A. Ottow, 'Independent Supervisory Authorities: A Fragile Concept' [2012] 39 LIEI 419.

<sup>103</sup> Guidi's study on the independence of NCAs shows a large variation across Member States concerning institutional, personal and financial independence from central governments. M. Guidi, 'Delegation and Varieties of Capitalism: Explaining the Independence of National Competition Agencies in the European Union' (2014) 12 CEL 343-365.

<sup>104</sup> Instruments to influence the enforcement by the ACM are the appointment of ACM's board, ascertaining ACM's budget and fining targets, drafting ACM's guidelines and annulment of *ultra vires* decisions. Outhuisje, A. Cseres, K.J. (2017) Parallel enforcement and accountability: the case of EU competition law, in: M. Scholten and M. Luchtman (eds.), *Law Enforcement by EU Authorities. Political and judicial accountability in a shared legal order*, Edward Elgar, Cheltenham, pp. 82-114.

concerns about the GVH's independence from the direct political influence of the government.

In 2010 an amendment to the HCA specified that the appointment of the Vice-presidents will coincide with that of the President. The term of the then GVH President was to expire in 2010. The Vice-presidents term would have run until 2015. The amendment of the HCA was filed in a constitutional complaint to the Hungarian Constitutional Court. The autonomy of the GVH is to protect it from direct influence from the government and market parties and is among others clearly safeguarded by the term of office of its president and vice-presidents. Even though the Constitutional Court argued that the GVH's autonomy is constitutionally protected and anchored in the fixed term of office of its President and Vice presidents and the amendment to the HCA was not justified, the Vice-Presidents resigned voluntarily. This was certainly a relevant setback to the GVH's autonomy.

In a generally weak institutional framework competition has been often explicitly limited by legislation. In this poorly performing institutional environment, where the low intensity of competition has been criticized for many years one has to conclude that the GVH has de facto become dependent on a legally constrained enforcement framework that limits its autonomy as an enforcer of competition rules. Moreover, independence has to be investigated in relation to political and judicial accountability. This will be the subject of the next section.

### **4.3. Accountability**

The NCAs can be held accountable by their national parliaments for their EU competition law enforcement. The scope of accountability and the procedures for accountability are largely determined by country-specific legislation and the respective legal traditions. Article 4 of the Directive ECN+ does not add a substantive provision on this and merely says that Member States should subject their NCAs to proportionate accountability requirements without defining further details of what these requirements are. The accompanying text does, however, indicate that 'proportionate accountability requirements include the publication by NCAs of periodic reports on their activities to a governmental or parliamentary body. NCAs may also be subject to control or monitoring of their financial expenditure, provided this does not affect their independence.'

#### **4.3.1. Political accountability**

The GVH is held accountable to the Hungarian Parliament. As mentioned above, its President is heard by the Parliament before his or her appointment. Moreover, the GVH submits its annual reports to the Parliament and, on request, to the competent parliamentary committee on the activities of the GVH. In addition, according to the Hungarian Competition Act, the GVH has to publish the non-confidential versions of all of its decisions and all of its final orders adopted at the conclusion of proceedings. Finally, the National Audit Office controls how the GVH uses its financial resources.

The GVH has been publishing and submitting its annual reports ever since its creation in 1991 to the Hungarian Parliament,<sup>105</sup> where various Committees such as the Economic and Consumer protection Committees have pre-discussed and commented on the reports and the Parliament has held general debates with the participation of the representative of various parties. The GVH's work has been praised and appreciated by the MEPS (both government and opposition parties) and they voiced their satisfaction about the transparency and accuracy with which the GVH worked and communicated its work to the outside world.<sup>106</sup>

However, when the new chairman of the GVH was appointed in 2010, he was not heard by the Parliament before his appointment.<sup>107</sup> As analyzed above, the policy since 2010 gradually excluded certain sectors and specific cases from the GVH's competence to enforce the competition rules. The direct consequence of the new constitutional and regulatory culture in Hungary was also the limited accountability of public administration.<sup>108</sup>

The discursive analysis of general debates in the Hungarian Parliament reveals that these debates no longer provide the forum to hold the GVH accountable for its enforcement work. The GVH's annual reports since 2012 have not been subject to the general debate in Parliament but merely discussed with one single Parliamentary Committee, the Economic Affairs Committee.<sup>109</sup>

This raises the question who holds the GVH to account concerning its enforcement work on the basis of both Hungarian but also EU competition law. As the ECN itself cannot be held accountable either to the European Parliament or the national parliaments. It is its members that must be held accountable to their respective parliaments. If

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<sup>105</sup> See annual reports in English: <[http://www.gvh.hu/gvh/orszaggyulesi\\_beszamolok](http://www.gvh.hu/gvh/orszaggyulesi_beszamolok)> accessed 8 December 2016.

<sup>106</sup> See Parliamentary debates on the GVH's Annual reports, J/15947 A Gazdasági Versenyhivatal 2004. évi tevékenységéről és a versenytörvény alkalmazása során szerzett, a verseny tisztaságának és szabadságának érvényesülésével kapcsolatos tapasztalatokról, J/5632 A Gazdasági Versenyhivatal 2007. évi tevékenységéről és a versenytörvény alkalmazása során szerzett, a verseny tisztaságának és szabadságának érvényesülésével kapcsolatos tapasztalatokról, J/2541 A Gazdasági Versenyhivatal 2006. évi tevékenységéről és a versenytörvény alkalmazása során szerzett, a verseny tisztaságának és szabadságának érvényesülésével kapcsolatos tapasztalatokról, J/227 A Gazdasági Versenyhivatal 2005. évi tevékenységéről és a versenytörvény alkalmazása során szerzett, a verseny tisztaságának és szabadságának érvényesülésével kapcsolatos tapasztalatokról,

<sup>107</sup> Az Országgyűlés hiteles jegyzőkönyve 2010. évi őszi ülészakasza október 11-12-ei ülésének második ülésnapja, 34.szám, point 5166.

<sup>108</sup> European Commission, Country Report, 2018, p.31/32. The aim was often to ensure that changes can be implemented unopposed and unchallenged, and that by the time their unlawfulness is established their reversal may no longer be possible. Lendület HPOPS, 2017 p.30.

<sup>109</sup> J e g y z ő k ö n y v az Országgyűlés Gazdasági bizottságának 2016. március 22-én, kedden 9 óra 34 perckor az Országház főemelet 37. számú tanácstermében megtartott üléséről, pp.5-12. J e g y z ő k ö n y v az Országgyűlés Gazdasági bizottságának 2016. szeptember 20-án, szerdán 9 óra 04 perckor az Országház főemelet 37. számú tanácstermében megtartott üléséről, pp.6-23.; J e g y z ő k ö n y v az Országgyűlés Gazdasági bizottságának 2018. október 15-én, 11 óra 10 perckor az Országház Tisza Kálmán termében (főemelet 37.) megtartott üléséről

accountability mechanism, however, fails at national level, can EU institutions hold the Member State liable for ineffective enforcement of competition rules?

#### 4.3.2. Judicial accountability

Judicial review is a fundamental component of any legal system's commitment to the rule of law. Judicial review is fundamental for economic exchanges, since trade and investment depends on public decision-making bodies being subject to effective means of oversight and legal redress.<sup>110</sup>

As has been mentioned above the developments in Hungarian economic policy since 2010 focused on increasing state involvement decision-making mechanisms and often increasing administrative discretion as well as restricting or eliminating judicial control. Regulatory changes, restructuring of markets often went hand in hand with limiting the opportunities of individuals for legal redress.<sup>111</sup>

Decisions of the GVH are subject to judicial review at three different levels of the court system. At the two first instances of court review, courts examine the legality of the administrative decisions based on points of law and facts. On third instance, the Supreme Court reviews only on points of law. Subsequently those three court instances, the parties may file a constitutional complaint with the Hungarian Constitutional Court.<sup>112</sup> The standard of review in administrative procedural law is that of 'legality'.<sup>113</sup>

The role of Article 6 European Convention on Human Rights (ECHR) on the right to a fair trial in a reasonable time and the European Court of Human Rights' *Menarini* judgment<sup>114</sup> had an important influence in Hungary concerning the standard of judicial review courts should engage in when assessing the GVH's decisions.<sup>115</sup> Both the Hungarian Constitutional Court and the Hungarian Supreme Court have acknowledged that cartel proceedings are quasi-criminal proceedings which require special

<sup>110</sup> Jean-Marie Woehrling: *Judicial Control of Administrative Authorities in Europe ...* HRVATSKA JAVNA UPRAVA, god. 6. (2006.), br. 3., p.36.

<sup>111</sup> The 2010 suspension of the review powers of the Constitutional Court on matters of fiscal policy certainly represents one of the major examples of this development. It enabled the government to introduce new, controversial fiscal measures and to engage in an equally controversial restructuring of certain economic sectors without being subject to constitutional scrutiny. Similarly, the exclusion of judicial review against the regulations of the energy regulator following an unfavourable judgment for the government in judicial review by the Budapest Metropolitan Court. See also Case C-510/13, *E.ON Földgáz Trade*, EU:C:2015:189.

<sup>112</sup> This procedure exists since the Fundamental Law of Hungary was implemented in 2012.

<sup>113</sup> Section 109(1) Hungarian Administrative Procedure Act, Section 339 of the Hungarian Code of Civil Procedure. In Hungarian law, judicial review of the legality of administrative decisions covers breaches of both procedural and substantive law, while on the basis of Article 339 it excludes the review of the merits of the administrative decision taken under direct statutory or discretionary powers. The Hungarian Code on Civil Procedure recognizes two types of questions of fact: simple facts and facts the determination of which requires expert knowledge. Their separation is often controversial, especially in competition law, in which economics-based evidence is used. Often it is unclear whether the public authority has to assess a question of expert evidence or a question of law. András Kovács and Márton Varjú, 'Hungary: The Europeanization of Judicial Review' [2014] EPL 195–226.

<sup>114</sup> *A Menarini Diagnostics SRL v Italy* (43509/08), judgment of 27 September 2011.

<sup>115</sup> Kovács and Varjú (2014) 166. Decision Vj-130/2006/239, point 8; Judgment 2Kf.27.360/2006/29; Judgment Kfv.IV.39.399/2007/28.

guarantees.<sup>116</sup> In the *Railways construction* case<sup>117</sup> the Hungarian Supreme Court concluded that Hungarian courts should be able to fully review the GVH's administrative decisions.<sup>118</sup> In the Supreme Court's view, the courts should consider the GVH's decision as an *indictment* in penal law and during judicial review the plaintiffs can prove that a more reasonable assessment of the evidence exists.<sup>119</sup> Moreover, according to the Supreme Court the full judicial review can lead to setting aside the rule that precludes courts to reconsider decisions of administrative authorities taken in the course of their discretionary powers.<sup>120</sup>

While more recent judgments of the Supreme Court have somewhat limited this full review approach based on the ECHR, in the *Early repayment home loan* case the Supreme Court was clear that administrative procedures, thus the GVH's procedures must meet the requirements laid down in Article 6 of ECHR and as such they need to take account of the fact to what extent the administrative procedure lives up to the standard of fair and judicial procedure.<sup>121</sup> The Supreme Court has extensively analyzed how the GVH's procedures comply with the principles of equality of arms and the principle of adversarial procedure and came to the conclusion that the procedures of the GVH and the way investigation is conducted by case-handlers and reported to the decision-making body, the Competition Council do not comply with the principle of adversarial procedure.<sup>122</sup> Therefore, the GVH procedure does not meet all the requirements of Article 6 ECHR and as such the Supreme Court stated that the judicial review process should ensure that the legal protection envisaged under the ECHR exists. Consequently, administrative courts must be able to consider the full range of relevant facts and legal issues and review the decision of the GVH in a sufficiently rigorous manner considering the legality and the rationality of the decision as well as whether procedural rules were complied with.<sup>123</sup>

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<sup>116</sup> Constitutional Court decision no. 30/2014 and Supreme Court judgment no. Kfv.III.37.690/2013/29.

<sup>117</sup> Judgment Kfv.III.37.690/2013/29

<sup>118</sup> Kfv.III.37.690/2013/29, 30-31. In other words, they have the authority to review questions of facts and law, they can modify the GVH's decision with their own, for example, to reduce the fines imposed by the GVH.

<sup>119</sup> M. Papp, 'Application of EU Competition Law by the Hungarian Judiciary: Cooperation with the ECJ and Relying on the Case Law of the ECtHR' in: P. A. Almășan, P. Whelan (eds.), *The Consistent Application of EU Competition Law*, Studies in European Economic Law and Regulation 9,p.265. T. Tóth, 'Life after Menarini: The Conformity of the Hungarian Competition Law Enforcement System with Human Rights Principles', YARS, VOL. 2018, 11(18) pp.

<sup>120</sup> This rule is laid down in Article 339 of the Hungarian Civil procedural Code. Article 339/B of the Procedural Code sets a limit on the competence of the courts to review the administrative decisions based on discretion; in practice, in reviewing the fines, the courts have the competence to overrule de facto the discretion exercised by the HCA with the reasoning that the facts established by the court are in contradiction with the records.

<sup>121</sup> Kfv.III.37.582/2016/16. Para 121-122..

<sup>122</sup> Kfv.III.37.582/2016/16. Para 121-122. The Competition Council does not act like a judicial forum, listening to the arguments of both parties and then deciding their legal dispute based upon the facts and legal arguments presented. The Council is part of the GVH, and is involved to some extent in the case handlers' investigation, as far as it can give advice about the directions of the investigation. T.Tóth, 'Life after Menarini: The Conformity of the Hungarian Competition Law Enforcement System with Human Rights Principles', YARS, VOL. 2018, 11(18) p.50.

<sup>123</sup> Kfv.III.37.582/2016/16. Paras 126-128.

This approach has been confirmed by the Constitutional Court in another case<sup>124</sup> where it stated that the standard of proof in administrative cases should effectively be the same as under criminal law.

It has been argued that in practice, courts first seemed to be passive in their review judgment perhaps because of the specific rule limiting their review of GVH decisions in its discretionary powers,<sup>125</sup> however, today they are more actively assessing and turning over GVH decisions which may be a consequence of the Supreme and Constitutional Court interpretation of the standard of review.<sup>126</sup> Despite the more rigorous judicial review by Hungarian courts, the effectiveness of the justice system increasingly raises concerns, in particular as regards judicial independence. Over the last year, perceived judicial independence among businesses decreased in Hungary<sup>127</sup> and checks and balances within the ordinary courts system further weaken. Even though the Hungarian government has postponed the creation of special administrative courts,<sup>128</sup> independence of the judiciary remains a concern in Hungary as shown by recent preliminary questions asked by Hungarian judges.<sup>129</sup>

## 5. CONCLUSIONS

The systematic destruction of the rule of law in Hungary has been extensively discussed by constitutional lawyers and political scientists, however, its impact on competition law enforcement has received almost no attention. The goal of this paper was to fill in this gap by first analysing the central role of competition law as a fundamental institution of a democratic system.

The central question of how competition law and enforcement should form part of the democratic process has been clearly conceptualized by the Ordoliberal school of thought.

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<sup>124</sup> Decision of the Constitutional Court No. 30/2014 (IX. 30.). The Constitutional Court acted upon the complaint of an undertaking who challenged the Curia's final judgment (Kfv.II.37.076/2012/28.)

<sup>125</sup> Tóth (n 122) p.53.

<sup>126</sup> Nagy argued that it may also be a consequence of more demanding effects analysis centering around actual effects [Vj- 96/2010/394 (Contact lenses), Kfv.11.37.110/2017/13 (Supreme Court); Vj- 8/2012/1751 (Bank Data)] Presentation Cs. Nagy at the conference Judicial review, October, 2018, Warsaw, [http://www.cars.wz.uw.edu.pl/tresc/konferencje/40/Prezentacja/10\\_Nagy\\_Judicial\\_review\\_of\\_fines\\_in\\_Hungary.pdf](http://www.cars.wz.uw.edu.pl/tresc/konferencje/40/Prezentacja/10_Nagy_Judicial_review_of_fines_in_Hungary.pdf)

<sup>127</sup> 2019 EU Justice Scoreboard, [https://ec.europa.eu/info/sites/info/files/justice\\_scoreboard\\_2019\\_en.pdf](https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf)

<sup>128</sup> In December 2018, the Hungarian Parliament proposed two legislative acts establishing an administrative courts system. The new law would create a self-standing branch of administrative courts, technically within the Hungarian judiciary, yet, placed under the direction of a separate, newly established Supreme Administrative Court alongside the existing Supreme Court. For an analysis see R.Uitz: *An Advanced Course in Court Packing: Hungary's New Law on Administrative Courts*, *VerfBlog*, 2019/1/02, <https://verfassungsblog.de/advanced-course-in-court-packing-hungarys-new-law-on-administrative-courts/>, DOI: <https://doi.org/10.17176/20190211-223946-0>.

<sup>129</sup> Kochenov, Dimitry and Bard, Petra, *The Last Soldier Standing? Courts vs. Politicians and the Rule of Law Crisis in the New Member States of the EU* (February 22, 2019). 1 *Eur Ybk Cont'l L* (2019); University of Groningen Faculty of Law Research Paper No. 5/2019. Available at SSRN: <https://ssrn.com/abstract=3339631>; P.Bárd, "Am I Independent?" – A Hungarian Judge Asks the CJEU in a Struggle against Judicial Capture, September 2019, *Reconnect*. <https://reconnect-europe.eu/blog/politics-newep-krum-2/>

Even though many scholars criticized the Ordoliberal interpretation of competition as formalistic, inefficient and unworkable *vis-à-vis* the more economic approach due to its focus on individual freedom, it is its understanding of competition as an instrument establishing and preserving a free democratic society by eliminating market power that reclaims prominence today.

Second, the paper mapped and analysed the milestones of backsliding of economic regulation and competition law enforcement in Hungary. Even though similar developments have taken place in other EU Member States after the financial crisis, the pace and forcefulness of the Hungarian law and policy making in order to advance political goals and the private interests of national economic actors has far exploited the space left by EU law for national legislation and law enforcement.

The Hungarian developments are striking when viewed in light of the transformation and the democratization process the Central and Eastern European states went through since the late 1990s. Competition law was not only acknowledged as a fundamental institution of democracy and as core element of the rule of law, but “Hungary has developed what many consider one of the more successful ‘new’ competition regimes”.<sup>130</sup> Hungarian competition law enforcement was a success story among emerging market economies with the GVH as a highly independent, internationally renowned and credible enforcement agency.<sup>131</sup>

As the overall regulatory and institutional environment weakened, competition as a stable institution of a democratic constitutional system and market economy has steadily been undermined and, in some instances, excluded. The backsliding of competition law enforcement has taken place gradually first through various legislative changes creating broad exemptions from merger control and the cartel provisions that significantly curbed and eventually excluded the GVH’s competence to start investigating cases and seriously undermining sometimes retrospectively the public procurement rules. Though the GVH is *de iure* an independent authority, the agency has been significantly reorganized and personnel recruited in a way that questions its independence from the current government.

Moreover, its political accountability to the Hungarian Parliament exists merely in form but not in substance. Its judicial accountability has been weak, and is currently under serious threat due to the newly proposed administrative court system that will subject judges to ministerial approval.

Hungary’s competition law backsliding cannot be seen as an isolated national case. Its impact is equally critical in light of its role in the the decentralized enforcement of EU competition law. The legitimacy of decentralized enforcement, which functions in a multi-level governance framework composed of EU law and national law and is built on

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<sup>130</sup> Kovács & Reindl (n 43)

<sup>131</sup> In both these ratings published by the Global competition review from 2007 and 2013 respectively, Hungary scored among the good authorities worldwide. [http://www.gvh.hu/data/cms994790/Rolunk\\_2007\\_GCR\\_Rating\\_enforcement\\_Hungary\\_2007\\_jun.pdf](http://www.gvh.hu/data/cms994790/Rolunk_2007_GCR_Rating_enforcement_Hungary_2007_jun.pdf).

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shared enforcement of the Commission and the NCAs, depends on the NCAs' compliance with the rule of law.

Presently, such a compliance is not guaranteed in the Hungarian competition law system. In fact, the Hungarian competition law enforcement is in stark contrast to the welcoming narrative accompanying the recently adopted Directive on empowering NCAs to be more effective enforcers of Articles 101 and 102 TFEU. Hungary's case, which functions in the shadow of an "effective" decentralized enforcement regime, openly questions the basic premises of the Directive, specifically the proposed means and instruments NCAs need to successfully enforce EU competition rules.

As EU rules tighten up and push for more harmonization concerning NCAs' enforcement powers as well as formulating criteria for independence and accountability, the Hungarian case well demonstrates that controversial national practices can live under the radar of EU law and monitoring without a forceful repercussions.