Kluwer Competition Law Blog

The Forgotten Constitutional Identity of EU Competition Law

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Over the past months, various discussions and debates have taken place concerning the future path of EU competition policy. Central to these discussions was the Draghi Report calling to revamp the EU's competitiveness and launch a new industrial policy. Some of these discussions were described as reviving "old Europe" mindset and proposing policy directions that reinforce the gap between Western and Central-Eastern Europe (CEE) as well as overlooking the strength and growth potential of CEE Member States.

In this blog, we wish to move the discussion further. What is at stake is not merely a balanced growth within the EU, and policy puzzle on how to improve the EU's innovativeness and competitiveness on the global stage. The challenges are broader and more complex than the narrow economic confines of the current debates seem to suggest. The challenges cut deep into a changing relationship between the state and markets. They call for complex assessments on the "bounds" of economic power and the role of competition law to control such power asymmetries. By largely focusing on the threat to competition by private digital companies, current debates often overlook what we call "the constitutional identity" of EU competition law.

In this contribution, we argue that there are crucial lessons learned in CEE on the function of EU competition law in the liberal democratic governance processes as well as its circumvention by authoritarian governance models. By focusing on the disruptive economic policies governments in CEE engaged in, and the effects it had on competition law enforcement over the past decade, our analysis can redirect the discussions to a more inclusive debate on the role of states in markets, and more deeply grounded analysis of Europe's challenges in its competition policy.

In the following, we first explain what we call the "constitutional identity" of EU competition law and then set out the key characteristics of CEE economic, legal and political contexts relevant for their competition law policies.

We argue that the lessons learned through the trajectories CEE countries have taken over the past decade continues to be politically and economically salient, and hence must be addressed in any future vision of EU competition policy. If these insights in Europe remain sidelined, no future reforms of the EU's internal governance processes are likely to succeed and its economic power on the global stage will be limited.

We provide a number of directions that must be considered in order to make the EU' future competition policy more inclusive, and more aligned with its original "constitutional identity".

What is the constitutional identity of EU competition law?

Constitutional identity has emerged as an important device of constitutional law with which to describe the multilevel space in Europe from both the perspective of the EU and its Member States. We use "constitutional identity" as an analytical concept that frames the way competition law emerged in Europe, the way it developed in Europe, the way it influences the emergence of national competition laws and the principles, values and legal rules it entails today.

Against such a backdrop, **the "constitutional identity**" of EU competition law is grounded on the EU's legal and economic order/constitutional framework, in which competition law plays a central role in safeguarding a pluralistic competitive process, functioning market economies and upholding democratic societies.

Indeed, competition law has emerged in Europe as a key component of public policy-building and developed as a quasi-constitutional foundation of liberal democracy, and over the past seven decades, it has become a powerful institution to defend markets across and beyond Europe, to safeguard European undertakings' freedom of economic activity and to support consumers' choice.

Even though competition law in the EU (and globally) has mainly been interpreted along economic rationales, its historical roots clearly show that it was drafted to promote democracy and understood as a fundamental constitutional value.

Importantly, competition law in the EU is "atypical", as it not merely addresses anti-competitive practices of private undertakings but protects the process of competition from excessive and arbitrary interventions by the EU Member States. EU competition law contains specific and unique provisions that impose prohibitions not only with respect to private undertakings but also states.

Accordingly, the CJEU has interpreted Articles 101 and 102 TFEU in combination with the principle of sincere cooperation in Article 4(3) TEU, to lay down a duty on Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings. Moreover, Article 101 TFEU and Article 4(3) TEU are infringed where a Member State requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article 101 TFEU or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere. The rules safeguarding competitive neutrality in the EU Internal Market are relevant in this context. In particular, a key role is played by Article 106(1) TFEU which obliges the EU Member States to respect the treaty rules with respect to public undertakings and to undertakings with special or exclusive rights. The EU state aid rules (Article 107 TFEU) and the Foreign Subsidies Regulation complement the picture. They respectively prohibit Member States from granting unjustified and distortive state subsidies to selected undertakings, and address distortions caused by foreign subsidies to ensure a level playing field for all companies operating in the Single Market.

Finally, under Article 37 TFEU Member States are obliged to adjust any state monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

This "constitutional identity" of competition law is especially relevant in the decentralised

enforcement system of EU competition rules, which entails close cooperation between Member States' competition authorities (NCAs) and the Commission in the enforcement of Articles 101 – 102 TFEU within the European Competition Network (ECN), and is based on mutual trust, i.e. that Member States respect the values set out in Article 2 TEU when applying EU competition law. The empowerment of NCAs to apply Articles 101 – 102 TFEU aims to promote the effective and uniform enforcement of both Articles 101 and 102 TFEU as ultimate objectives of Regulation 1/2003 and Directive 2019/1 (the ECN+ Directive). In other words, EU Member States must use their sovereign powers to maximise the effectiveness of Articles 101 and 102 TFEU enforcement.

The principle of effectiveness also forms a legal basis to adopt independence requirements in EU law concerning competition authorities, as illustrated by the ECN+ Directive. Accordingly, competition authorities' power to challenge conduct deemed hostile to competition, particularly when such conduct can be linked to market actors with distinctive economic and political links to ruling governments, is an essential measure of their political standing. Consequently, even if competition authorities' formal independence is guaranteed, Member States should be barred from adopting legislative or other measures that undermine NCAs' *de facto* independence. The courts have on various occasions emphasised the obligations Member States have on the basis of the principle of effectiveness, which "demands the availability of *sufficiently robust* national enforcement structures so that Member States can discharge their overarching obligation to secure the meaningful application of EU law within the domestic system" (emphasis added). Moreover, in its *Sped-Pro* judgment, the General Court recently confirmed that compliance with the fundamental values of Article 2 TEU applies to the enforcement mechanisms of Articles 101 and 102 TFEU. This judgment was interpreted as anchoring NCAs independence directly in the EU primary law (Article 19 TEU) and is an important reminder of the interconnection between EU fundamental values (rule of law and democracy) not only with respect to its objectives but also institutional and procedural organization of its enforcement.

With this "constitutional identity" in mind, EU competition law was created and enforced in order to facilitate a social order extending beyond price and output of specific products and services: to curb overarching economic power that threatens the basic idea of a democratic society. By decentralizing economic power, it functions as the accountability mechanism for markets and facilitates the integrity and impartiality of political institutions and makes interest capture less likely.

Similar to the EU values laid down in Article 2 TEU, EU competition rules seek to control arbitrary use of power. By safeguarding undistorted competition in the internal market, it defends the "market's equivalent of separation of powers" and guarantees the rule of law in economic activities. Therefore, the "constitutional identity" of EU competition law is about its pro-democratic role. Competition law helps markets reinforce the civil and economic rights which are inherent in free democratic societies. By defending economic freedoms, it protects well-functioning markets and provides equal opportunity for all EU citizens to participate in the whole internal market.

The lessons CEE countries can teach on the constitutional identity of EU competition law

Over the past decades, discussions on these core EU competition law tenets seem to have taken the backstage. For example, this is evidenced by the Draghi report, which addresses the long-standing

conflict between public interventions and free market competition but in a rather controversial manner.

This is surprising as a growing body of political scientists show how several CEE countries turned to economic nationalism and political illiberalism, after their accession to the EU and the financial crisis, and how their economic policies have disrupted core principles of EU economic policies and internal markets rules. Indeed, they contested the economic models of liberal democracies with free competition at its core. By increasing state intervention and ownership in markets they often undermined market mechanisms. The illiberal economic policies also raised political concerns of re-nationalising EU competition law by certain Member States implementing their own national strategic interests within the EU legal framework, for example through providing selective exemptions in certain sectors and to certain undertakings with tangible effects for example in public procurement markets.

In terms of history, CEE countries have shared historical, economic and political legacies and distinctive structural and historical trajectories. While taking different economic paths after the political changes of 1989, they all share a common historical legacy having emerged from socialist political systems and centrally planned economies. Much discussed by political scientists, and less by legal scholars, CEECs also share the heritage of the Eastern enlargement process, which was characterized by these countries' strong desire to 'return to Europe' according to the EU unprecedented power to influence their legal, political and economic development. The CEECs' adoption of EU rules was governed by strong EU conditionality, which acted as a crucial incentive for implementing the necessary legal, political and economic changes. The CEEs' desire to transition to an ideal model of liberal democracy and market economy according to Western standards accompanied and influenced their market, constitutional and institutional reforms. These legacies still define, not just trajectories within the CEE, but also trajectories in the EU's neighbourhood, and as such carry relevant impact and the current status of the EU integration project. In its enlargement policy accession conditionality acts as a governance mode with intended positive effects on democracy, governance capacity and economic transformation, and to soften the process of integrating transition economies into the EU's single market.

However, after accession, which created ample socio-economic, institutional and political uncertainties, economic nationalism and political illiberalism has been taking hold in some CEE that previously had been most eager to return to the West and embrace its values. Corruption and oligarchic state capture in various CEE are cases in point, while some countries of the Western Balkans have never quite broken with their authoritarian past, which facilitated their turn to hybrid regimes without a detour to capitalist democracy. In all countries, since the financial crisis, an important transformation in the relationship between states and markets has been taking place, one where states assume a more active role.

Power differentials between new and old EU members (manifest in absolute income and the one-directional foreign direct investment) increasingly turned the CEE Member States to anti-liberal ideas contesting Western models of liberal democracy. Unequal economic positions and economic subordination lead to contestation of the economic models of liberal democracies with free competition at its core. Characterized by "capitalist diversity on Europe's periphery" that emerged after political changes and accession to the EU several CEEs increased state intervention and ownership in markets, and undermined market mechanisms. While economic inequality and dependence were not the only decisive factors that contributed to the rise of authoritarian governments and illiberal policies in CEE, economic dissatisfaction has been an aggravating factor.

For example, economic policies in Hungary and Poland under Fidesz and PiS-led governments took on a decisively interventionist and nationalist turn having reshaped these countries' economic policies in fundamental ways. Being supported by domestic business elites disappointed with their economic opportunities posed by global neoliberalism or wishing to consolidate its political power, these governments adopted policies legitimizing a stronger role of the state in the economy, concentrating economic policymaking, favouring domestic economic actors at the expense of foreign market players in selected sectors and politicizing media.

The public interest exemption for "national strategic interest", introduced in 2013 in the Hungarian Competition Act, which has been systematically and frequently (unlike other international practice) used by the government to exempt large mergers in the area of media, telecommunications, energy, financial, and transport sectors without having the Hungarian NCA scrutinizing them on the basis of their impact on competition, is a clear example for such policies. Another case at stake, is the readiness to rely on the SOEs market power to affect the democratic process. Examples include the takeover of local media outlets in Poland by the state-controlled oil refiner, Orlen and the manipulation of petrol prices by this firm before the 2023 elections.

Overlooking these trajectories and the paradoxical link between increasing levels of economic prosperity and the rejection of democratic rule and liberal values in Central-Eastern Europe, can also undermine the EU's integration capacity, and transformative power in EU enlargement policy, which is closely intertwined both with the role competition law plays in accession criteria (see Copenhagen criteria), and the role of the current CEE Member States in enlargement actions. The CEE's trajectories are an important pathway for many candidate countries in the Western Balkans, where law, politics and markets develop in a hierarchical relationship with external actors and top-down governance mode (conditionality) driven by the EU and its laws, and policies.

Conclusion

The current debate on the EU's global competitiveness and the need to adapt EU competition law and policy to new challenges is undisputed. However, by one-sidedly focusing on threats to the competitive process by private undertakings (mostly Big tech companies), current discussions overlook crucial challenges to competitive markets in the EU well illustrated by the discussed developments in the CEE countries.

Therefore, we advocate for a more comprehensive vision of EU competition law for the years to come. A vision that takes due consideration of the social and economic realities of the CEE region and acknowledges the pro-democratic function of EU competition law in line with its constitutional identity. In particular, a focus on the role of states in combination with the effectiveness of enforcement of competition law and merger review is needed, especially concerning state-owned enterprises (SOEs) and crony companies. Following this vision, enforcement should be prioritized in sectors vital for a thriving democratic society, such as food, public utilities, and media markets. This perspective on competition law and policy is not exclusive to the CEE region; it offers a lens through which we can understand broader European trends and guide the EU's further enlargement process.

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