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The Missing Dimension

Competitive Markets and the Reconstruction of Constitutional Democracy in Hungary

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Public discourse on democratic backsliding, particularly among public law scholars, tends to focus on its political dimensions. We invest considerable resources in discussions about the erosion of judicial independence and the role that constitutional courts should play in resisting autocratic government. Important as these debates are, they draw attention away from other aspects of the contemporary crisis of democracy that are equally significant. Functioning of markets is a key dimension to consider.

The case of Hungary illustrates that the ways in which markets functioned were among the reasons behind Fidesz's success in 2010, and the subsequent reorganisation of the economy through law served to reinforce the party's grip on power. It was also, in the end, disillusionment with Fidesz's economic agenda and the capture of public resources by private individuals that contributed to its electoral defeat. The restoration of constitutional democracy in Hungary, which will inevitably involve the re-organisation of the economy, should therefore prompt reflection in public law discourse on the ways in which markets ought to be structured in democratic societies.

Markets Fidesz's Rise and Consolidation of Power

One of the reasons Fidesz came to power was economy. Its 2010 electoral victory took place during a period of acute economic crisis. OECD data show that in the years preceding that election, prices, unemployment, poverty levels, and social inequality were all rising. On a broader level, the implementation of a neoliberal agenda across Central-Eastern Europe, including Hungary, had produced serious social externalities. Unemployment, particularly in regions affected by de-industrialisation, was high (27.84% among young people in Hungary in 2010), while wages remained low. A sense of having been left behind by the transformation processes persisted.

Once in power, Fidesz did not shy away from intervening in the economy. While some reforms aimed at addressing genuine economic distress within Hungarian society, family bonuses being one example, others were designed to reorganise the economy so that political and economic power became concentrated in the ruling party. Several markets that had previously been subject to competition were monopolised, with exclusive rights granted to state public authorities or state-owned enterprises (SOEs). Under the 2011 Act on National Assets monopolised markets came to include passenger and freight rail transportation; passenger transportation by road; the construction and operation of the international commercial airport; and the construction and operation of national roads and core network railways. Separate laws provided for the monopolisation of the energy retail market, the education textbook market, the waste management market, and the national road mobile payment market. Risks of corruption and bid-rigging in public procurement increased markedly, and the allocation of state resources became increasingly opaque.

The role of independent economic regulators was also affected. Among others, a previous in-depth study has revealed that it became increasingly difficult for the Hungarian Competition Authority (GVH) to pursue its mission of protecting open and competitive markets effectively. Two related phenomena arguably materialised: selective enforcement of competition law, and selective non-enforcement. Legislative carve-outs further limited the GVH's power to fight against cartels in sectors crucial to the public: agriculture and waste management. Furthermore, under Article 24/A of Hungarian Competition Act, the GVH was barred

from reviewing mergers that the government deemed to be in the public interest. Article 24/A was applied often (between 2014 to 2017 21 times) and was used, for example, to exempt from GVH's control of concentration a transfer of 476 media outlets to KESMA Foundation.

These processes were not merely damaging to markets. They reinforced, at least indirectly, the decline of constitutional democracy in Hungary. KESMA exemption enabled the government to bypass GVH scrutiny and allowed for the creation of a dominant, pro-government media group. The severe limitation of media freedom and pluralism, prerequisites for democracy and the rule of law guaranteed by Article 2 TEU, was thereby consolidated due to lack of application of a competition law mechanism.

Rebuilding Constitutional Democracy: The Case for Competition Law Reform

Taking these developments into account, any serious attempt to rebuild constitutional democracy in Hungary must learn the lessons of the Fidesz period. While the problems described above require the attention of economists and private lawyers, they cannot be treated as falling outside the domain of public law. In the following sections the article proposes several reforms. The focus is on competition law. Other possible reforms, such as the amendment to 2011 Act on National Assets are not analysed.

Strengthening the Independence of the Hungarian Competition Authority

The weakening of independence of GVH was not accidental – it was implemented through politically driven appointment mechanisms of the GVH leadership and internal governance practices that lowered the autonomy of the GVH decision-making body, i.e. the Competition Council. Reversing this requires changes at both levels.

First, the appointment of the GVH president and two vice-presidents should be depoliticised. Currently, these positions are filled through a process that gives the Prime Minister a decisive influence over who leads the authority. A credible legal reform would require that candidates be nominated by an independent panel – composed, for example, of representatives of the legal profession, academic experts, and civil society – with parliamentary confirmation. Fixed terms with dismissal only for cause would further insulate leadership from short term political pressure. At the same time, rules strengthening the GVH accountability before the parliament and civil society should be developed.

It is important in this context that members of the GVH Competition Council are protected under EU law (Article 4 of ECN+ Directive) against undue dismissals, so any changes of the national law in this respect and any personal decisions envisaged shall ensure that the EU law standards allowing dismissals only in rare circumstances linked to criminal prosecutions or serious misconduct are adhered to. Conversely, Article 4 of ECN+ Directive does not seem to protect the GVH President against the dismissal without cause since the GVH President does not adopt infringement, commitment, interim measures and fines decisions (in Hungary this is the task of the Council). Therefore, the changes of Hungarian Competition Act which now provides for the six-year term of the GVH President could arguably be considered.

Second, the internal decision-making structure of the GVH requires reform. At present, the Council – the body that decides the cases on merits – is headed by a GVH vice-president with other members nominated by the GVH President. This means the GVH President effectively shapes the composition of the body. This creates conditions for internal pressure on outcomes. The Council should be restructured as a genuinely independent body: its members should be appointed through a separate procedure, serve fixed terms, and its chair should not simultaneously hold an executive position within the GVH unless the appointment of GVH leadership will be depoliticised.

Abolishing the Fidesz-Era Legislative Carve-Outs

The scope of GVH jurisdiction was deliberately narrowed during the Fidesz years through legislative carve-outs. They should be either repealed in full or significantly modified. Importantly, the Hungarian

approach with respect to agricultural markets deviates from the EU Common Agriculture Policy: EU law does not generally permit broad horizontal price coordination exemptions of the type enabled under Hungarian law. When it comes to merger review, there is a need for accommodating non-competition related public interest values, but, as approaches adopted in many countries suggest, this should not exclude a competition authority's review as to negative effects of a merger on competition and should not eliminate judicial review of governmental decision to exempt the merger. The amendment of Article 24/A of Hungarian Competition Act is therefore necessary.

Importantly, the public interest merger exemption is not merely a competition law problem – it is a constitutional one. When a government can bypass an independent agency process so as to authorise a merger, not only competition is affected but also a direct risk to democracy may arise on the grounds that it represents the exercise of an unchecked power over a sine qua non for democratic discourse (for example, the KESMA merger affecting media pluralism).

Bringing Civil Society into GVH Decision-Making

Democratic legitimacy in competition enforcement requires not only independence from government but also an agency's accountability and openness to a broad range of voices. Therefore, the reforms should introduce structured mechanisms for civil society participation. Proposals could include formal consultation procedures before the adoption of enforcement priorities by the agency or the creation of an advisory panel including civil society and consumer associations, trade unions, and business representatives.

From Selective Enforcement to Public Interest Prioritisation

One of the patterns that was observable during the Fidesz period is what appears to have been a tendency toward selectivity: an inclination to pursue cases with respect to some sectors of economy while showing reluctance to enforce the law in sectors characterized by high presence of firms with government connections. The clear evidence for this pattern is difficult to be established. This is also not meant to say that enforcement actions actually taken were illegitimate. Nevertheless, the picture is sufficiently concerning to warrant a response. The GVH should adopt and publish a transparent enforcement priority framework, developed with public input, that focuses resources on conduct causing the greatest harm to ordinary Hungarian consumers and citizens – and that is applied regardless of the political affiliations of the firms involved. In this sense, enforcement of competition law should be seen through transformative lenses: transitioning back to democracy and addressing some of the economic reasons lying behind the success of authoritarian-leaning politicians.

There is also a need for rules strengthening transparency and providing reasons why certain proceedings are not initiated. While the capability of competition agencies to prioritise is an asset, it needs to be performed in a way that prevents abuse. Therefore, improvements to the existing legal framework in Hungary is necessary. For example, transparent and publicly available information on what cases are not opened by the GVH would inform the public about which actions have not been undertaken by the agency.

Addressing Past Mergers: The Possibility of Ex-Post Review

One of the most difficult challenges concerns what to do about concentrations that were immunised from GVH review. Two legal avenues require examination.

Where a merger led to a creation of dominant position of the acquiring entity or strengthened an already existing one, the GVH could consider opening abuse of dominance proceedings. The CJEU judgment in *Towercast* (C-449/21) is relevant here: the CJEU confirmed that competition authorities may apply Article 102 TFEU to assess the effects of a concentration that was not subject to merger review. This opens a potential pathway for the GVH to examine the competitive effects of politically immunised mergers – though careful legal assessment of each case would be required. Importantly, the threshold is a demanding one: it must be shown that competition has been

substantially impeded to the point where only undertakings whose behaviour depends on the dominant firm remain in the market (*Towercast*, para. 52).

The second possible approach could consist of a review of the past governmental decrees exempting certain mergers from GVH scrutiny under Article 24/A of the Hungarian Competition Act, conducted by a dedicated group of experts. If irregularities were to be identified, the government could consider amending or revoking those decrees – on condition that national law permits such a step and rule of law safeguards are put in place. Specific expertise in Hungarian law is required before any concrete recommendations can be made in this regard.

Recovery of Unlawfully Granted State Aid

The concentration of economic power in the hands of Fidesz-aligned private actors was not coincidental. State resources were channelled to politically connected firms in ways that may constitute unlawful state aid under EU law. The scope of potential recovery is broad: any state aid illegally granted to private actors and not notified to the European Commission could in principle be challenged. Where such aid was granted without prior notification to the Commission, or was approved on the basis of misrepresented facts, recovery is legally possible under Article 16 of Regulation 2015/1589.

The new Hungarian authorities should therefore cooperate proactively with the Commission to identify aid measures that meet the recovery threshold, and conduct audits covering the potential aid instruments used during the Fidesz period that may have distorted competition in favour of politically connected firms. State aid must be understood broadly in this context. It encompasses not only direct grants, subsidies, or tax relief, but any advantage conferred by state-controlled entity on terms more favourable than the market would offer. While the Commission retains ultimate authority over enforcement, the Hungarian government can strengthen its position by notifying the Commission of measures that were not previously disclosed and by exploring whether domestic court proceedings to unwind those contracts or recover the value of the aid are available under Hungarian law.

Conclusion

The repair of constitutional democracy in Hungary cannot be reduced to restoring judicial independence, re-establishing effective review by Constitutional Court or reforming electoral rules. The Fidesz period demonstrated with clarity that markets and democratic governance are deeply interconnected: the reorganisation of the economy was both a tool for consolidating political power and a consequence of the erosion of constitutional checks. Public law scholars must engage seriously with this dimension of democratic backsliding – and with the role that competition law reform can play in the democratic reconstruction that Hungary now faces.

The proposals set out above are not technical matters to be left to competition lawyers alone. They are, at their core, questions of constitutional design. Whether and how Hungary addresses them will shape not only its markets but also its democracy. The reforms proposed here should be understood as part of Hungary's substantive reintegration into the EU legal and economic order.

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