Rule of Law Crisis, Judiciary and Competition Law

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This article discusses the implications of the rule of law crisis on a core area of EU law: competition law. It analyses the reforms of the judiciary in selected EU Member States and the reaction of EU institutions. The article shows that the reforms of the judiciary give rise to doubts regarding the independence and expertise of courts which are responsible for reviewing the decisions of national competition authorities adopted under Articles 101–102 Treaty on the Functioning of the European Union (TFEU) and national competition laws. As a result, the effective judicial protection required by EU primary law is undermined. In addition, mutual trust, upon which the decentralized enforcement of EU competition law is based, is put into question. The article calls upon EU institutions, and in particular the European Commission, to monitor closely the developments in Member States which may affect the enforcement of EU (and national) competition rules.

1 INTRODUCTION

In the last four years, rule of law crises in several EU Member States have been the subject of intense academic discussion, with legal scholars taking a leading role. At the same time, the rule of law and independence of the judiciary have become topics of intense political debate both in Brussels and in Member States. Cities in several European countries have witnessed mass rallies in defence of the judiciary and its independence. Never before has the rule of law been such a hot topic for the European Union. Nevertheless, this debate has largely overlooked the implications of the rule of law crisis for economic law, including competition law, despite the fact that the economy and the proper functioning of the internal market lie at the core of the European Union project and that rule of law is essential for the proper functioning of the EU internal market. Such a state of affairs invites closer academic attention.

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Competition law is a crucial area of EU law. It is important for the proper, consumer-friendly functioning of the economy. It aims to protect consumer welfare, which is associated with low prices, high quality, choice, and innovation. In addition, competition law works against the partition of the internal market by private actors. If the rule of law crisis were to affect this role of competition law, its fundamental importance for the EU would be endangered. In particular, the limitation of the independence of courts reviewing competition authorities' decisions would be problematic. Judicial review of competition authorities' decisions ensures that competition authorities stay within the limits prescribed by law and it limits the likelihood of abuse of power and abuse of discretion by competition authorities. In addition, full judicial review of the questions of facts and law provides a check of the correctness of the decision as well as the procedural regularity of the administrative proceedings leading to its adoption. Any limitation on the independence of the courts would undermine judicial review in competition law. In particular, courts could be put under pressure to take into account non-legal factors when exercising judicial review. The limitation of independence of courts adjudicating competition law would also undermine the decentralized system of EU competition law enforcement, because this system is based on mutual trust. The functioning of the European Competition Network (ECN); the cooperation of national competition authorities (NCAs) and national courts with the European Commission under Regulation 1/2003[1];and the evidentiary importance of an NCA's decision for private damage proceedings instituted in another Member State[2] – all these aspects require trust in the activity of NCAs and courts exercising judicial review of their decisions. Any lack of independent judicial check of the competition authority would undermine this trust.

Against this backdrop, this article analyses the implications of the rule of law crises in Hungary and Poland for the competition law system. The EU's response to developments on the national level is also taken into account. The article aims to answer the question whether the ongoing reforms of the judiciary in Hungary and Poland circumvent the standards of effective judicial protection as far as judicial review by national courts empowered to review the decisions of NCAs is concerned. In this context, the challenges concerning the independence of these courts are scrutinized. In addition, since expertise is necessary to review the substance of

1 *See* Art. 5 of Council Regulation (EC) No 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty, OJ L 1, 4 Jan. 2003, at 1–25.

2 Under Art. 9(2) of the Directive 2014/104 of 26 Nov. 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5 Dec. 2014, at 1–1, final decision of competition authority, i.e. in most of the cases the decision which was upheld by national courts, serves as a proof, or at least constitutes prima facie evidence, of infringement of competition law in private damage proceedings instituted in another Member State.

decisions of competition authorities and is conducive to the independent character of judicial decision-making, the question arises whether the reforms affect the expertise of judges adjudicating in competition law cases. The selection of Poland and Hungary is justified in the light of developments in the national laws of these countries which may undermine effective judicial protection required by EU law.[3] So far, national courts of these countries were ready to uphold the decisions of the competition authority despite the political criticism faced by the competition authority[4] and to provide effective judicial review of competition authorities' decisions which were in line with the political will of the ruling party.[5] Such a role is not likely to be played by courts once their independence is limited.

The article aims to fill-in the existing gap in the competition law literature, which normally takes the independence of courts reviewing the decisions of competition authorities for granted[6] and focuses on the institutional and procedural organization of NCAs. A similar approach was taken by the EU legislator when enacting ECN+ Directive.[7] Since, in the predominant model, NCAs are administrative authorities (rather than courts), it is necessary to provide that effective judicial review of their actions by independent courts. In light of the rule of law crisis, academic attention should not be limited only to questions concerning the scope and the intensity of judicial review of competition authorities' decisions. Instead, one has to take a broader view and address the question of whether the national courts responsible for competition law are indeed independent. This is important because

3 *See* more *infra* part 2.

4 *See* the decision of Polish competition authority of 13 Jan. 2011, DKK 1/2011 prohibiting the merger between two state-owned energy companies, PGE and Energa. The authority's action faced strong criticism by the representatives of government, including the prime minister. The reviewing court upheld the authority's decision in its entirety confirming the credibility of the Polish competition law system. *See* Marek Martyniszyn & Maciej Bernatt, *Implementing a Competition Law System – Three Decades of Polish Experience*, 0(10 J. Antitrust Enforcement 12–13, 1–51 (2019), DOI: 10.1093/jaenfo/jnz016.

5 *See* the decision of the Hungarian competition authority of 19 Nov. 2013, Vj/74/2011/873, in a case against banks offering loans denominated in foreign currencies. The authority instituted the proceedings in Nov. 2011 after the call for action by an important politician of the Hungarian Fidesz ruling party. The authority found that banks violated competition law by coordinating between Sept. 2011 and Jan. 2012 their strategies to reduce the full prepayment of mortgage loans denominated in foreign currencies under fixed exchange rates imposed on banks in 2011. Record fines were imposed. The Hungarian Supreme Court, Kuria, annulled the decision in respect to fines imposed on banks and sent the case back to the authority ordering the recalculation of fines. *See* the judgment of Kuria of 13 Dec. 2016, Kfv.III.37.582/2016/16.

6 Independence of judiciary is sometimes discussed in the context of developing countries establishing their competition law regimes. *See* e.g. Umut Aydin & Tim Büthe, *Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits*, 79(4) L. & Contemp. Probs. 1, 18–19 (2016) and Mel Marquis, *Competition Law in the Philippines: Economic, Legal and Institutional Context*, 6(1) J. Antitrust Enforcement 79, 98–100 (2018).

7 Directive of 11 Dec. 2018 the European Parliament and of the Council to Empower the Competition Authorities of the Member States to Be More Effective Enforcers and to Ensure the Proper Functioning of the Internal Market, OJ L 11/3, 14 Jan. 2019, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0001&from=EN (accessed 31 Oct. 2019).

national competition agencies, while having far-reaching powers, may often lack this characteristic, either for legal or practical reasons. Even in the best case-scenario the decision-makers of competition agencies do not have the status of judges and their members do not enjoy guarantees equal to those of judges.[8] Moreover, the independence of competition agencies can be hampered by pressure from governments, which may tend to follow a patriotic and protectionist economic agenda.[9]

This article is structured as follows. Part 2 identifies the standards of effective judicial protection in EU law and the scope of their application. Part 3 discusses how the reforms of the judiciary in Poland and Hungary affect the competition law system in those countries. The focus is on their adverse effects vis-à-vis the independence and expertise of the judiciary in competition law. Part 4 analyses, in the context of competition law, the nature and the shortcomings of the European Commission's interventions aimed at the protection of the rule of law in Member States. The article closes by offering conclusions and suggestions for improvement. The article constitutes part of the author's broader research project on how competition law is shaped by broader legal and socio-economic changes. In this respect, Parts 3 and 4 benefit from in-depth interviews with antitrust experts conducted in Hungary and Poland in late 2018 and in 2019.[10]

2 THE RULE OF LAW, EFFECTIVE JUDICIAL PROTECTION, AND THE INDEPENDENCE OF THE JUDICIARY IN EU LAW

The rule of law is one of the principal values on which the European Union is founded.[11] The market freedoms and EU competition rules cannot function properly without respect for the rule of law at both the EU and national levels. Since EU law is based on the premise that each Member State shares Article 2 values in common with all the other Member States, mutual trust between the Member States that these values will be recognized is assumed, together with the corollary that the EU law that implements these values will be respected.[12] It is therefore the

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8 For this reason competition authorities are not courts in a meaning of EU law. The factors taken into account in assessing whether a body is a 'court or tribunal' include, inter alia, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent, judgment of 16 Feb. 2017, Margarit Panicello, C-503/15, EU:C:2017:126, para. 27.

9 *See* Marton Varju & Monika Papp, *The Crisis, National Economic Particularism and EU Law: What Can We Learn from the Hungarian Case?*, 53(6) Common Mkt. L. Rev. 1647 (2016).

10 The interviewees represented four categories of experts: practitioners, academics, civil servants and judges. Their anonymity has been guaranteed.

11 *See* Art. 2 TEU. Judgments of 27 Feb. 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, para. 31 and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice, LM)*, C-216/18, EU:C:2018:586, para. 49.

12 Judgment of 6 Mar. 2018, *Achmea*, C-284/16, EU:C:2018:158, para. 34 and *LM*, para. 35.

obligation of Member States to establish a system of legal remedies and procedures which guarantees that the rule of law is ensured.

In the case-law of the Court of Justice of the EU (the CJEU), effective judicial protection (Article 19 Treaty on the European Union, TEU) is seen as a concrete expression and the essence of the rule of law.[13] The judicial systems of the EU Member State must be organized in such a way that ensures national courts are indeed offering effective judicial protection to all individuals and legal entities.[14]

The independence of the judiciary is a prerequisite for effective judicial protection. In the light of the Grand Chamber rulings in *Associação Sindical dos Juízes Portugueses* (C-64/16), *Minister for Justice and Equality* (C-216/18, *LM*), and *Commission v. Poland* (C-619/18),[15] in order to be considered independent the court concerned should be protected from external pressure.[16] Protection from influence by external factors should be provided by means of guarantees offered to the persons who have the task of adjudicating in a dispute, i.e. judges.[17] Secondly, the independence of the judiciary remains inherently connected with impartiality, understood by the CJEU as an equal distance from the parties to the proceedings and their respective interests with regard to the subject matter of the proceedings.[18] Thirdly, the disciplinary regime governing judges must be constructed in such a way that prevents any risk of its being used as a system of political control over the content of judicial decisions.[19]

The guarantees of independence need to be of such a nature so as to 'to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.' In the light of *Commission v. Poland* (C-619/18), this external requirement of the appearance of independence is crucial.[20]

The standards concerning effective judicial protection (including independence of the judiciary) are fully applicable in the case of competition law, and there is nothing that suggests that the CJEU wants to limit in any way the scope of application of these standards in this regard. To the contrary, the fundamental role of

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13 Judgment of 28 Mar. 2017, *Rosneft*, C 72/15, EU:C:2017:236, para. 73.

14 *Associação Sindical dos Juízes Portugueses*, paras 33–34.

15 Judgment of 24 June 2019, *Commission v. Poland (Independence of the Supreme Court)* (C-619/18), ECLI:EU:C:2019:531.

16 *Associação Sindical dos Juízes Portugueses*, para. 44 and *LM*, para. 63. *See* also judgments of 19 Sept. 2006, *Wilson*, C-506/04, EU:C:2006:587, para. 51, and *Panicello*, para. 37.

17 *Associação Sindical dos Juízes Portugueses*, para. 44 and *LM*, para. 63.

18 *LM*, para. 65. *See also Wilson*, para. 52.

19 *LM*, para. 65.

20 For the CJEU the existence of doubts concerning the real goal of Polish reform of judiciary was a fundamental argument to reach the conclusion that requirements of Art. 19 TEU are not met, *see Commission v. Poland*, para. 82 and the following ones.

competition rules for the EU internal market[21] suggests a need for the stringent application of the standards of independence of the judiciary in competition law. Moreover, these standards are fully applicable regardless of whether in a given case EU law (for example Articles 101–102 TFEU) is applied or not applied.[22] The fact that EU (competition) law is not applied in a given proceeding is not a defence. Therefore, the courts which review the decisions of NCAs have to be constructed in such a way that effective judicial protection meeting the standards of Article 19 TEU is provided.

3 THE REFORMS OF THE JUDICIARY IN POLAND AND HUNGARY AND THEIR IMPLICATIONS FOR THE COMPETITION LAW SYSTEM

The reforms of the judiciary which took place in Hungary and in Poland after the latest change in power in these countries (respectively in 2010 and 2015) have been the subject of academic attention for some time.[23] The question of whether these reforms undermine judicial independence has been under close scrutiny. However, the question whether they affect the competition law system in such a way that the standards of effective judicial protection are circumvented in competition law cases has not been significantly discussed yet.

3.1 New courts to review competition law cases

Both Hungary and Poland offer examples of reforms of the judiciary which are of relevance for the competition law system.

As for Poland, the change was brought about by the new Law on the Supreme Court of 2017.[24] According to this law, competition law cases (as well as sector-specific regulatory telecommunication, energy and railway transportation cases) fall

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21 *See* Art. 3 of TEU read in connection with Protocol (No. 27) on the internal Market and Competition.

22 *Associação Sindical dos Juízes Portugueses*, paras 29–32. The mere possibility that a given court will be deciding on questions concerning the application or interpretation of EU is sufficient for the standards of effective judicial protection to be applicable, *see Commission v. Poland* (C-619/18), para. 51.

23 As regards Hungary, *see* e.g. Kim Lane Scheppele, *Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)*, 23 Transnat'l L. & Contemp. Probs. 51 (2014); Bojan Bugaric & Tom Ginsburg, *The Assault on Postcommunist Courts*, 27 J. Democracy 69 (2016); Gábor Halmai, *An Illiberal Constitutional System in the Middle of Europe*, Eur. Y.B. Hum. Rts. 497 (2014). As regards Poland, *see* e.g. Mirosław Wyrzykowski, *Bypassing the Constitution or Changing the Constitutional Order Outside the Constitution*, in *Transformation of Law Systems in Central, Eastern and South-Eastern Europe in 1989–2015* 159–79 (Andrzej Szmyt & Boguslaw Banaszak eds, 2016); Wojciech Sadurski, *How Democracy Dies (in Poland): A Case-Study of Anti-Constitutional Populist Backsliding* (2018), https://ssrn.com/abstract=3103491 (accessed 31 Oct. 2019); Maciej Bernatt & M. Ziółkowski, *Statutory Anti-Constitutionalism*, 28 Wash. Int'l L.J. 487 (2019), https://ssrn.com/abstract=3384304 (accessed 31 Oct. 2019).

24 Ustawa o Sądzie Najwyższym of 8 Dec. 2017 (Journal of Laws 2019, item 825).

within the competence of the newly established Extraordinary Control and Public Affairs Chamber of the Supreme Court (hereinafter: Extraordinary Control Chamber).[25] They are no longer placed on the docket of the formerly existing Chamber of Labour Law, Public Securities and Public Affairs (the name of which is now shortened to the 'Chamber of Labour Law and Public Securities'). In addition, the Supreme Court's judges hitherto sitting in the Chamber of Labour Law, Public Securities and Public Affairs became judges of the Chamber of Labour Law and Public Securities.[26]

As for Hungary, the developments are related to the enactment in late 2018 of the Act on administrative courts,[27] which establishes a new structure of administrative courts in Hungary (with the High Administrative Court at the top). The new administrative courts once established (the entry into force of the reform was suspended in June 2019[28]) will have the competence, inter alia, to decide on appeals against decisions of the Hungarian competition authority (*Gazdasági Versenyhivatal*, GVH).

The reasons behind the establishment of these new judicial bodies to exercise judicial review in competition law cases are not clear. The new Extraordinary Control Chamber of the Polish Supreme Court was established principally in connection with the introduction into the Polish legal system of a new legal remedy: an extraordinary complaint against final court judgments. As far as competition protection and market regulation cases are concerned, the justification to the draft Law on the Supreme Court does not offer any reasons why these cases have been moved to the Extraordinary Control Chamber. However, it is primarily this category of cases which will guarantee a constant influx of cassation complaints.

As regards Hungary, the establishment of administrative courts was justified by the need to improve the efficiency of the judiciary in reviewing the decision-making by public administration.[29] This justification seems of a doubtful nature, as the separate divisions within the existing courts set up to control the administration

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25 Art. 26 of the Law on the Supreme Court. In the Polish system, the Supreme Court acts as a court of last resort in competition law cases and rules on cassation complaints brought against the judgments of the 2nd instance court, i.e. the Court of Appeal in Warsaw.

26 Art. 134 of the Law on the Supreme Court.

27 Act CXXX of 2018 on administrative courts, https://kozigbirosagok.kormany.hu/download/b/84/62000/Act%20CXXX%20of%202018%20on%20administrative%20courts.pdf (accessed 1 Aug. 2019).

28 The entry into force of *Act CXXX of 2018 on administrative courts* was suspended in June 2019 after the *Act CXXXI of 2018 on the entry into force of the Act on administrative courts and certain transitional rules* was abrogated (for the reasons for this, *see* Zoltan Kovacs, *Hungarian Government Postpones the Introduction of Administrative Courts Due to International Pressure*, (3 June 2019) https://index.hu/english/2019/06/03/administrative_courts_postponed_hungary_fidesz_government_eu_epp/ (accessed 1 Aug. 2019). However, the *Act on administrative courts* was not abrogated and there are no major obstacles to enact a new law on the entry into force of the *Act on administrative courts* once the Hungarian ruling majority so decides.

29 *See* the statement by Zoltan Kovacs, the Spokesman of Hungarian Government: Zoltan Kovacs, *Q&A on Hungary's plan to establish independent, administrative courts* (3 Oct. 2018) http://abouthungary.hu/blog/qa-on-administrative-courts/ (accessed 1 Aug. 2019).

worked efficiently.[30] Due to the Hungarian specificity, the claim that the reform brings back to life the administrative judiciary abolished during the communist period was also important.[31]

3.2 Independence

The reforms discussed pose risks to the independence of courts adjudicating in competition law cases.

As far as Poland is concerned, the relocation of judicial review of competition law cases to the Extraordinary Control Chamber raises doubts concerning whether the guarantees of judicial independence in hearing such cases are sufficient. The main reason for this is that the judges sitting in this Chamber were selected in 2018 by the structurally amended National Council of the Judiciary (NCJ), which came into being in 2018. There are significant doubts whether this body, which is charged with safeguarding judicial independence in Poland, is sufficiently independent to guarantee the proper selection of judges.[32] The Polish 2017 legislation modified the manner in which NCJ judicial members are appointed. Its composition is now primarily determined by the legislative and executive authorities. Most importantly, its fifteen judges-members were elected by the Parliament, with the ruling majority proposing the majority of candidates (and not by the judges themselves, as was the case prior to the reform and as is recommended by specialized bodies[33] in light of the separation of powers principle).[34] What's more, the new law interrupted the four-year term of members of the 'old' Council, which was prescribed by the Constitution. These shortcomings characterizing the new NCJ affect the selection of judges of the Extraordinary Control Chamber.[35] The situation is further exacerbated by the procedural shortcomings of the selection process, which concern, inter alia, the

30 Hungarian Helsinki Committee, *Blurring the Boundaries. New Laws on Administrative Courts Undermine Judicial Independence* 2 (2018) and the sources provided there, https://www.helsinki.hu/wp-content/uploads/Blurring-the-Boundaries-Admin-Courts-HHC-20181208-final.pdf (accessed 1 Aug. 2019).

31 *Ibid*.

32 Opinion of AG Tanchev of 27 June 2019 in joined Cases C-585/18, C-624/18 and C-625/18 *Krajowa Rada Sądownictwa*, ECLI:EU:C:2019:551, paras 133–135.

33 The Venice Commission observed that 'a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself.' *See* the Opinion 904/2017 CDL(2017)035 of the Venice Commission, at 19.

34 Please note that most of the judge-members of the new National Council of the Judiciary, elected by the Parliament in 2018, represent lower instance courts and in the case of some of them their professional careers seem to have blossomed only recently, i.e. after the current Minister of Justice promoted them to serve new roles (such as the heads of district and regional court branches).

35 The same model of selection of judges found application in case of another new chamber of Supreme Court: Disciplinary Chamber what, as argued by AG Tanchev, violates the standards of EU law. *See* the Opinion of AG Tanchev, *supra* n. 32. The observations of AG Tanchev are of relevance as far as Extraordinary Control Chamber is concerned.

lack of effective access to judicial review of NCJ decisions.[36] In consequence, significant doubts exist as to whether the judicial panels – composed of judges of the Extraordinary Control Chamber – meet the requirements of EU law. In addition, this puts the validity of judgments issued by such panels at stake.[37] Such doubts concern the judgments and procedural orders in competition law cases which are issued by the Extraordinary Control Chamber. From the procedural perspective, the extraordinary complaint procedure carries some risks to the principle of *res iudicata* and overall legal certainty in the field of competition law, as the Prosecutor General, i.e. a representative of the government,[38] has the competence to consider filing extraordinary complaints also in the area of competition law, including with respect to past cases.[39]

Doubts concerning the independence of the Extraordinary Control Chamber are of importance for the legal system not only because of the crucial role of the Supreme Court in the field of competition law. They are also of relevance since lower-instance courts in Poland face pressures which may affect their independence. In particular, new laws which reformed the way in which these courts are organized have involved political nominations of the presidents of ordinary courts,[40] introduced a new and more rigid disciplinary regime administered by the Minister of Justice,[41] and created overall incentives for conformism among judges. In addition, disciplinary proceedings against several judges – including those who referred the questions to the CJEU for preliminary rulings – have been initiated.[42] These developments may discourage judges from taking decisions which would not be politically welcome.[43]

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36 *See* the preliminary reference by the Polish Supreme Court (Civil Law Chamber) of 21 May 2019 in case III CZP 25/19, http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/III%20CZP%2025-19.pdf (accessed 1 Aug. 2019).

37 *Ibid*.

38 In the Polish legal system, the position of Minister of Justice and the Prosecutor General is held by the same person.

39 Art. 89 s. 2 of the Act on the Supreme Court.

40 The Minister of Justice was empowered to dismiss, at his own discretion, the presidents and vice-presidents of the Regional, District and Appellate Courts and appoint new ones within a six month-period from the entry into force of the 2017 amendment to the Law on the Organization of the Common Courts.

41 For example, the Minister of Justice has discretionary power to appoint the disciplinary prosecutor in a case against a particular judge; *see* Art. 112b § 1 of the Act of 27 July 2001 – the Law on the Organization of Ordinary Courts (Journal of Laws 2016, item 2062).

42 Piotr Mikuli, Attacking Judicial Independence Through New 'Disciplinary' Procedures in Poland, Int'l J. Const. L. Blog (9 Apr. 2019), http://www.iconnectblog.com/2019/04/attacking-judicial-independence-through-new-disciplinary-procedures-in-poland/ (accessed 1 Aug. 2019). *See* also the Report of the Justice Defence Committee 'A country that punishes. Pressure and repression of Polish judges and prosecutors', http://komitetobronysprawiedliwosci.pl/app/uploads/2019/02/Raport-KOS_eng.pdf (accessed 1 Aug. 2019).

43 *See* the study by *Rzeczpospolista*, a Polish daily, showing that 93% of respondent judges believe that the independence of the Polish judiciary is endangered. The study also reveals that judges are afraid that the

Similarly to Poland, the case of Hungary also demonstrates that the reforms of the judiciary put in place are capable of affecting the independence of courts which adjudicate in competition law cases. In Hungary the courts have been under pressure since the Fidesz party took the power in 2010.[44] In particular in 2012, over 270 judges – including the most senior judges holding many high positions in the judiciary – were forced into early retirement following the introduction of a lower sixty-two-year-old compulsory retirement age.[45] In addition, the mandate of the president of the Supreme Court was prematurely terminated.[46] As regards Hungary, a similar concern as in Poland relates to the politicization of the Hungarian counterpart of the Polish NJC – the National Judiciary Office[47] – and the powers of its president, who is linked personally to the Fidesz ruling party.[48] In particular, she is empowered to appoint the presidents of courts across the country, who in turn have an influence on the allocation of cases to a given judge.[49]

Despite these developments and the broader changes taking place in Hungary, the ordinary judiciary has managed to remain relatively independent so far.[50] In the competition law field the courts empowered to review the decisions of the Hungarian competition authority have in recent years opted for a more intensive review, leaving less space for judicial deference to the GVH assessment. Similarly to Poland, this intense judicial review was particularly true with respect to the Supreme Court (Kuria).[51] The due process-related case-law of the European Court of Human Rights has been invoked and interpreted as well.[52] The competition law cases have often been adjudicated by Andras Kovacs, a judge with expert knowledge in

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risk of instituting disciplinary proceedings under the new rules can have a chilling effect on their adjudications in particular cases. *See Niezawisłość sędziów jest zagrożona, a sądom grozi upolitycznienie - ankieta 'Rzeczpospolitej'*, https://www.rp.pl/Sedziowie-i-sady/310249921-Niezawislosc-sedziow-jest-zagrozona-a-sadom-grozi-upolitycznienie—ankieta-Rzeczpospolitej.html (accessed 1 Aug. 2019).

44 For an overview, *see* Attila Bado, *Foreword*, in *Fair Trial and Judicial Independence Hungarian Perspectives* VI-IX (Attila Bado ed., Springer 2014).

45 These changes were introduced as a result of the adoption on 25 Apr. 2011 of the Hungarian new Constitution (Basic Law), which entered into force on 1 Jan. 2012 (*see* Art. 26(2)).

46 *See* the judgment of European Court of Human Rights (Grand Chamber) of 23 June 2016 in the case *Baka v. Hungary*, http://hudoc.echr.coe.int/eng?i=001-163113.

47 *See* Zoltan Fleck, *A Comparative Analysis of Judicial Power, Organisational Issues in Judicature and the Administration of Courts*, in *Fair Trial and Judicial Independence Hungarian Perspectives* 19–20 (Attila Bado ed., Springer 2014). A similar opinion was expressed by the Hungarian antitrust experts interviewed, many of whom have personal court-related experience (in particular as representatives of appellants of the GVH decisions).

48 Zoltan Fleck, *Judges Under Attack in Hungary* (14 May 2018), verfassungsblog.de/judges-under-attack-in-hungary (accessed 1 Aug. 2019).

49 *Ibid*.

50 *Ibid*.

51 *See* in particular the railway constructors case, Kfv.III.37.690/2013/29, judgment of 20 May 2014 and home loan cartel case, Kfv.III.37.582/2016/16, judgment of 13 Dec. 2016.

52 *See* Tihamer Toth, *Life After Menarini: The Conformity of the Hungarian Competition Law Enforcement System with Human Rights Principles*, 11(18) Y.B. Antitrust & Reg. Stud. 35 (2018).

competition law cases related to his experience in lower-instance courts as well as his academic activity. He is known for his independence vis-à-vis the ruling party[53] and his EU-law friendly approach.

The independence of the judiciary in Hungarian competition law cases has been put into question by the enactment in late 2018 of the Act on administrative courts.[54] There are two major problematic characteristics of this law.[55] The first relates to the role of the Minister of Justice and the second to the model of appointment of judges of administrative courts and the conditions which they have to meet. As far as the first problem is concerned, the Minister of Justice's powers will include the selection of, as well as having an important role in the appointment of, new judges to the Administrative High Court and lower administrative courts[56];the appointment of the courts' presidents and judges to senior positions[57] as well as their promotions[58] and assignment to particular court[59];and determination of the administrative courts' budgets.[60] The Minister of Justice is also believed to be able to determine the composition of the High Administrative Court by deciding on the number of judges in this court[61] and by appointing persons to it from outside the current judicial system.[62] Such a process will be possible due to the low requirements which the candidates have to meet. In particular, their experience in administration or private practice is placed on an equal footing with their professional experience in the judiciary.[63] In other words, former government or administrative agency workers linked to the governing party[64] are entitled to become judges of administrative

53 Judge Kovacs came under public criticism after delivering a 2018 judgment annulling one of mandates won in 2018 parliamentary elections by the Fidesz party, *see* https://magyaridok.hu/belfold/nem-elo szor-dontott-a-fidesz-ellen-a-kuria-3063883/ (accessed 1 Aug. 2019).

54 *See supra* nn. 27–28.

55 For a detailed discussion of the original version of the law, *see* the Report of the Hungarian Helsinki Committee, *supra* n. 30. For a criticism of the version of the law as amended in Mar. 2019, *see* Renáta Uitz, *What Does the Spring Bring for the Rule of Law in Europe?* (6 Apr. 2019), https://verfassungsblog.de/what-does-the-spring-bring-for-the-rule-oflaw-in-europe/ (accessed 1 Aug. 2019).

56 *See* s. 71(1)–(2) and s. 73 of the Act on administrative courts. In particular, the Minister of Justice is not bound by the results of the selection process (i.e. the ranking list) conducted by the National Administrative Judicial Council (ss 71–72).

57 *See* s. 76 of the Act on administrative courts. *See* also the s. 42(3) therein.

58 *See* s. 83 of the Act on administrative courts.

59 *See* s. 79 of the Act on administrative courts.

60 *See* s. 30 of the Act on administrative courts. For other powers of the Minister of Justice related to the administration of administrative courts, *see* s. 61.

61 *See* s. 38 of the Act on administrative courts.

62 The Report of the Hungarian Helsinki Committee, *supra* n. 30, at 8.

63 S. 66 of the Act on administrative courts. *See* also s. 44 of the Act on administrative courts with respect to the requirements applicable to the President of Supreme Administrative Court.

64 Renáta Uitz notes that the new administrative judges will be not hired from an abstract, professional, politically neutral bureaucracy. She observes that since the spring of 2010 the Hungarian civil service underwent a strategic personnel reshuffle: the civil servants of the previous regimes were swept aside and replaced by new hires. According to her the civil servants who will compete with judicial positions on the new administrative courts will arrive from this apparatus, *see* Uitz, *supra* n. 55.

courts. It is also of relevance that the President of the Supreme Administrative Court, which is likely to play an important role in the formation of the new administrative courts, will be elected by the Parliament upon the nomination of the President of the Republic. Hence, the system is political and does not involve judges, as judges of the administrative courts are excluded from the selection process of their president.

The role of the Minister of Justice in the new system of administrative courts and the model of appointment of judges of administrative courts may be seen as in tension with the rule of law, particularly if one takes a broader view and sees the changes made in their overall legal and sociopolitical Hungarian context.[65] The same set of rules could be acceptable in a country where checks and balances function well and where liberal democracy is vibrant, while in another country where such elements are missing they become problematic.[66]

The analysis provided above thus suggests – in the broader legal and socio-political Hungarian context – that the independence of administrative judges in competition law cases will be limited if the Act on administrative courts enters into force.[67] Such independence concerns not only formal guarantees, but also the personal integrity of judges and their external perception. Tellingly, the interviewed Hungarian antitrust experts commonly expressed a fear that the new administrative courts will not be fully independent. This was linked to, inter alia, the above-discussed model of the selection of judges, which may favour former civil servants over sitting judges and candidates who have the support of the Minister of Justice[68]; the limited transparency and public consultation process leading to the draft law[69]; the undermining of the ethos of a judge; the expectancy of a political nominee as the president of the new Supreme Administrative Court; greater control over the decision-making of individual judges; or even placing the seat of the Supreme Administrative Court outside Budapest.

3.3 Expertise

The reforms introduced have the potential to adversely affect the expertise of courts adjudicating on competition law cases.

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65 Uitz, *supra* n. 55.

66 Please note that comparative arguments were used to justify the introduction of new administrative courts regime, *see* Kovacs, *supra* n. 29.

67 Please note that entry into force of Act on administrative courts is now suspended, *see supra* n. 28.

68 Interviewees expected the ratio between hitherto judges and former government civil servants to be 50–50%.

69 Reflected in three extreme cases where the interviewed antitrust experts were not aware of this reform despite the fact that it is closely linked to their work. When asked about the reform they reacted with disbelief and anxiety.

In Poland the 2017 reform neglected to take into consideration the Supreme Court's experience in competition and regulatory cases. The Supreme Court has played a crucial role in developing Polish competition law and was highly respected by all actors: competition authority officials, competition law practitioners, and scholars.[70] In fact, the Supreme Court was sometimes the first judicial instance where the parties could benefit from a deep expertise in competition law cases.[71] Throughout the 1990s and in particular after 2004, it has delivered important judgments which interpreted the axiology of competition protection in Poland.[72] The tendency was not to reject cassation complaints on formal grounds, but rather to decide them on the merits, and by doing so to provide much needed interpretations of Polish competition acts. In the past ten years, two highly respected judges and law professors – Dawid Miąsik and Andrzej Wróbel – usually served as judge rapporteurs in competition law cases.[73] This era is over, as they have automatically become, under Article 134 of Law on the Supreme Court, judges of the Chamber of Labour Law and Public Securities.

This development merits a negative assessment. Judges who possess expert knowledge in competition law and a broader understanding of the economy and whose judicial integrity has never been questioned will no longer be adjudicating in the competition law field.[74] Such judges are a rare asset and a rational state should look after them and do its best to preserve and take advantage of their expertise.[75] The relocation of competition law cases to the new Extraordinary Control Chamber was neither postulated nor expected by the Polish antitrust community.[76] To the contrary, the existing Supreme Court organization and judicial practice in the competition law field was positively assessed. The legislative move was thus an unwanted surprise – one which had not been supported by any prior study or legislative assessment. Of course, one may argue that we cannot presume that the

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70 An opinion shared by several of the interviewed Polish antitrust experts.

71 It has been argued that expertise in competition law field was missing in the lower courts. *See* Maciej Bernatt, *Effectiveness of Judicial Review in the Polish Competition Law System and the Place for Judicial Deference*, 9(14) Y.B. Antitrust & Reg. Stud. 97, 119 (2016), https://ssrn.com/abstract=2896823 (accessed 31 Oct. 2019).

72 On this point, *see* e.g. Dawid Miąsik, *Controlled Chaos with Consumer Welfare as the Winner – A Study of the Goals of Polish Antitrust Law*, 1(1) Y.B. Antitrust & Reg. Stud. 33 (2008).

73 In a final move, two weeks before the entry into force of the 2017 Act the Supreme Court panel including judge Miąsik (as judge rapporteur) and judge Wróbel issued an intellectually stimulating ruling rejecting the neoliberal, Chicago-school oriented interpretation of the Polish Competition Act by the Court of Appeal in Warsaw, and placed competition law in the broader constitutional social-market economy context. *See* the judgment of 20 Mar. 2018, III SK 5/07.

74 Theoretically they could have been delegated to the Extraordinary Control Chamber, but this did not happen.

75 In this vein, the interviewed Polish antirust experts uniformly noted that judges with expert knowledge in competition law should be very much cared for. One of them, after noting that the Supreme Court was often tough for appealing parties, considered that due to the personnel changes the relocation of competition cases to a new Extraordinary Control Chamber to be a 'huge mistake'.

76 As expressed by several interviewees.

newly appointed judges of the Extraordinary Control Chamber will fail to deliver judgments of sufficient quality since two (out of nineteen) of the Chamber judges have some previous experience in adjudication in the field of competition law in the lower instance courts. However, only time will tell whether such an optimistic expectation will materialize. What is certain is that something that was tried and tested and provided a guarantee of high-quality work was replaced by something new and unpredictable. Such a state of affairs is exacerbated by the doubts concerning the independence of the judges of the Extraordinary Control Chamber and the propriety of the means of their appointment.[77]

Insofar as Hungary is concerned, analysis of the law on administrative courts leads us to make similar observations. In particular, in terms of expertise, it is not clear if all judges of the Kuria with expert knowledge in competition law will decide to join and/or will be admitted to the new administrative court system (if it starts operating). Their existing expertise in the field of competition law might well be lost. While one cannot exclude the appointments of civil servants with expertise in competition law, for example former members of GVH, even in such a case a bias in favour of the GVH and their lack of judicial experience could potentially be an issue.

4 THE EU'S REACTION

The regional system of competition law is not only about national competition agencies. Reforms in a Member State concerning its national judiciary are of great relevance in this respect. Both the European Commission and the CJEU are eager to defend the courts of Member States. The importance the Commission places on this issue is confirmed by the three infringement proceedings it launched against Poland in 2017–2019.[78]

While the European Commission's rule of law-related interventions are to be welcomed, they nevertheless have two significant limitations. First, it is not always possible to reinstate the *status quo ante* from before the national reforms. For example, despite a finding that Hungary had violated EU anti-discrimination laws in the context of its introduction of early retirement for judges,[79] the judges were never reinstated to the positions they formerly held.[80] While some CJEU interim measures

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77 *See supra* part 3.2.

78 Infringement procedures: on the Polish Law on Ordinary Courts launched on 29 July 2017, http://europa.eu/rapid/press-release_IP-17-2205_en.htm (accessed 1 Aug. 2019), on the Polish Law on the Supreme Court launched on 2 July 2018, http://europa.eu/rapid/press-release_IP-18-4341_en.htm (accessed 1 Aug. 2019), and on the new disciplinary regime for Polish judges launched on 3 Apr. 2019, http://europa.eu/rapid/press-release_IP-19-1957_en.htm (accessed 1 Aug. 2019).

79 Judgment of 6 Nov. 2012, *Commission v. Hungary*, C-286/12, ECLI:EU:C:2012:687.

80 *See* the Report of the Hungarian Helsinki Committee, *supra* n. 30, at 9.

may mitigate such risks,[81] they are unlikely to fully address the actual harm. This is particularly true with respect to the reputation the courts enjoy in the society. Second, usually only the most far-reaching changes, such as violation of the principle of the non-removability of judges, are called into question by the Commission. This approach is due to the Commission's willingness to enter into dialogue with the Member States and the Commission's cautiousness not to go overboard in terms of existing judicial interpretations.[82]

These two approaches may backfire in competition law. As for Poland, the infringement proceedings launched by the Commission do not involve the Extraordinary Control Chamber, even though their judges were selected in the same way as the Supreme Court Disciplinary Chamber (which the Commission challenged).[83] Such an approach may come as a surprise since it is the Extraordinary Control Chamber that decides competition law cases and regulatory cases with a clear EU element. As for Hungary, the Commission has not decided to launch any action concerning the establishment of the new administrative judiciary.[84] The highly technical Venice Commission's opinion may have encouraged the Commission not to take action.[85]

One could argue that the reason behind the reforms of the judiciary was also to limit the use of preliminary references by national courts,[86] which were used by both national courts and the CJEU as a platform to keep economic reforms within the framework of EU law.[87] In addition, both the Polish and Hungarian Supreme Courts made important preliminary references in the field of

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81 *See* the CJEU final order of 17 Dec. 2018 imposing interim measures, *Commission v. Poland*, C-619/18 R, ECLI:EU:C:2018:1021.

82 For the criticism of the Commission's initial approach when dealing with rule of law violations *see* Dimitry Kochenov & Laurent Pech, *Better Late than Never? On the Commission's Rule of Law Framework and Its First Activation*, 54 J. Common Mkt. Stud. 1062 (2016).

83 *See* Press Release, *Rule of Law: European Commission Launches Infringement Procedure to Protect Judges in Poland from Political Control*, Brussels (3 Apr. 2019), http://europa.eu/rapid/press-release_IP-19-1957_en.htm (accessed 1 Aug. 2019). Please note that the Commissioner for Competition seemed to consider rule of law challenges on the national level to be the task of other commissioners, not her. *See* M. Vestager, *Competition and the Rule of Law, European Association of Judges*, Copenhagen (10 May 2019), https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-rule-law-0_en (accessed 1 Aug. 2019). While the CJEU has recently been given the possibility to decide on whether the Extraordinary Control Chamber meets the EU law standards via a preliminary reference by the Civil Law Chamber of the Supreme Court, *supra* n. 36, it is worth noting that the initiative in this respect did not come from the Commission.

84 Media reports suggest that the move to suspend the entry into force of laws concerning administrative courts were purely political in nature and related to the position of the Fidesz party in the European People's Party Group, *see* Kovacs, *supra* n. 28.

85 For criticism of the Venice Commission's opinion, *see* Uitz, *supra* n. 55.

86 The opinion of an interviewed Hungarian academic.

87 *See* e.g. the preliminary reference judgment of 5 Feb. 2014, C-385/12, *Hervis*, ECLI:EU:C:2014:47 concerning the issue of the discriminatory character of the Hungarian retail surtax. *See also* the judgments of 19 Mar. 2015, *E.ON Földgáz Trade*, C-510/13, ECLI:EU:C:2015:189 and of 6 Mar. 2018, *SEGRO*, C-52/16, ECLI:EU:C:2018:157.

competition law.[88] The lack of an official Commission intervention to defend existing judicial systems which act in relation to competition law is a development which is likely to have adverse effects on EU law. It would seem that the direct connection with EU law would have made any such interventions legally non-controversial.

This unwillingness on the part of the European Commission to intervene to defend the independence of the judiciary responsible for competition law may have several important consequences. The effectiveness of judicial review in cases involving Articles 101–102 may be circumvented. The national courts may be less eager to refer preliminary questions concerning the interpretation of competition law (both EU and national competition law). In such a scenario, the reach of EU law in the field of competition law would be more limited in practical terms. As a result, the competition agencies might feel free to push forward an agenda which does not correspond with the values inherent in EU competition law.

5 CONCLUSIONS

The analysis provided demonstrates that reforms of the judiciary in EU Member States are not necessarily neutral for the competition law system. Courts adjudicating in competition law cases (including those decided under Articles 101–102 TFUE) may be affected in terms of both their independence and expertise. The validity of their judgments can thus be called into question. From the EU law perspective, the existence of doubts as to the independence of a judiciary is a sufficient argument to claim that the national judiciary in question does not meet the standard of effective judicial protection required by Article 19 TEU. The discussed developments in Poland and Hungary show that such doubts exist when it comes to the courts which exercise (in the case of Poland), or may have competence (in the case of Hungary) to exercise judicial review in competition law.

The existence of doubts concerning the independence of judiciary adjudicating in competition law also undermines the decentralized system of EU competition law enforcement, because this system is based on mutual trust. In *LM* the CJEU permitted a rebuttal of the presumption of trust on which the functioning of the European Arrest Warrant is founded if the independence of the judiciary (and in the broader sense the rule of law) in the country issuing the arrest warrant is at risk.[89] A similar reasoning could be considered applicable in the context of the decentralized

[88] As regards Poland, *see* the judgment of 3 May 2011, Tele 2 Polska, C-375/09, ECLI:EU:C:2011:270. As regards Hungary, *see* the judgment of 14 Mar. 2013, *Allianz Hungária*, C-32/11, ECLI:EU:C:2013:160. Please note that according to the CJEU the preliminary reference procedure is of great importance to ensure consistency and uniformity in the interpretation of EU law across the EU, *see Commission v. Poland*, paras 44–45.

[89] *LM*, paras 58–62.

application of EU competition law and the functioning of the ECN. Once it is confirmed that there are significant doubts that an NCA and the courts reviewing its actions do not offer sufficient guarantees of merit-based, independent adjudication of competition law cases, their decisions might not be automatically recognized by the authorities of other Member States and the Commission. For example, in the context of follow-on private damages actions based on a decision of such an NCA, the CJEU might decide to limit the scope of application of Article 9(2) of Damages Directive[90] in such circumstances. Similarly, cooperation among NCAs and the Commission under Regulation 1/2003 (for example the exchange of information) would have to proceed with a great deal of caution. What's more, the European Commission could be expected to particularly closely review NCA's draft decisions under the procedure provided in Article 11(4) of Regulation 1/2003 so as to mitigate any flaws in the judicial review on the national level related to insufficient safeguards for effective judicial protection.

On a more general level, the European Commission should consider taking adequate steps to protect the independence of all national judiciaries that decide EU and national competition law cases. For example, an infringement procedure concerning the risks posed to EU law by the establishment of the Extraordinary Control Chamber of the Polish Supreme Court would have a basis under the existing CJEU case-law. Such a case would directly aim at the protection of institutional safeguards concerning EU primary law, i.e. Articles 101–102 TFEU.

[90] *See supra* n. 2.