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Editorial - Constitutional Challenges in Europe: The Impact and Role of
Competition Law*Kati Cseres**

We live in a time of social, economic and political turbulence. An unresolved economic crisis has generated financial instability and slowed down economic growth. The environment is threatened by adverse effects of climate change. The technological revolution disrupts labour markets and radically changes income distribution.¹ Social instability and inequality is on the rise while corporate and political concentration is growing.

These changes fragment and transform our societies and economies, and also generate a profound effect on the way firms compete with each other as well as how they interact with consumers. Ultimately, they disrupt existing business models and hence challenge our current understanding of how markets work. As social, economic, and political conditions are fundamentally changing, they are shifting to new structures and organizations of society and the economy. The resulting shifts and disruptions challenge the prevailing models of competition law in and outside of the EU.

There have been numerous discussions that have tried to formulate which global challenges² (EU) competition law and policy faces, and how eventually competition law, but more significantly law enforcers and policy makers, should address them.

A great part of these discussions has so far concentrated on one particular dimension: challenges posed by technological changes and the rise of digital markets.³ The importance of border-defying technological developments and increased digitalization is unquestionably an area that probes the fundamental principles of competition law and policy and give rise to practical difficulties for competition law enforcers. However,

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¹ Klaus Schwab, *The Fourth Industrial Revolution* (Crown Business 2016).

² These global challenges comprise various social, economic and political concerns. The United Nations summarized these ranging from democracy, climate change, poverty, population, gender equality, human rights, food, aging etc. <https://www.un.org/en/sections/issues-depth/global-issues-overview/>.

³ M. Vestager, 'Challenges and continuities in competition policy and enforcement Competition Law 2018' – Helsinki, 11 October 2018, http://ec.europa.eu/competition/speeches/text/sp2018_14_en.pdf; Antonio Capobianco, Anita Nyeso, 'Challenges for Competition Law Enforcement and Policy in the Digital Economy', *Journal of European Competition Law & Practice*, Volume 9, Issue 1, January 2018, Pages 19–27, <https://doi.org/10.1093/jeclap/lpx082>

digitalization is only one of the many challenges that test the effectiveness of the current technocratic approach to competition law.⁴

The challenges of climate change concerns, growing inequality, democracy⁵ and rising political populism⁶ as well as poverty⁷ or gender inequality⁸ may not have immediate and direct impact on the daily practice of competition law, but they pose fundamental questions for businesses and change the types of market failures competition law may need to correct in the marketplace. In this way, these challenges are competition law challenges that call for rethinking legal and economic underpinnings of competition.

Critical voices have addressed the “modernized” and “economics-based” competition law model that singled out economic efficiency (consumer welfare) as the goal of competition law and promoted technocratic enforcement of competition rules.⁹ Some commentators both in the US and in the EU have explicitly called on competition policy specifically to address inequality¹⁰ and adjust legal standards in response to increasing public concerns with inequality, sustainability,¹¹ or other challenges.

What came to be known as the “modernization”¹² of competition law took place in the US throughout the 1970s-80s and in the EU from 1990s on to early 2000s using the toolbox of neoclassical economics as the main source of interpretative guidance of the competition law rules focusing on price and output effects. This model firmly

⁴ Crane argues technocratic reforms are justified by three key attributes of modern antitrust - consensus on antitrust goals, resolution of the most divisive ideological questions, and the absence of a need to balance the interests of identified groups. Crane, Daniel A., ‘Technocracy and Antitrust’. Cardozo Legal Studies Research Paper No 208; Texas Law Review, Vol 86, 2008. Available at SSRN <https://ssrn.com/abstract=1030632>

⁵ Drexel J, ‘Economic Efficiency versus Democracy: On the Potential Role of Competition Policy in Regulating Digital Markets in Times of Post-Truth Politics’ in Damien Gerard and Ioannis Lianos (eds), *Reconciling Efficiency and Equity: A Global Challenge for Competition Policy* (Cambridge University Press 2019) pp. 242-26, doi:10.1017/9781108628105.013.

⁶ Cas Mudde - Populism in the Twenty-First Century: An Illiberal Democratic Response to Undemocratic Liberalism <https://www.un.org/en/sections/issues-depth/global-issues-overview/>

⁷ Lianos I, ‘The Poverty of Competition Law: The Short Story’ in D. Gerard & I. Lianos (eds), n 5, pp. 45-87.

⁸ Sarah Long, ‘Gender Inequality, Market Distortion and Consumer Welfare: A Call to Action for Competition Authorities’, [2019] *Journal of European Competition Law & Practice*, <https://doi.org/10.1093/jeclap/lpz020>.

⁹ Crane, Daniel A., ‘Technocracy and Antitrust’. Cardozo Legal Studies Research Paper No. 208; Texas Law Review, Vol. 86, 2008. Available at SSRN: <https://ssrn.com/abstract=1030632>; Blockx, Jan, ‘Technocracy and Populism in Antitrust in the US and the EU’ (December 18, 2017).

¹⁰ Jonathan B Baker and Steven C Salop, ‘Antitrust, Competition Policy, and Inequality’ (2015-2016) 104 *Geo IJ Online* 1; Stiglitz J, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (WW Norton, 2012); Sandeep Vaheesan, ‘The Evolving Populisms of Antitrust’, 93 *Nebraska L. Rev.* 370, 409-14 (2014) (arguing that consumer-oriented antitrust enforcement can promote more progressive wealth distribution); Khan, Lina and Vaheesan, ‘Sandeep, Market Power and Inequality: The Antitrust Counterrevolution and its Discontents’ 11 *Harvard Law & Policy Review* 235 (2017), available at, <https://ssrn.com/abstract=2769132>; and, several contributions to *Antitrust Chronicle*, October 2017, ‘Antitrust’s Inequality Conundrum?’

¹¹ A. Gerbrandy, ‘Rethinking Competition Law within the European Economic Constitution’, (2019) 57(1) *JCMS* 127-142.

¹² Lianos, Ioannis, ‘The Poverty of Competition Law’ (April 6, 2018), *CLES Research Paper Series 2/2018*, available at SSRN: <https://ssrn.com/abstract=3160054>, 16-17.

concentrates¹³ on consumer benefits from lower prices and higher output and disregards questions related to the allocation of consumer surplus between different groups of consumers or non-price dimensions of competition as this would lead to complex value judgments regarding distributive justice. At the moment, the increasingly complex economy and fragmented society is confronted by a simple world of competition law that is anchored in neoclassical price theory.¹⁴ Accordingly, some of the challenges have been framed along the conflicting concepts of equity vs efficiency, non-economic (non-price related) vs economic (price related) effects, or less vs more control over private power.¹⁵

As a matter of fact, these global challenges and the ensuing social and economic transformations touch upon the deeper foundations of competition laws and call on to rethink basic constitutional premises on the relationship between the state, markets, politics and the law.

This deeper foundation is often referred to as an economic constitution and analysed through the intimate relationship between economic and political freedom, between a competitive market economy and a democratic constitutional system.

The idea of an economic constitution concerns “the relation of law to the fundamentals of the economic system”¹⁶ and aims at a certain “ideal of coherence in the organization of public power”.¹⁷

In the EU the concept of an economic constitution has long been anchored in its foundational Treaties. The constitutional value of competition and free trade have always been the cornerstones of the European integration project: the EU’s “microeconomic constitution”.¹⁸ Originally an Ordoliberal concept, the EU’s economic constitutional framework is an exceptional legal construct as it is the very first dimension of EU constitutionalization and constitutionalism. Until the Maastricht Treaty, the European integration was almost exclusively an economic project¹⁹ and the constitution of the single European market.²⁰

In its original Ordoliberal school of thought the economic constitution was defined as a comprehensive decision (*Gesamtenentscheidung*) to separate the state and the market, to

¹³ Lianos, Ioannis, ‘Polycentric Competition Law’, available at SSRN: <https://ssrn.com/abstract=3257296>, p.6-7.

¹⁴ Lianos, I, ‘Competition Law for a Complex Economy’ (2019) 50(6) *International Review of Intellectual Property and Competition Law* 643–648, <https://doi.org/10.1007/s40319-019-00829-6>.

¹⁵ E Fox, *Markets and Democracy*,

¹⁶ Tuori, Kaarlo, ‘La Constitution économique parmi les Constitutions européennes’ (2011) 25(4) *Revue internationale de droit économique* 559-599.

¹⁷ Prosser, T, *The Economic Constitutions* (OUP, 2014).

¹⁸ Tuori, Kaarlo & Tuori, Klaus, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press, 2014), p 231ff.

¹⁹ Tuori, K., & Tuori, K, ‘Two layers of the European economic constitution’, in *The Eurozone Crisis: A Constitutional Analysis* (CUP, 2014), 13-60. doi:10.1017/CBO9781107297289.005.

²⁰ In contrast to the US model, the EU model of competition was initially conceived as a tool of economic, rather than, social policy, Lianos, n 7.

resolve conflicts of the political and economic spheres and limit political discretion in economic matters.²¹

It is this “rule of the market”²² that gives constitutional recognition to individual economic rights and thus structures economic life in favour of a free market economy, based on undistorted competition. Accordingly, in the Rome Treaty, the core of the Economic constitution delineates the role of the state in markets and the economy, it limits public and private power through granting fundamental economic rights and market freedoms.²³

In the US, as Eleanor Fox argued “antitrust was the economic democracy of the market”²⁴ and even though the link to political economy has been cut through by the Chicago School there is in the antitrust caselaw and rhetoric frequent invocation of democratic values. Moreover, democratic values are increasingly called upon in fierce criticism of the allegedly under-enforced antitrust laws.²⁵

Economic constitutionalism has been extraordinarily influential in the development of the EU integration process and as a normative theory on the relationship of government and the economy.²⁶ As the European Union is facing multiple challenges today, ranging from the risk of disintegration to the erosion of the rule of law and democracy, an enduring economic crisis and the disruptive technological revolution, the distinctive relationship between EU constitutionalisation and economic integration becomes critical again.

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

The risk of disintegration, the problem of Member States’ departure from rule of law standards not only undermine legal certainty and political stability but also have adverse effects on economic performance. Backsliding from democracy, rule of law and fundamental rights heavily destabilizes the core institutions and structures of economic governance.

The political capturing of the EU’s “microeconomic constitution”²⁷ calls for a closer analysis of the impact and role of competition law in these constitutional challenges.

²¹ Francesco De Cecco, *State aid and the European economic constitution* (Hart, 2012), p.12

²² Frerichs, Sabine, ‘The Rule of the Market: Economic Constitutionalism Understood Sociologically’, in Blokker, Paul & Thornhill, Chris, *Sociological Constitutionalism* (Cambridge University Press, 2017), 241-264.

²³ De Cecco, n 21, p.12

²⁴ Eleanor M. Fox, ‘Modernization of Antitrust: A New Equilibrium’ (1981) 66 Cornell L. Rev. 1140.

²⁵ See American Antitrust Institute, <https://www.antitrustinstitute.org/>. Open Markets Institute, <https://openmarketsinstitute.org/>. Tim Wu, *The Curse Of Bigness: Antitrust In The New Gilded Age* (Columbia Global Reports, 2018); Lina Khan, ‘Amazon’s Antitrust Paradox’ (2017) 126 Yale L.J. 564.

²⁶ Gerber, D.J., ‘Economic Constitutionalism and the Challenge of Globalization: The Enemy is Gone? Long Live the Enemy’ (2001) 157 Journal of Institutional and Theoretical Economics 14-22.

²⁷ Tuori & Tuori, n 18, p. 231ff.

The current issue brings together four articles that investigate the impact and role of competition in these constitutional challenges from distinctive perspectives. The articles reflect on and analyze the impact of global constitutional challenges on two distinct and relatively recent foundations of EU competition law: the economization and the modernization of EU competition law. The current criticism of the economics-based model of competition law and calls for the competition law community and scholarship to engage also with the ongoing social transformations has already been discussed above. However, the social, political and economic changes also query into the effectiveness and legitimacy of the current governance model of EU competition law enforcement and question whether its modernization (decentralization) works effectively.

The current governance framework of EU competition law enforcement was created in 2004. A new procedural and institutional framework was implemented through decentralizing the enforcement of EU competition law. Regulation 1/2003 delegated an active role for national actors and established a system of close cooperation between the European Commission and the national authorities. In the decentralized governance framework the NCAs and the Commission²⁸ act in a multi-level governance system composed of EU and national procedural laws.²⁹

Over the past fifteen years public views praised the success of the decentralised enforcement system stating that decentralized enforcement increased the Europeanisation of competition rules across the Member States and developed a shared sense of competition policy and culture among the Member States.³⁰ However, the effectiveness of the decentralised enforcement has also been criticized arguing that there are centrifugal pulls from the Member States towards their national legal systems³¹ and centripetal pushes from the Commission towards more centralization.³²

²⁸ The Commission and the NCAs have parallel jurisdictions and they can both enforce Articles 101 and 102 TFEU without territorial limitations to their enforcement powers.

²⁹ In order to coordinate parallel proceedings between the Commission and the NCAs, Regulation 1/2003 established the European Competition Network (ECN) and laid down the rules of its core functions. Notice on cooperation within the Network of Competition Authorities [2004] OJ C 101/43.

³⁰ A Italianer, 'The ECN, convergence and enforcement of EU competition law: achievements and challenges', 3 October 2014, Vilnius, Lithuania European Competition Day of the Lithuanian Presidency, available at ec.europa.eu/competition/speeches/text/sp2013_08_en.pdf; WPJ Wils, 'Ten Years of Regulation 1/2003 – A Retrospective' (2013) 4(4) *Journal of European Competition Law and Practice* 293–301. B Lasserre, 'The Future of the European Competition Network', St Gallen International Competition Law Forum ICF, 16 May 2014, available at ssrn.com/abstract=2567620; H Kassim and K Wright, 'The European Competition Network: a European Regulatory Network with a Difference', Paper presented at ECPR Standing Group on Regulatory Governance, Third Biennial Conference, Dublin, 17–19 June 2010, available at regulation.upf.edu/dublin-10-papers/2E3.pdf.

³¹ KJ Cseres 'Competition Law Enforcement Beyond the Nation-State: A Model for Transnational Enforcement Mechanisms?' in H-W Micklitz and A Wechsel (eds), *The Transformation of Enforcement* (Hart, 2015) 319–339.

³² S Wilks, 'Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?' (2005) 18 *Governance* 431. G Monti, 'Independence, Interdependence and Legitimacy: the EU Commission, National Competition Authorities, and the European Competition Network' EU Working Paper Law 2014/01 <http://cadmus.eui.eu/bitstream/handle/1814/29218/LAW_2014_01.pdf?sequence=1>; G Monti, 'Managing decentralized antitrust enforcement: *Toshiba*' (2014) 51 *CMLRev* 261.

In the current issue Mulder shows in his paper how decentralization and the self-assessment by private undertakings had formative effects on national self-regulation.

Mulder critically reflects upon both the economization and modernization of EU competition law from the (EU) constitutional perspective. He shows that both economization and modernization of EU competition law has entrenched a certain socio-economic orientation and decision-making in the Member States favouring the demand side of markets.

He argues that the legitimacy of EU competition law's turn towards a consumer welfare standard is contestable from the EU constitutional perspective that stands on the ground of social diversity and accommodation of various governance framework. With two case studies of the Netherlands concerning sustainability initiatives and liberal professions he illustrates how the EU Commission's specific economic rationality has been pushed to interfere with national regulatory schemes that were based on broader welfare effects (sustainable producer) than the consumer welfare standard. He suggests an alternative approach that would partly turn to free movement case law and in this way allow for more diverse social-economic orientation of the Member States.

Gerbrandy in her piece critically reflects on the role EU competition law should play in a profoundly changing world and focuses especially on how the changing societal context of EU competition law presses it to address and engage with these societal challenges. She argues that the place of EU competition law in the EU's overall constitutional framework needs to be reconsidered and shifted to a new position where it engages with the other elements of the constitution such as the free movement rules and other sectoral policies as well as its own societal context.

Gerbrandy argues that reconceptualizing the goals of EU competition law and shifting the focus of EU competition policy from market integration and broader economic, social and political goals of the EU to the single goal of economic efficiency and consumer welfare certainly had benefits in terms of rationalizing and making decisions more predictable. However, this policy has also decoupled EU competition policy from its broader EU (economic) constitutional context and from current social and political challenges. She analyzes two specific challenges: sustainability and digitalization and shows how these developments tests the current analytical framework of EU competition law. She shows that as EU competition policy has been defined in pursuing distinct economic interests and thereby distancing itself from possible non-economic interests that find increasing support in the EU's broader constitutional order.

Van de Gronden's paper analyzes a fundamental issue at the cross-section of education and the EU rules for the single market including competition law, namely whether EU competition and internal market law contains the legal framework for regulating a wide array of economic activities is also able to contribute to the creation of a network of European universities. He asks to what extent the EU rules on competition and the internal market reinforce the building of a common academic culture.

His thorough analysis runs from laying out which universities fall within the scope of the EU competition and internal market rules and whether universities engage in economic activities to how the various parts (including state aid law) and doctrines of EU

competition law and internal market law apply to higher educational services. Van de Gronden shows that the impact of EU law is higher in Member States, where the level of public funding in higher education is relatively limited. EU competition and internal law provides important requirements for supplying economic educational services. However, EU internal and competition law is not capable of *directly* creating values for a network for *all* European universities. These values are mainly relevant for universities operating in member states that have moved higher education for a great part to the market place. For that reason, commodification of higher education stimulates, strikingly, the creation of a network of European universities. A large number of member states do not wish to make the provision of higher educational services subject to a process of commodification. EU internal market and competition law is, however, also useful for these educational systems. Member states could learn from the experience of applying the Services Directive and the competition rules to economic educational services and this experience in turn could serve as a breeding ground for developing values for higher education. Member states can base their educational laws on values, such as freedom of choice, fairness, independent standard setting, accountability and access to education, identified in this conclusion. Consequently, EU competition and internal market law may *indirectly* contribute to creating building blocks for a pan-European approach towards a network of all universities.

Competition as a value of a democratic constitutional system and market economy is the underlying theme in Cseres' paper. She analyzes how the drastic re-transformation of the constitutional system has fabricated a framework for economic regulation where accumulation of political power has resulted in accumulation of economic power. The new framework of economic governance systematically undermined key legal rules and independent institutions of the functioning Hungarian market economy. The rate and scope of constitutional re-engineering of Hungary's economic governance framework and most notably the enforcement of competition rules pose questions beyond the Hungarian context on the interplay of politics, law and economics as well as on the role of markets, states and the competitive process in EU competition law and policy. Competition law backsliding is analyzed through a few landmark (alarming) cases of the past 5 years beyond the work of the Hungarian competition authority by evaluating the broader legal and regulatory landscape, the role of national parliaments in competition law, independence and accountability of national competition authorities as well as its impact on the decentralized enforcement of EU competition law and setting backsliding in context of the broader economic and political developments and progress of competition law enforcement before 2010.

It has been argued that the effectiveness of the decentralized enforcement system in Regulation 1/2003 depends on safeguarding uniform and consistent application in the multi-level governance system while the legitimacy of shared enforcement depends on its compliance with Rule of Law values. The paper demonstrates that such a compliance is not guaranteed today. Hungary's case is a convincing illustration of this argument as

its government systematically undermines the values and institutions of the rule of law.³³ As checks and balances disappear, so does the rule of law control over law making and law enforcement, including the enforcement of competition law and ultimately EU competition law enforcement. The case of Hungary also warns that the recently adopted Directive on empowering NCAs to be more effective enforcers of Articles 101 and 102 TFEU does not provide the effective means and instruments NCAs need to successfully enforce EU competition rules.

All contributions in this issue seem to share one common point, namely that current social, economic and political challenges compel to reconsider the current normative foundation and institutional model of EU competition policy and critically analyse whether and how it could be re-embedded in the broader economic constitution of the EU and be responsive to non-economic elements of EU policies.

³³ European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL))