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EUROPEAN POLICY ANALYSIS

# European competition law, an overlooked element of the EU's rule of law toolbox

Katalin Cseres*

## Summary

This paper analyses the question of how EU competition law – with its central constitutional role in the EU's economic and legal order – protects the rule of law in the EU and its Member States. Like the EU constitutional principles and the EU values of Article 2 Treaty of the European Union, EU competition law controls the excessive and arbitrary use of power in economic activities. Effective enforcement of competition law is particularly relevant in fighting corruption and preventing economic power being abused through, for example, unlawful state subsidies and their precarious 'connection' with the concentration of political power.

As an exclusive competence of the EU, with direct administration by the European Commission (DG Competition) which has far-reaching enforcement powers, EU competition law can be enforced in cases in which national competition law is backsliding. For this reason, the European Commission can intervene directly in cases that threaten the rule of law, for example by preventing excessive concentration or the unfair allocation of state advertising in media markets.

This paper argues that EU competition law forms an indispensable element of the EU's rule of law toolbox. Therefore, the European Commission should prioritise, rather than overlook, the application of EU competition rules in its fight for the rule of law.

* Katalin Cseres is an Associate Professor of Law, Amsterdam Centre for European Law & Governance (ACELG), University of Amsterdam.

## 1. Introduction

The European Union's rule of law crisis, which has unfolded over the past ten years, has been the result of two types of development: the crisis was related, on the one hand, to the drastic changes made by certain Member States to their constitutional systems and their (non)-compliance with the EU's foundational values, and on the other, to the EU's failure to tackle such erosion of the rule of law effectively. For many years the EU institutions have tried to address the root causes of this crisis by appealing to the fundamental EU values laid down in Article 2 of the Treaty of the European Union (TEU), and by developing specific preventive and corrective measures to address the rule of law problems and protect the underlying democratic values, but they have not been able to prevent rule of law backsliding in some of the Member States.

Over the years, the European Commission has developed a 'rule of law toolbox' (European Commission, 2020) to enable the EU to address the systematic threats to and violations of the rule of law in the Member States (Pech, 2022, 2023). Some of the tools in this toolbox are policy instruments centred around monitoring mechanisms, reporting tools and political dialogues, such as the EU Justice Scoreboard, the Annual Rule of Law Reports and the European Semester, and some are sanction mechanisms – for example, the possibility of withholding EU funds on rule of law grounds (Regulation 2020/2092). Sanction mechanisms also include Treaty-based mechanisms to curb breaches of EU law (Article 7 procedure, and infringement procedures). Both sets of tools have shown strengths and limitations, but, so far, they have had limited impact against systematic rule of law violations (Czina, 2024; Pech, 2023).

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However, the toolbox has not been exhausted. In this paper, I argue that legal tools for protecting the rule of law need to be sought in, and applied broadly across, different fields of EU law. This is an approach that was once the foundation of EU integration and the EU's legal order.

The focus for this analysis is how *EU competition law*, with its central constitutional role in the EU's economic and legal order, plays an important complementary role in protecting the rule of law in the EU and its Member States, and, accordingly, forms part of the EU's rule of law toolbox. By safeguarding the competitive process, competition law is the legal instrument that constrains arbitrary economic power and defends the 'market's equivalent of separation of powers' (Maduro, 2024, 34). It limits private power in order to safeguard individual economic freedoms and prevent undesirable collusions with political power (Amato, 1997). By dispersing economic power it keeps control over any excessive concentration of economic power that could risk eroding democratic processes and institutions and lead to rent-seeking, oligarchy, and crony capitalism (Deutscher, 2022).

To safeguard the competitive process and to ensure that it functions properly for the benefit of all members of society, competition law aims to prevent anti-competitive practices resulting from collusive agreements between undertakings, abuses of dominant positions, mergers leading to excessive market power and state aid that provides economic advantages to selected firms.

The enforcement of competition law is particularly relevant in fighting corruption by ensuring competitive public procurement procedures without collusion among firms, and safeguarding the governance of strategically important sectors for society. Under-enforcement or selective enforcement of competition law tolerates collusion among undertakings and is commonly seen as one of the main threats to the integrity of public procurement processes. Hence, the effective enforcement of competition law also protects the sound financial management of EU funds and forms a complementary tool to the EU's budget conditionality instruments (Cseres, 2022a).

Likewise, combating the accumulation and abuse of economic power and unlawful state subsidies and their precarious 'connection' with the accumulation of political power is particularly important for safeguarding media pluralism and fundamental

rights, such as equal opportunities for all market actors in the economy. Various acquisitions of media outlets in both Poland and Hungary (see Section 6.1) have demonstrated that if the competition law review is absent or inadequate then a concentration of both economic and political power can damage citizens' fundamental economic and political rights. Equally, regulatory measures that have been used to restructure markets, override market mechanisms and increase state intervention in certain segments of the economy have severely undermined or eliminated equal opportunities for market actors. Competition law instruments such as merger control, which aim to disperse economic power, have been systematically set aside for political purposes.

These examples are often considered as 'pure' national cases. However, national competition law enforcement is not isolated but is deeply interconnected with the enforcement systems of the EU and its 27 Member States that safeguard the protection of the competitive process, as the system of undistorted competition is a core component of the EU's economic and legal order.

> '[...] competition authorities, who enforce these rules, protect citizens' quasi-constitutional economic rights, and, hence, have similar functions to courts.'

The intimate relationship between competition law and the rule of law and democracy makes competition law a robust avenue not just for controlling and preventing the accumulation of significant economic power, but also for safeguarding effective legal protection and defending the rule of law. Competition law functions as the guarantor of the rule of law in economic activities, and competition authorities, who enforce these rules, protect citizens' quasi-constitutional economic rights, and, hence, have similar functions to courts. The fact that EU competition law is directly enforced by the European Commission and that its enforcement is interconnected with enforcement in the Member States makes it an important legal tool for safeguarding rule of law values in the EU.

This paper is organised as follows: in Section 2 I analyse the constitutional role of the competition rules in the EU, and in Section 3 I explain how competition law became a shared value across the EU, after being transferred and implemented in the EU Member States in the course of the deregulation of the 1990s and the eastern enlargement in 2004. Section 4 sets out the main substantive rules of EU competition law, and continues with an analysis of how the EU competition rules are enforced, and the role played by the competition authorities in their effective application. Section 5 analyses how EU constitutional principles work in the field of EU competition law, and how this complementarity could strengthen the protection of the rule of law. By focusing on the case of media pluralism as an essential component of a well-functioning democracy and a free and open society, Section 6 outlines how merger control and state aid law can make an important contribution to safeguarding media pluralism by preventing excessive concentration in media markets. The paper closes with conclusions (Section 7).

## 2. Competition law as a constitutional charter in the EU

Competition, as a fundamental institution of a democratic system, is a salient concept that influenced the drafting of the Treaty of Rome. Its central role in creating democratic political systems was re-stated in the 1993 Copenhagen, or accession, criteria (Cseres, 2024), which reflect the fundamental conditions that must be satisfied by all candidate countries wishing to become members of the EU.

Competition law gained a 'constitutional' character at the EU (supranational) level, and developed into the central pillar of the integration project (Joerges, 2014, 2015). The EU's law-based economic order, whose purpose is to defend undistorted competition in the internal market, including the rule of law and individual economic freedoms, helped the Community to acquire legitimacy in the foundational period of the EU.

Like the EU constitutional principles and the EU values laid down in Article 2 TEU, the EU competition rules seek to control the excessive and arbitrary use of power. While the constitutional

rules focus on monitoring public power, the competition rules keep private (or public) economic power in check. Hence, competition law complements the protection provided by constitutional law in the effective protection of citizens' fundamental rights by making sure citizens benefit (economically) from the functioning of open and competitive markets.

'While the constitutional rules focus on monitoring public power, the competition rules keep private (or public) economic power in check.'

Consequently, the protection of the competitive process must be seen as an implementation of Article 2 of the TEU, which lists, among others, the EU values of democracy, equality, the rule of law and respect for human rights. When states join the EU, they commit to the EU's economic and legal order, which, as a 'constitutional charter', explicitly includes the system of undistorted competition. By joining, Member States commit to the values of EU law as laid down in Article 2 TEU and promise that in the enforcement of competition law they will recognise and respect the EU's values and objectives.

In 2022, an important link was established by the General Court (one of the two courts of the Court of Justice of the European Union, the CJEU). For the first time, the Court recognised a direct link between systematic deficiencies in the legal order of a Member State and the ability of its competition authority to investigate and take enforcement action under EU law and properly protect a complainant's rights.

More precisely, in the *Sped-Pro* judgment (Case T-791/19), the General Court established that compliance with the fundamental values of Article 2 TEU applies to the EU's competition law enforcement mechanisms under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). In this judgment, the Court addressed the rule of law issues to be considered when assessing whether a national competition authority (NCA), in this case that of Poland, is capable of effectively enforcing competition law and adequately safeguarding a complainant's rights according to Article 19(1) TEU (Cseres and Hwija, 2023).

This judgment is an important reminder of the fundamental connection between democracy, the rule of law and competition law, as well as the complementarity of constitutional law and competition law. The Court found that, like national courts, NCAs must be independent in order to effectively protect individuals' rights. This judgment is also a confirmation of the fact that the rule of law is not just a value of some isolated fields of EU law but has to be maintained and defended across all legal, political and economic fields of EU law, and notably the internal market.

## 3. Competition law as a shared value in the EU Member States

This fundamental role of competition law has been implemented into the legal systems of all EU Member States as an indispensable part of their economic policies. By the late 1990s, successful market integration and the process of EU constitutionalisation, combined with solid supranational enforcement mechanisms, transformed competition law into a strong legal and policy field in the EU and its Member States. With the increasing Europeanisation of competition norms in the Member States, competition law became a 'common core' of EU and national law (Cseres, 2024; Drahos, 2002). EU competition law thus acted as a vehicle for the spreading of democracy and the rule of law (Ramirez Perez and van de Scheur, 2013).

The restatement of competition law as a building block of market economies and democratic societies was formulated in the governance mechanism guiding the accession process for the Central and Eastern European countries (CEECs) from the late 1990s to the 2004 enlargement. The Copenhagen criteria laid down the obligation to align domestic competition law with that of the EU as a key part of the legal and economic conditions of EU membership, and played a key role in the CEECs' economic and political transformation. Accession to the EU exercised significant influence in shaping the competition law regimes in the CEECs that joined the EU in 2004, 2007 and 2013 (Cseres, 2014). The

EU's influence on domestic legal systems was wide-ranging because the Europeanisation of the CEECs' laws interacted with market, constitutional and institutional reforms. Moreover, because of the governance method of top-down rule transfer, based on strong EU conditionality, the implementation of EU rules was exceptional (Schimmelfennig and Sedelmeier, 2004).

> 'Accession to the EU exercised significant influence in shaping the competition law regimes in the CEECs that joined the EU in 2004, 2007 and 2013.'

This shows that, in contrast with the Article 2 TEU values, which draw on the shared legal and constitutional traditions of the Member States (Scheppele, Kochenov, and Grabowska-Moroz, 2020), competition law was centrally established with far-reaching powers unmatched in any other EU legal and policy field (Warlouzet, 2010) and was later 'transplanted'[1] by the Member States and implemented in their own legal and economic systems (Guidi, 2016). This difference is important, even though the CJEU in 2018 clarified that the national courts' responsibility for ensuring judicial review in the EU legal order is a concrete expression of the value of the rule of law stated in Article 2 TEU (see also Section 4.3).

Hence, unlike the Article 2 TEU values, which are constrained by the EU's limited competences to legislate and enforce, EU competition law is *an exclusive competence* of the EU, and there is direct administration and far-reaching enforcement mechanisms. Unlike democracy and the rule of law within the EU, which are suffering from growing dissensus and contestation (Coman, 2022), EU competition law is a fundamental part of the EU legal order, implemented and enforced by all Member States, and the protection of competitive markets is a *shared value* for all Member States.

## 4. EU competition rules and enforcement

### 4.1 Substantive EU competition rules

Competition is a specific institutional form of the market, which defines the boundaries of public power (Prosser, 2005) and ensures the integrity and impartiality of political institutions, making interest capture less likely (Deutscher, 2022). By creating a free and fair competitive process, competition law imposes checks and balances on private and public market power and guarantees an inviolable sphere of private activity for individuals (Deutscher and Makris, 2016).

By allowing some firms to acquire others and hence create bigger economic actors, and by assessing the damage that anti-competitive practices may cause to other firms, competition law acts as a key ordering principle of the economy. Controlling public and private economic power is an important feature of both competition and democracy, as it safeguards individual economic and political freedoms (Deutscher and Makris, 2016).

Competition law is a fundamental area of law that shapes markets at the national as well as the supranational level and ensures that they function properly to bring the greatest benefit to society. In Europe, competition law emerged as a core pillar of EU integration with the goal of safeguarding competitive markets as vital components of both functioning market economies and democratic legal and political systems.

EU competition law is designed to protect the process of competition in the internal market. It consists of specific substantive rules that prohibit (i) anti-competitive agreements (Article 101 TFEU), (ii) the abuse of significant market power (Article 102 TFEU), and (iii) anti-competitive mergers (Regulation 139/2004).

Articles 101 and 102 TFEU are directly effective in the Member States. They are enforced both by the European Commission and, at the national level, by NCAs and national courts, which also enforce national competition laws. Importantly, EU law requires NCAs to have the necessary independence, resources, and enforcement and

[1] 'Legal transplant' is a term commonly used to designate the dissemination of legal models from an exporting legal order to a receiving one. Borrowing laws and legal institutions by one country from another is used as a way to improve a legal system (Husa, 2018).

fining powers to be able to enforce Article 101 effectively (Directive 2019/1),[2] as will be discussed in detail below in Section 4.2, and it also requires national courts to ensure the effective judicial protection of the rights conferred by Articles 101 and 102 TFEU (Case C-453/99, *Courage*). These rules impose important checks on private, but also on public, economic power. As such, they are instrumental in protecting democracy and the rule of law in the EU legal order. For example, Article 101 TFEU prohibits anti-competitive bid rigging arrangements and in this way forms part of the EU's anti-corruption framework (together with public procurement and anti-corruption laws) and guards the competitiveness of public tenders against corruption (Bernatt and Jones, 2023). Anti-competitive practices in the area of public procurement can lead to significant economic harm in the form of overcharges to national (and EU) budgets and large opportunity costs: by some estimates, conduct such as bid rigging may increase prices for public procurement by as much as 20 per cent (Smuda, 2012).

'Concentrated economic power can reinforce the political power of capital and directly impact citizens' economic as well as non-economic interests, such as fundamental rights related to media pluralism or access to reliable information.'

Merger control monitors concentrations in markets and assesses the magnified or reduced economic power of the merging firms. At the same time, merger control has political and social consequences for citizens. It is a legal instrument that can decentralise economic power and enable economic opportunities for firms by encouraging a democratic political order. Concentrated economic power can reinforce the political power of capital and directly impact citizens' economic as well as non-economic interests, such as fundamental rights related to media pluralism or access to reliable information (Banasiński and Rojszczak, 2021; Cseres, 2024).

The Treaty also contains rules that address Member States, such as Article 106 TFEU, which prohibits Member States from adopting, with regard to public undertakings or undertakings bearing special or exclusive rights, any measure that would lead to an infringement of another Treaty provision, including Articles 101, 102 and 107 TFEU. Article 107 TFEU contains a general prohibition on state aid in order to prevent distortions of competition in the internal market that could result from the granting of selective advantages to certain companies. EU state aid law is concerned with preventing negative market outcomes that are the result of state subsidies, such as the misallocation of resources (e.g. concerning state advertising in media markets), which reduce economic welfare by weakening the incentives for firms to improve their efficiency (Cseres and Reyna, 2021).

### 4.2 Enforcement of competition law

Enforcement is the most important aspect of competition policy; what is crucial is who enforces the rules, the mandate on the basis of which they enforce these rules, and how enforcement is controlled (Guidi, 2016). The way EU competition rules are enforced is also what makes this area of EU law an effective instrument for tackling the rule of law crisis.

In Europe, the blueprint for effective enforcement and institutional design was laid down by the Ordoliberal school of thought, and first implemented in the German competition law system in the 1950s (Gerber, 1997). The Ordoliberals envisaged a specific procedural and institutional model for enforcing the substantive competition rules. In their view, the monopoly office would be a highly independent and autonomous entity with sole responsibility for enforcement. It would not form part of the state bureaucracy, in order to prevent political influence (Gerber, 1997). Its actions and decisions would be subject to review by the regular courts for their conformity with the economic constitution. The

[2] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ C11/3.

Ordoliberals envisioned a quasi-judicial office that was solely guided by the application of judicial methods to authoritative texts (Gerber, 1997). Accordingly, the monopoly office had to be a strong institution with significant enforcement powers and adequate resources to operate quickly and decisively and to demand compliance effectively.

This model also influenced the drafters of the procedural rules of EU competition law. Since the establishment of the Treaty of Rome in 1957, competition law has been directly enforced by the Directorate-General for Competition (DG COMP) of the European Commission. While the competition rules were laid down in the Treaty of Rome of 1957, the procedures for enforcement and the institutional design of DG COMP were only laid down in 1962, in Regulation 17/62. The institutional design of DG COMP mirrored the Ordoliberal model described above, with an emphasis on the importance of *rule of law* values over ad hoc political decision-making (Harlow and Rawlings, 2014).

Importantly, the same Regulation implemented administrative procedures for the Commission to enforce EU competition law directly, and gave it far-reaching enforcement powers. The enforcement of competition rules by the Commission is still exceptional today, and relevant as a form of the direct enforcement of EU law.

However, the enforcement of EU competition rules changed in 2004, since Regulation 1/2003 established a decentralised enforcement framework by granting an active role for national actors to enforce Articles 101 and 102 TFEU. This resulted in a system of parallel competences between the Commission, the NCAs and the national courts, and obliged the national enforcers to apply EU and national competition laws simultaneously.

This enforcement system relies on a mix of substantive EU provisions and national procedural laws and institutional designs. Hence, the challenge concerning the enforcement of Articles 101 and 102 TFEU is that it relies on the effective administrative enforcement of the treaty rules by national administrative authorities and follows procedures embedded in diverse political and institutional settings (Cseres, 2024).

Regulation 1/2003 still defines broad investigative and sanctioning powers for DG COMP. The autonomy for DG COMP to start investigations and impose sanctions is exceptionally broad, and no other EU institution or Member State government has the (formal) means to intervene. The reason for delegating enforcement powers to the NCAs and national courts was to relieve the Commission of its increasing administrative burden and make overall enforcement more effective. The Regulation (Article 3(1)) thus imposed an obligation on national authorities to apply Articles 101 and 102 TFEU in parallel with their national competition rules when an 'effect on trade between Member States' can be established. The change to a decentralised enforcement system was also to give competition policy more democratic support in Europe (White Paper 1999, para 46), with the risk of renationalising decision-making within the EU enforcement framework.

> 'The change to a decentralised enforcement system was also to give competition policy more democratic support in Europe [...]'

### 4.3 Effective and independent competition law enforcement

The European Commission and the NCAs thus have broad powers to enforce the EU competition rules. As independent regulatory authorities, competition authorities have a particular position in the classical scheme of the division of powers. Separated from the legislative and the executive powers, they do not belong to the judiciary power, and their functions are a mix of legislative production, administrative implementation and judicial enforcement (Guidi, 2016).

Competition authorities fulfil 'court-like' functions (Maher, 2000; Wright, 2009) as they address market actors' quasi-constitutional rights and protect the legal position of undertakings as well as citizens' rights to economic activity and free choice in markets. Accordingly, their independence is seen as a fundamental prerequisite. They decide concrete cases, applying only the law (Amato, 1997), which makes their functions almost judicial. As such, effective enforcement of competition law

is not only crucial for safeguarding undistorted competition within the internal market, but also forms part of effective judicial protection in the EU, as laid down in Article 19(1) TEU.

In a seminal judgment in 2018, the CJEU established that Article 19 gives concrete expression to the value of the rule of law laid down in Article 2 TEU (Case C-64/16 *Associação Sindical dos Juízes Portugueses*), as it obliges all Member States to ensure the full application of EU law and the judicial protection that individuals derive from EU law by guaranteeing an 'impartial, independent and effective judicial and administrative system' (Case C-192/18, *Commission v Poland (Independence of ordinary courts)*, EU:C:2019:924, para 98). In other words, the EU is based, as confirmed by various other judgments given by the CJEU, on the mutual confidence that the administrative and judicial decisions and practices of all Member States fully respect the rule of law (Case C-619/18 *Commission v Poland (Independence of the Supreme Court);* Joined Cases C-83/19, C-127/19 and C-195/19, Cases C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România'*, EU:C:2021:393), and that systemic violations of the rule of law breach Article 19(1) TEU in conjunction with Article 47 of the EU Charter on Fundamental Rights (the right to an effective remedy and a fair trial).

In the above mentioned *Sped-Pro* judgment, the General Court confirmed that the fundamental right to a fair trial before an independent tribunal under Article 47 of the Charter 'is also of particular importance for the effective application of Articles 101 and 102 TFEU' and that Member States are obliged, 'under the second paragraph of Article 19(1) TEU, to provide the remedies necessary to ensure respect for individuals' right to effective judicial protection in the fields covered by EU law, including the field of competition law' (para 91).

The decentralised enforcement is based on enforcement by national administrative authorities who are operating in diverse political, institutional and procedural settings. This system makes national laws and policies inconsequential in cases in which governments do not have (sufficient) capacity to implement these rules. The decentralisation did not address questions of effective and credible enforcement by capable organisations that can detect problems, set priorities, allocate resources, and penalise non-compliance. However, with the adoption in 2019 of the so-called ECN+ Directive,[3] which empowers NCAs to be more effective enforcers of competition law, a first move was taken to address the institutional embeddedness of competition rules that influence effective law enforcement. The Directive contains minimum harmonisation rules for NCAs' investigative, decision-making and enforcement powers. Article 4 of the Directive sets minimum safeguards for NCAs' independence from market actors and political pressure, and also requires accountability to the government and parliament.

> 'Competition authorities need not just 'pure' independence but rather 'embedded autonomy' [...] that enables them to challenge the anti-competitive practices not just of private actors but also of state-owned enterprises [...].'

However, concerning de facto independence and accountability, the ECN+ Directive does not address the broader legal and constitutional context of competition enforcement. The relevance of de facto independence has repeatedly been emphasised by the literature on legal transplants in competition law (Aydin and Büthe, 2016), which demonstrates that independence depends on the strength of the rule of law in a given country. Competition authorities need not just 'pure' independence but rather 'embedded autonomy' (Evans, 1995) that enables them to challenge the anti-competitive practices not just of private actors but also of state-owned enterprises, and to take on entrenched interests within the government and the state.

The same literature is crucial for understanding what makes competition law and policy effective

[3] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ C11/3.

or ineffective, as well as how a competition authority succeeds or fails to make itself an independent regulatory authority with institutional capacity, sufficient autonomy and considerable capability to address both private and public barriers to competition (Aydin, 2019; Aydin and Büthe, 2016). When countries systematically undermine market mechanisms in their economies, reverse economic liberalisation and political democratisation, competition law no longer fulfils its function of effectively addressing cross-border anti-competitive practices, guaranteeing economic openness and creating market access for companies. Hence, it fails to fulfil the original conditions to become members of an international or regional agreement (Aydin, 2012).

'[...] dismantling constitutional checks and balances in national legal systems and interfering with the independence of competition authorities can undermine compliance with competition laws and with the EU values of open competition.'

Accordingly, dismantling constitutional checks and balances in national legal systems and interfering with the independence of competition authorities can undermine compliance with competition laws and with the EU values of open competition. For example, over the past decade, the Hungarian government has systematically used law-making to restructure sectors of the economy and to override market mechanisms, while often providing artificial advantages to crony firms. Reducing competition makes it easier or more profitable to form a cartel (collusion) because of higher market concentration, and ultimately leads to higher prices for consumers (Cseres, 2022a, b). The lack of competition in Hungarian public tender procedures, and collusive tendering (bid rigging), have been identified as a key element of 'systemic irregularities, deficiencies and weaknesses in public procurement procedures' (Council Implementing Decision (EU) 2022/2506), which is in line with statements made over the years by the Commission (see European Semester Reports, Rule of Law Reports, 2020–2023). The lack of competition in Hungary's public procurement system and the inadequate use of competition rules by the Hungarian Competition Authority have since 2014 regularly been pointed out by both the Council and the Commission, most recently in the 2023 country-specific recommendations (Recommendation for a Council Recommendation, 2023).

However, while the Commission acknowledged that bid rigging undermines the primary goal of a procurement process, which is to achieve the best value for money for public services through fair competition among potential providers, it has not addressed any questions related to competition (cartel) law enforcement in public tender procedures in Hungary (Cseres, 2022a, b).

The above mentioned *Sped-Pro* judgment makes it clear that when a national competition authority systematically fails to enforce or under-enforces the rules laid down to protect the value of competition, as has been the case in Hungary and Poland (Cseres, 2024), this endangers the functioning of markets and the protection of undertakings and citizens at the national and EU level.

## 5. The role of EU constitutional principles in EU competition law

Notwithstanding the different institutional and procedural settings that arise from the principle of procedural and institutional autonomy, national competition authorities are subject to a number of important obligations under EU law, such as mutual trust and the principle of effectiveness.

*First*, the decentralised system rests on the implicit safeguarding of mutual trust and sincere cooperation, which is manifested in the cooperation mechanism between the Commission and the NCAs, and which demands that they all trust each other in making use of their investigative and fining powers in order to deter uncompetitive conduct (Commission Notice, 2004, pp. 43–53).

The principle of mutual trust was restated by the General Court in the above-mentioned *Sped-Pro* judgment, establishing that the protection of competitive markets is a *shared value* for all Member States, who are obliged to enforce this protection effectively. In assessing whether an NCA is capable of effectively enforcing competition law and adequately safeguarding a complainant's rights,

the General Court focused on rule of law issues. Referring to its own case law, developed in the area of the European Arrest Warrant (EAW) (Case C-216/18 *LM v Ireland*), the General Court in 2018 articulated an important new element of the Commission's enforcement of EU competition law.

Accordingly, the Commission will have to examine whether an NCA can *de facto* act independently from the executive in the Member State, and whether there are independent courts that can review the competition authority's decisions and adequately protect the rights of complainants. In its judgment, the General Court established that the lack of independence of an NCA is analogous with the lack of judicial independence of an authority issuing an EAW, and, hence, that a lack of independence may justify the suspension of cooperation between Member States (Cseres and Hwija, 2023). This is a clear recognition of competition authorities' constitutional role and their quasi-judicial function in deciding concrete cases (Guidi, 2016).

*Second*, the principle of effectiveness. As a core component of EU competition law enforcement (Council Regulation 1/2003 and Directive 2019/01), this principle obliges Member States not to make the implementation of EU law excessively difficult or in practice impossible (Case C-453/99 *Courage*), and to ensure that the rules which they establish or apply do not jeopardise the effective application of Articles 101 and 102 TFEU.

Competition authorities' power to challenge conduct deemed hostile to competition, particularly when that conduct is undertaken by politically powerful actors, is an essential measure of their 'embedded autonomy'. Consequently, a Member State should be barred from adopting legislative or other measures that de facto eliminate the autonomy and independence of its competition authority. For example, the frequent application of a public interest exemption in the Hungarian Competition Act enabled the Hungarian government to declare numerous mergers to be of 'national strategic interest' and free from competition law review. The use of this exemption prevented the Hungarian Competition Authority from assessing (media) mergers, and created highly concentrated markets in various sectors, including the media, with the particular risk of isolating the Hungarian markets from the rest of the internal market (The Good Lobby Profs, 2022).

By referring to the principle of effectiveness (e.g. in Case C439/08 *VEBIC*), the Court of Justice has frequently underlined Member States' obligations concerning 'the availability of sufficiently robust national enforcement structures' (Dunne, 2016, 466). Effective enforcement means that national sanctioning systems deter undertakings from anti-competitive conduct because the undertakings fear prosecution and the obligation to pay a fine. This is also what effective legal protection under Article 19(1) TEU requires from competition authorities, as discussed above.

'Effective enforcement means that national sanctioning systems deter undertakings from anti-competitive conduct because the undertakings fear prosecution and the obligation to pay a fine.'

Systematically setting aside national competition law rules (cartel provisions, merger rules) for political purposes is a case in point (Bernatt and Jones, 2023; Cseres, 2024). Such backsliding, even in a single Member State, damages the competitive process across the whole of the EU and can lead to the accumulation of economic and political power. Consequently, it is a fundamental matter of EU law and policy and a central responsibility of the European Commission to address such cases. Such cases and the national competition law enforcement that should apply are not isolated but are deeply interconnected with the enforcement systems of the EU and its 27 Member States that aim to safeguard the system of undistorted competition as a core component of the EU's economic and legal order (Cseres, 2024). Therefore, backsliding in competition law enforcement in one Member State endangers the competitive process in the internal market and the relationship between competitive markets and democracy, a central pillar of the EU integration project.

The interdependent nature of decentralised enforcement means that the systemic failure of an NCA to enforce Regulation 1/2003, given

the risk this poses to the system of enforcement, should be sufficient to suspend cooperation under Regulation 1/2003 (Borgers, 2021). The suspension of cooperation means that other NCAs no longer recognise the national system concerned as an effective system, and cases must be re-allocated from this NCA to other NCAs to ensure that Articles 101 and 102 TFEU are enforced. Alternatively, on the basis of Article 11(6) of Regulation 1/2003, the Commission can intervene if there is a serious risk of incoherence, by relieving the NCA of its competence to act. It has, however, so far not made use of this possibility. In the *Slovak Telekom* case (C-165/19P), the Court of Justice confirmed that, pursuant to Article 11(6) of Regulation 1/2003, when 'the Commission initiates proceedings against one or more undertakings for an alleged infringement of Article 101 or 102 TFEU, the competition authorities of the Member States are relieved of their competence to bring proceedings against the same undertakings for the same, allegedly anticompetitive, practices occurring on the same product and geographical market or markets during the same period or periods' (para 30).

## 6. Media pluralism and competition law

The question of how EU competition law can protect rule of law values can be most directly answered in relation to media markets. EU competition law in general, and state aid law and merger control in particular, play an important role in controlling and preventing the accumulation of significant economic power in media markets, and in preventing unfair competition generated by states that support certain undertakings through subsidies and other state measures.

> 'The question of how EU competition law can protect rule of law values can be most directly answered in relation to media markets.'

Media pluralism is an essential characteristic of a well-functioning democracy and a free and open society. It contributes to the formation of public opinion, allowing citizens to make informed choices in their political decisions. Media freedom and pluralism are core components of the rule of law, and form preconditions for a sound debate on politically and socially relevant issues (Brogi et al., 2021).

While the EU lacks an explicit competence to regulate the media, the regulation of media markets – as an important economic sector in the single market – falls under the EU's internal market and competition law competences. Concerning the internal market, the Commission shares its competence with the Member States. The EU may only take action to support national initiatives and, according to Article 167(5) TFEU, this action may not take the form of an instrument harmonising national media laws and regulations.

However, in the area of competition law the EU has direct and exclusive competence with the far-reaching supervisory powers that are described above. In this way, the enforcement of competition law can contribute to the maintenance and development of media pluralism (independence from private control) by preventing excessive concentration in media markets and exclusionary behaviour that forecloses smaller media players and impedes market entry. While competition law is a legal instrument that can address the economic aspects of media markets, its control mechanisms can be complemented with specific anti-concentration rules to safeguard external pluralism – the offer of a plurality of voices by the market. This could target the manipulation of public opinion and the concentration of power or political influence over public and private media, and safeguard citizens' rights to free and plural media (Bania, 2015). Moreover, it can enhance media pluralism by addressing broader consumer interests, such as media diversity, which is an important dimension of quality (another parameter of competition besides price and choice).

The following two sections will analyse, first, the media concentration rules in EU competition law (Section 6.1) and second, the state intervention and state advertising that can be addressed by state aid rules (Section 6.2).

### 6.1 Media power and concentration control

Media power encompasses 'opinion power' (Helberger, 2020, 842). Media power does not necessarily coincide with market power, but it does have political relevance concerning possible state intervention. Concentrated economic power can reinforce the political power of capital and directly impact citizens' fundamental rights, such as their protections related to media pluralism and their access to reliable information (Banasiński and Rojszczak, 2021).

In Hungary, the 2018 creation of the media conglomerate KESMA, which was enabled by an exemption in the Hungarian Competition Act, resulted in the control and operation of nearly 480 publications by a publisher known for his loyalty to the Hungarian prime minister, and it formed a massive concentration of advertising and readership.

This is a crucial reminder of the tangible damage that arbitrary measures of the Hungarian government can cause to the economy, its market participants and Hungarian citizens. Such exemptions from the competition rules on the grounds of 'national strategic interest' should be subject to detailed analysis to expose how concentrated economic power reinforces political power and has an impact on citizens' fundamental rights related to, for example, media pluralism, access to utilities, reliable information and data protection.

Likewise, the acquisition in Poland of Polska Press by the state-owned company PKN Orlen in 2020 raised serious concerns related to its negative impact on media pluralism. It threatened the regional media market, and undermined citizens' rights to access reliable information, to publicly scrutinise and, if necessary, criticise the actions of public authorities, and to enjoy transparency in public life (Article 11 of the Charter of Fundamental Rights; Banasiński and Rojszczak, 2021).

In the media field, the EU shares competence with the Member States and can only take action to support national initiatives (Article 167(5) TFEU). However, on the basis of the Treaty and the EU's Merger Regulation (Council Regulation 139/2004), the Commission is explicitly entrusted with assessing whether a concentration with a Union dimension may significantly impede effective competition. As explained above in Section 2, merger control can decentralise economic power and offer economic opportunities to firms by striving for a democratic political order.

> '[...] merger control can decentralise economic power and offer economic opportunities to firms by striving for a democratic political order.'

Although the legal framework is not clear about the Commission's merger assessment for the protection of media pluralism, and the Commission's competences are limited concerning culture, Articles 167(4) TFEU and 11(2) and 51(1) of the Charter of Fundamental Rights of the EU lay down a duty for the Commission to have regard to non-economic goals when implementing EU competition policy (Bania, 2013). Moreover, it has been suggested that Article 3(1) of the ECN+ Directive, which requires competition authorities to take the provisions of the Charter of Fundamental Rights into account in their decisions, could be broadly construed to require them to take into account other provisions of the Charter, and not just those relating to procedural safeguards. For example, according to this provision NCAs should consider whether the impact of mergers on media pluralism complies with Articles 11(1) and 11(2) of the Charter of Fundamental Rights (Banasiński and Rojszczak, 2021).

Under the merger control rules, the Commission assesses whether the economic power of the merging firms would increase, and Member States' competition authorities also use merger rules to control the structure of markets. On the basis of specific criteria (Article 1(2) Regulation 139/2004), the control of mergers is exercised either by the Commission or by the Member States.

However, not all Member States have a merger control regime, and their concentration rules differ concerning media plurality tests (European Commission, 2022). The Commission has central and exclusive competence concerning

mergers with a so-called 'Union dimension', but no competence if the concentration does not have such a dimension. This is clearly reflected in Article 21(4) of the EU Merger Regulation, which explicitly allows Member States to 'take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation'. Hence, Member States may implement and apply a separate 'plurality of the media' review in their own legal systems.

Nevertheless, the allocation of jurisdiction is subject to certain corrective mechanisms and exceptions that provide, among others, for the possibility for the Commission to review cases even without a Union dimension (so-called referrals under Article 22 EU Merger Regulation). Under the referral mechanism of Article 22 a system of close cooperation exists between the Commission and the NCAs, similar to the above-mentioned cooperation mechanism under Regulation 1/2003 (Cseres, 2023).

The close resemblance between the principles of close cooperation between NCAs and the Commission underlying Article 22 referrals under EU Merger Regulation and Regulation 1/2003 demands that the Commission takes account of the additional conditions of effective competition law enforcement and concerns about rule of law backsliding, as interpreted by the General Court's judgment in *Sped-Pro*, when decisions are made on referrals (Cseres, 2023). As mentioned above, the lack of independence of an NCA could in certain cases justify the suspension of cooperation between a Member State and the Commission and require the case to be dealt with by the Commission.

### 6.2 State intervention and state aid

The relationships between the state and the media and between the media and politics is complex (Bátorfy and Urbán, 2019). A diverse media market that is free from state intervention is a cornerstone of democracy and an informed citizenry. While state aid is generally prohibited by EU law under Article 107 TFEU, state measures that support public broadcasting services, traditionally seen as 'services of general economic interest', may qualify for an exemption from state aid and competition rules on the basis of Article 106(2) TFEU. Therefore, Member States who entrust media organisations with the task of providing high quality and varied programming in order to safeguard media pluralism and who, for the performance of this mission, grant aid to these organisations, are entitled to request a derogation from the general prohibition on state aid (Kozak, 2024).

The Amsterdam Protocol on the System of Public Broadcasting in the Member States ratifies the role of public broadcasting in fulfilling the democratic, social and cultural needs of a given society, as well as the need to preserve and promote media pluralism. It explicitly states that it is up to the Member States to define and organise the public service remit in a manner of their own choosing. However, it also lays down that the state financing of broadcasting activities may not bring about distortions of competition if such distortions are not necessary for fulfilling the public service mission.

> 'The relationships between the state and the media and between the media and politics is complex.'

Therefore, in the same way as the derogation under Article 106(2) TFEU, the Protocol does not go as far as to provide a full exemption from the Treaty rules. Both Article 106(2) TFEU and the Amsterdam Protocol demand, in essence, a balance between national interests and Union interests, but do not explain how this balance may be achieved. Pursuant to Article 106(3) TFEU, the Commission is the competent body to strike this balance (Bania, 2015). While recognising the significance of public service broadcasting, the Protocol has an interpretative character.

Furthermore, state advertising in some countries serves as a significant revenue source for many media service providers, who face economic difficulties and struggle with the sustainability of their business models. Financial support from the state, in any form, can be crucial, especially for non-profit, community media and other less commercial forms of journalism.

However, state advertising, meaning public funds allocated for promotional or self-promotional messages, public announcements or information

campaigns by public authorities or entities, has emerged as a key source that distorts the media landscape and jeopardises both fair competition and media independence in some Member States, such as Poland through the purchase of Polska Press by the state-owned enterprise PKN Orlen (ECPMF, 2023). The unequal distribution of state advertising by the Hungarian government, for example, transformed and distorted the media market, created censorship and built an uncritical media power aligned with the government (Bátorfy and Urbán, 2019).

Over the years, several complaints have been filed to the Commission concerning, for example, the Hungarian government's practices of supporting pro-government media outlets in the newspaper, online and television markets (Mérték/Átlátszó, 2020). These cases allege that state advertising has often been misused by Member States to exercise undue influence over individual media organisations and the media market as a whole. Criteria for the allocation of advertising by state agencies remain vague and have occasionally revealed how the award of advertising contracts to the press has been used for political influence. The lack of fair and transparent rules concerning the distribution of state resources has been favourable to media capture, and the lack of available data on this allocation creates the risk of money being channelled to specific media outlets in unfair ways.

'The threat of political capture through the opaque and unfair allocation of state advertising may mean that this is illegal state aid to certain media outlets and, hence, poses a real risk to the media market by distorting competition.'

The threat of political capture through the opaque and unfair allocation of state advertising may mean that this is illegal state aid to certain media outlets and, hence, poses a real risk to the media market by distorting competition (Nenadić, 2022). Considering the economic vulnerability of media organisations, state advertising may be used as a hidden subsidy and thus as an instrument of political influence on the media, as is allegedly the situation in Hungary (Mérték/Átlátszó, 2020; see also the 2024 Rule of Law Report).

EU state aid rules under Article 107 TFEU address precisely these situations, ensuring that aid granted by a Member State or through state resources does not distort competition and trade within the EU by favouring certain companies or the production of certain goods. The goal of the EU state aid rules is to provide a level playing field in the internal market, contesting the foreclosure of market entry as well as distortions of competition, through governmental favouritism at public expense, by market participants. While these rules generally focus on assessing the effects of state measures on competition, they follow a 'social welfare standard' that takes into account all the effects that may be generated by the state measures, and hence both economic and equity considerations, such as the quality of the media (Bania, 2015).

## 7. Conclusions

The systematic dismantling of the democratic legal and political system in certain EU Member States has developed into a rule of law crisis of the EU itself. For many years the EU institutions have struggled to address this crisis by relying on legal and policy tools composed of preventive and corrective measures.

This paper analyses how EU competition law can play a role in protecting the rule of law in the EU and its Member States. While the primary role of competition law is to safeguard the competitive process, it is an important mechanism to constrain arbitrary power and functions in a similar way to the rule of law. By constraining economic power, competition law safeguards competitive markets as fundamental components of both functioning market economies and democratic legal and political systems. This role is especially important with regard to anti-competitive practices in public procurement procedures, the protection of EU funds, the growing concentration of, and state capture in, media markets, and the unfair allocation of state advertising in the media sector.

As a fundamental part of the EU legal order, which is implemented and enforced by all Member States and which rests on a wide consensus across the East–West divide (Pech, 2022), the protection

of competitive markets is a *shared value* for all Member States. As an exclusive competence of the EU, which has direct administration and far-reaching enforcement mechanisms, EU competition law can be enforced in cases in which national competition law is backsliding. This paper demonstrates that, on the basis of various Treaty provisions and the EU Merger Regulation, the European Commission can directly intervene to address collusive practices and the abuse of dominance with cross-border effect, state aid rules and, in certain cases, mergers even without a so-called Union dimension. The application of these rules is strengthened by various constitutional principles of EU law, such as mutual trust, sincere cooperation, the principle of effectiveness and effective legal protection.

This means that, in cases in which the authority of EU competition law is challenged by national economic policies and the backsliding of certain Member States on their commitment to the rule of law and democracy in the EU, EU competition law has concrete and robust legal instruments to address the challenges (Cseres, 2024). With regard to media pluralism, as an essential component of a well-functioning democracy and a free and open society, this paper shows how the enforcement of merger control and state aid rules can directly and meaningfully protect media pluralism by preventing excessive concentration in media markets and unlawful state subsidies. As such, the European Commission should monitor the enforcement of competition rules in its Rule of Law reports and consider its own more active enforcement of these rules in those Member States in which the state has captured the free media.

The current EU legal system has the tools to remedy the rule of law crisis: over the years, the EU institutions have developed a toolbox in response to the backsliding with respect to the rule of law. However, competition law and its enforcement tools deserve a place in this toolbox, as legal tools need to be sought among and applied broadly across different fields of EU law and the various DGs of the European Commission, most notably DG Justice and DG COMP.

> ‘The current EU legal system has the tools to remedy the rule of law crisis [...].’

Such a compound analytical approach was once the foundation of EU integration and the EU’s legal order. It is indicative of the way in which markets contribute to democratic societies by guaranteeing meaningful economic participation for firms and safeguarding the plurality of options for citizens. Hence, economic rights to participate in markets on equal terms must be associated with rights to freedoms and economic opportunities as laid down in the political rights language in national constitutions. The protection of open and competitive markets, with a solid competition law system, is a fundamental economic right of citizens across jurisdictions. As such, the EU, should prioritise, rather than overlook, the application of competition law in its fight for the rule of law.

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