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Cseres, K.

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From the Board: Rule of Law Challenges in Europe: A Matter of Economic Constitutional Law

What began thirty years ago as a ‘Pan-European picnic’ across the iron curtain at the Hungarian–Austrian border and marked a starting momentum for political change, continued three months later into the fall of the Berlin Wall, the end of communist regimes in Eastern Europe and ultimately led to the re-unification of the European continent as well as to the largest eastern enlargement of the EU. The EU’s eastward enlargement was more intrusive and more transformative than earlier enlargements in the 1990s. Its influence on domestic legal systems was more comprehensive because the Europeanization process of the candidate countries’ legal orders was interacting with market, constitutional and institutional reforms. Compliance with rule of law values and the EU’s economic law framework based on a functioning market economy formed key requirements for EU membership set out in the so-called ‘Copenhagen criteria’.¹ These criteria laid down the legal, economic and political requirements of the Central and Eastern European countries accession to the EU and played a key role in their accession process as well as in the economic transformation and democratization of these countries.² However, the EU has failed to transfer the same principles into its law and governance framework and lacks a clear specification of these fundamental principles. It has, in fact, been argued that once countries become full members, the EU loses its transformative capacity.³

Thirty years on, the European Union is facing various challenges ranging from the risk of disintegration to the erosion of the rule of law and democracy, an enduring

¹ 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 Art. 2 TEU, which also represents the most important condition to be fulfilled before joining the EU, as hinted at in Art. 49 TEU.

² 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*, 87 (3) *Am. Pol. Sci. Rev.* 574–75 (Sep. 1993).

³ Tanja A. Börzel & Frank Schimmelfennig, *Coming Together or Drifting Apart? The EU’s Political Integration Capacity in Eastern Europe*, 24(2) *J. Eur. Pub. Pol’y* 281 (2017) & U. Sedelmeier A. L. Dimitrova & B. Steunenbergh, *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 179–93* (A. L. Dimitrova ed., Manchester University Press, Manchester; New York 2004).

economic crisis and the impact of disruptive technological revolution. The crisis of the European integration process and the changing role of constitutions and constitutionalism in the EU Member States are testing both the EU and its institutions on its effectiveness and vigilance.

The risk of disintegration and the problem of Member States' departure from rule of law standards not only undermine legal certainty and political stability but also have adverse effects on economic performance. The financial crisis brought to light the vulnerability of the neoliberal economic model and national strategies globally shifted towards more inward-looking policies challenging neoliberal ideas of free trade and market competition. The economic downturn corroded the legitimacy of democratic regimes and populist appeals gained ground. Financial instability and social inequality are on the rise while corporate and political concentration is growing. In this sense, the EU is not only facing a serious challenge of its Member States' backsliding from democracy and their commitment to the rule of law and fundamental rights, but also of how these developments destabilize the central institutions and structures of economic governance.

For example, the way the enforcement of economic regulation and competition law 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 economic law enforcement, show how basic tenets of the rule of law can be neglected or outright abolished in order to make economic choices in favour of local economic actors or specific sectors.⁴ Beyond re-regulating certain sectors in order to decrease the room for competition law enforcement, institutional safeguards, most importantly, the independence and accountability of the administrative authorities have also been substantially affected.⁵ Hungary's competition law backsliding cannot be seen as an isolated national case. Its impact is 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

⁴ M. Varjú & M. Papp, *The Crisis, National Economic Particularism and EU Law: What Can We Learn from the Hungarian Case?*, 53(6) *Common Mkt. L. Rev.* 1647–74 (2016); N. Chronowski & M. Varju, *Two Eras of Hungarian Constitutionalism: From the Rule of Law to Rule by Law*, 8(2) *Hague J. Rule L.* 283 (2016). K. J. Cseres, *Rule of Law Challenges and the Enforcement of EU Competition Law, a Case-Study of Hungary and Its Implications for EU Law*, *Competition L. Rev.* (2019 forthcoming); I. J. Tòth & M. HAJdú, *Corruption Research Center Budapest, Intensity of Competition, Corruption Risks and Price Distortion in the Hungarian Public Procurement – 2009-2016*, Working Paper Series: CRCB-WP/2017:2 (2017).

⁵ Varjú & Papp, *supra* n. 4, at 1647–74; K. J. Cseres & A. Outhuisje, *Parallel Enforcement and Accountability: The Case of EU Competition Law*, in *Law Enforcement by EU Authorities. Political and Judicial Accountability in a Shared Legal Order* 82–114 (M. Scholten & M. Luchtman eds, Cheltenham: Edward Elgar 2017); European Commission, *European Semester, Country Report, Hungary* 54 (2015); European Commission, *European Semester, Country Report, Hungary* 31/32 (2018).

on shared enforcement of the Commission and the NCAs, depends on the national competition authority (NCAs') compliance with the rule of law.

As a matter of fact, these challenges and the ensuing social and economic transformations touch upon the deeper foundations of economic law and call on to rethink basic constitutional premises on the relationship between the state, markets, politics and the law. This deeper foundation is often referred to as the economic constitution and analysed through the intimate relationship between economic and political freedom, between a competitive market economy and a democratic constitutional system.

The idea of an economic constitution concerns 'the relation of law to the fundamentals of the economic system'⁶ and aims at a certain 'ideal of coherence in the organization of public power'.⁷

In the EU the concept of an economic constitution has long been anchored in its foundational Treaties. The constitutional value of competition and free trade have always been the cornerstones of the European integration project: the EU's 'micro-economic constitution'.⁸ Originally an Ordoliberal concept, the EU's economic constitutional framework is an exceptional legal construct as it is the very first dimension of EU constitutionalization and constitutionalism.⁹

In its original Ordoliberal school of thought the economic constitution was defined as a comprehensive decision (*Gesamtentscheidung*) to separate the state and the market, to resolve conflicts of the political and economic spheres and limit political discretion in economic matters.¹⁰

It is this 'rule of the market'¹¹ that gives constitutional recognition to individual economic rights and thus structures economic life in favour of a free market economy, based on undistorted competition. Accordingly, in the Rome Treaty, the core of the economic constitution delineates the role of the state in markets and the economy, it limits public and private power through granting fundamental economic rights and market freedoms.¹² Similarly, in the US, as Fox argued 'antitrust was the economic

⁶ Kaarlo Tuori, « *La Constitution économique parmi les Constitutions européennes* », xxv(4) *Revue internationale de droit économique* 559–99 (2011).

⁷ T. Prosser, *The Economic Constitutions* 8 (OUP 2014).

⁸ Kaarlo Tuori & Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* 231 ff (Cambridge: Cambridge University Press 2014).

⁹ Until the Maastricht Treaty, the European integration was almost exclusively an economic project and the constitution of the single European market. In contrast to the US model, the EU model of competition was initially conceived as a tool of economic, rather than, social policy. I. Lianos, *The Poverty of Competition Law: The Short Story* *, in *Reconciling Efficiency and Equity: A Global Challenge for Competition Policy* 45–87 (D. Gerard & I. Lianos eds, *Global Competition Law and Economics Policy*, Cambridge: Cambridge University Press 2019). K. Tuori & K. Tuori, *Two Layers of the European Economic Constitution*, in *The Eurozone Crisis: A Constitutional Analysis* 13–60 (Cambridge Studies in European Law and Policy, Cambridge: Cambridge University Press 2014).

¹⁰ Francesco De Cecco, *State Aid and the European Economic Constitution* 12 (Hart Publishing 2012).

¹¹ Sabine Frerichs, *The Rule of the Market: Economic Constitutionalism Understood Sociologically*, in *Sociological Constitutionalism* 241–64 (Paul Blokker & Chris Thornhill, Cambridge: Cambridge University Press 2017).

¹² De Cecco, *supra* n. 10, at 12.

democracy of the market'¹³ and even though the link to political economy has been cut through by the Chicago School, there is in the antitrust case law and rhetoric frequent invocation of democratic values. Moreover, democratic values are increasingly called upon in fierce criticism of the allegedly under-enforced antitrust laws.¹⁴

Economic constitutionalism has been extraordinarily influential in the development of the EU integration process and as a normative theory on the relationship of government and the economy.¹⁵ This distinctive relationship between EU constitutionalization and economic integration has become critical again and calls for a closer analysis of the impact and role of the EU's 'microeconomic constitution' in the present constitutional challenges.

The current issue brings together five papers that provide critical analysis of these current rule of law challenges to the EU's economic constitution.

These papers formed the backbone of the conference on 'Rule of Law Challenges in the EU: Implications for Economic Law' that was held on 10 January 2019, in Budapest at the Hungarian Academy of Sciences Magyar Tudományok Akadémia (MTA) Centre for Social Sciences Institute of Legal Studies. The aim of the conference was to analyse the question of whether and how systemic and larger-scale weakening of constitutional safeguards, in particular the protection of fundamental rights and institutional independence, have impacted the authority of EU and national economic law and its enforcement in the Member States. Additionally, it intended to scrutinize the overall impact of these developments for the European integration process.

The urgency of the rule of law matters discussed in this issue is sadly also illustrated by the faith of the institute that hosted the conference. Since the conference has taken place, the Centre for Social Sciences and the Institute of Legal Studies no longer form part of the Hungarian Academy of Sciences. It is among those fifteen academic institutes that were removed by a Bill adopted on 2 July 2019 by the Hungarian Parliament from the Academy and placed in a newly established state research network, the Eötvös Loránd Research Network under the supervision of the Hungarian Ministry of Innovation and Technology. The decision was made despite stark resistance from within the Hungarian science system as well as from European science organizations.¹⁶

K. Cs.

¹³ Eleanor M. Fox, *Modernization of Antitrust: A New Equilibrium*, 66 Cornell L. Rev. 1140 (1981).

¹⁴ See American Antitrust Institute, <https://www.antitrustinstitute.org/> (accessed 1 Nov. 2019). Open Markets Institute, <https://openmarketsinstitute.org/> (accessed 1 Nov. 2019). Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*, Columbia Global Reports (2018); Lina Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 564 (2017).

¹⁵ D. J. Gerber, *Economic Constitutionalism and the Challenge of Globalization: The Enemy Is Gone? Long Live the Enemy*, JITE 22 (2001).

¹⁶ For more details <https://mta.hu/english/parliament-has-passed-the-bill-concerning-the-academy-109864> (accessed 1 Nov. 2019).