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The Rule of Law Deficit in EU Competition Law – A Time for Reassessment

CRISTINA TELEKI

1. *Introduction*

The current rule-of-law crisis in the European Union (EU) started with Hungary and Poland breaking away from the founding values of the EU which they had committed to safeguarding when joining the EU[1]. These breakaway, "illiberal" Member States have found supporters among other populists in the EU, which further increases the risk of an "illiberal" Europe, civil strife and conflict. At the same time, a number of epistemic and practice communities have risen to the challenge of defining and defending the rule of law as a central value of the EU in an awakening to the importance of the rule of law.

As previously described in this journal, all EU institutions have responded promptly to the threats against the rule of law in the EU[2]. The Court of Justice of the European Union (CJEU) has used two innovations to safeguard the judicial power in the EU as a key element of democratic societies operating under the rule-of-law principles. In two landmark decisions, the CJEU found itself competent to adjudicate the fate of judicial independence in the EU and to promote "judge-to-judge dialogues" to ensure the rule of law[3]. The EU Commission has launched an annual Rule of Law Report showcasing the importance of upholding democratic values, human rights and the rule of law[4]. Finally, the European Parliament and the Council of the EU have adopted the "Conditionality Regulation", which defines a rule-of-law conditionality mechanism to prevent breaches of the principles of rule of law that affect or seriously risk affecting the sound financial management of the budget or the protection of the financial interests of the EU[5]. The Conditionality Regulation has served as the legal basis for a written procedure against Hungary resulting in the suspension of approximately 6.3 billion euros in budgetary commitments[6].

Against this background, a long-forgotten debate about the goals of competition law and its relationship with democracy and

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the rule of law has been given a new lease of life[7]. A huge concentration in the Hungarian media industry in 2018 has shown that a properly functioning competition-law system is essential not only for the operation of markets, but also for the survival of democracy. The concentration in question involved an entity called the Central European Press and Media Foundation which had allegedly been set up by allies of Prime Minister Viktor Orbán[8]. It had acquired more than 450 pro-government media outlets, including national and regional newspapers, websites and television stations. In order to safeguard these mergers and acquisitions, the Hungarian government exempted them from the existing competition rules on the ground that the survival of public media forums was in the public interest[9].

In light of this case, one scholar has argued that the weakening of the rule of law in the EU Member States affects the proper functioning of the competition-law system in the EU[10]. This, however, is a minority view. Most scholars in fact consider that competition law conflicts with the rule of law. In this vein, Pranvera Këllezi recently noted that properly functioning markets require discretion, opportunism, expediency and a bureaucracy that manages people and relationships, concluding that these needs run counter to the rule of law[11]. Further, Pablo Ibáñez Colomo recently highlighted that there is a persistent argument in the literature to the effect that «the ideals of the rule of law are little more than a luxury, if not an inconvenience, that the competition law system cannot afford»[12]. This apparent resistance to the rule-of-law ideals in the competition-law community is grounded in a deep-rooted idea that competition law is *special* and that using law to protect competition entails a move outside the normal domain of the law. As David Gerber has noted, «in this view, competition law is a new type of law which deals with problems for which traditional legal mechanisms are inappropriate, and thus it requires correspondingly non-traditional methods and procedures»[13].

As I have shown elsewhere, the purported *specialness* of EU competition law manifests itself strongly in its interaction with fundamental rights, especially the notion of fair trial or due process[14]. For the purposes of this paper, I define "due process" as a principle encompassing the right to a fair trial guaranteed by Article 6(1) of the European Convention on Human Rights (ECHR), the right to an effective remedy guaranteed by Article 13 ECHR and the right to an effective remedy and a fair trial guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union (the "Charter").

A concept with a history that begins with the Magna Carta, due process «is a basic element of the rule of law and part of the common heritage [...] of the Contracting States [of the ECHR]»[15]. As is clear from both the American and European traditions, the purpose of this concept was to ensure the separation of powers. In other words, due process was fundamentally

> about *securing the rule of law*. It ensured that the executive would not be able unilaterally to deprive persons within the nation of their rights of life, liberty, or property except as provided by common law or statute and as adjudicated by independent judicial bodies, and that legislatures would not be able to step beyond their properly legislative roles of enacting general rules for governance of future behaviour[16].

The above discussion touches upon the principal components of what I consider to be a rule-of-law deficit in EU competition law. Before I engage in further argument, two concepts need to be briefly defined. First, I understand the "rule of law" to mean a principle whereby «all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws [...]»[17]. Second, I use the "rule-of-law deficit" to refer to a constitutional set-up according to which the Commission does not comply with EU fundamental rights, in particular the right to due process, when it enforces EU competition law.

To describe that rule-of-law deficit in EU competition law, I will proceed in two stages. In Section 2, I will describe the anatomy of EU competition law and the arrangements that enable the rule-of-law deficit to occur. I will then proceed in Section 3 to define the rule-of-law deficit affecting EU competition law as well as the risks posed by this deficit.

2. *The anatomy of EU competition law*

Historical accounts show that competition laws in Europe and in the United States were enacted to protect not only markets, but other values as well. As Eleanor Fox has shown, «in the United States, from the end of the nineteenth century and for most of the twentieth century, antitrust law and policy was the economic democracy of markets»[18]. The world's first competition law was the U.S. Sherman Act, which was embraced as «a charter against power and privilege, which were used by the great industrialists against farmers, entrepreneurs, and consumers»[19]. When presenting the bill to the U.S. Congress in 1890, Senator John Sherman famously argued that «if we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor, we should not submit to an autocrat of trade»[20].

In Europe, the genesis of the idea of protecting competition through law similarly had close links to the idea of protecting freedom. In his detailed and fascinating historical account, Gerber has shown that

> the political component of the liberal agenda focused on changing the existing political system in which kings and princes wielded power according to their own discretion. It sought to redefine political power, and, above all, to restrict and redistribute existing concentrations of such power. Its principal tool and driving force was the idea that political freedom was a *right* and that government had to be organized so as to protect that right[21].

Gerber also found that, just as liberals sought to free political conduct from the discretion of absolutist rulers, they also sought to free economic conduct from the constraints imposed under those regimes[22]. Competition law came to play a crucial role in this context.

The history of the EU is in fact tightly linked to the history of competition law, as the latter has been a founding policy of the common market and later of the European Union. What is more, as Laurent Warlouzet and Tobias Witschke have shown, competition policy is «in many ways a prime example of how a European rule of law has been established in the EU»[23]. The 1951 Treaty of Paris establishing the European Coal and

Steel Community (ECSC) dealt in Article 65 with agreements and concerted practices between firms and associations of firms which tend directly or indirectly to prevent, restrict or distort normal competition within the common market. Article 66 of the same treaty dealt with mergers and Article 67 with the abuse of dominant positions. These articles of the ECSC Treaty became the blueprint for the competition-law provisions subsequently adopted as part of the 1957 Treaty of Rome establishing the European Economic Community (EEC) and its current successor, the Treaty on the Functioning of the European Union (TFEU).

The Treaty of Paris entrusted the High Authority with all issues concerning the enforcement of competition policy, a task that the Treaty of Rome later placed in the hands of the Commission. The first implementing regulation was adopted after the entry into force of the Treaty of Rome: Regulation 17/1962 established the Commission's mandate and investigative powers for the enforcement of Articles 85 and 86 of the Treaty, now Articles 101 and 102 TFEU[24]. That regulation remained in force until 2002, when it was replaced by Regulation 1/2003 (Regulation on Procedure), whose purpose was to meet the challenges of an integrated market and a future enlargement[25].

The above historical account shows, first, that competition law has been foundational for the inception of the ECSC, the EEC and the EU alike. It is important to point out that competition law was enacted not only to protect the process of market competition but also to achieve society-building. Specifically, society-building has been an important goal of competition law, since the latter has been «a tool for combating the use of private power and public authority to maintain barriers between national markets»[26] and has helped Member States build a justice-aware economic community transcending national borders. Although justice concerns have been relegated to a lesser role in recent decades, when the focus has been on economic efficiency, it is important to remember that the pursuit of justice has long been an important rationale for competition law in the EU.

Second, the historical account also suggests that the substance of EU competition law – that is, rules that seek to control cartels, monopolies and mergers, or in other words the behaviour of economic actors in the internal market – has not significantly changed since its inception. Instead, competition law has developed mainly through being applied and interpreted by the Commission, the CJEU and, more recently, the Member States' national competition authorities (NCAs).

The current operation of the EU competition-law system is the result of the Community method. This means that the Commission – the institution representing the general European interest – holds the monopoly of legislative initiative while the Council and the European Parliament adopt EU legislative acts by co-decision[27]. This method has been lauded by scholars for combining democracy and efficacy[28]. However, as will be shown below, that method runs counter to the principles of separation of powers and due process in the field of EU competition law.

EU competition chef Margrethe Vestager presents the competition policy review, November 18, 2021

2.1. *The Commission – the "brain" and "hands" of EU competition law*

This section will show that the Commission acts as both the "brain" and the "hands" of the EU competition-law system by initiating and implementing, respectively, EU competition law. This anatomical peculiarity is at cross-purposes with the respect of the rule of law.

The Commission in fact cumulates three forms of constitutional power in the field of EU competition law: legislative power, executive power and judicial power. These functions can be shared with other EU institutions, or exercised individually by the Commission only.

One way in which the Commission participates in the development of EU competition law is by submitting proposals for legislative acts to be adopted by the Council and the European Parliament. Certain other bodies are also involved in law-making in the competition field, including the Advisory Committee on Restrictive Practices and Dominant Positions, which attends hearings and makes comments on the Commission's proposed decisions or legislation, and the Economic and Social Committee, which has an advisory role.

The Commission can also act as a legislator in its own right by adopting implementing regulations, which are binding in their entirety and directly applicable in all Member States. The most recent one is Commission Regulation 773/2004[29].

In addition, the Commission can adopt non-binding measures such as notices and guidelines, which are often referred to as "soft law". These instruments provide important information and clarification regarding the Commission's practices and

can trigger legitimate expectations. For example, the Commission's notice on immunity from fines made it clearer what information an applicant needs to provide to the Commission in order to benefit from immunity and introduced a procedure to protect corporate statements made by companies[30]. Its guidelines on the method of setting fines explained how it goes about calculating the amount of fines[31].

The Commission is the main executive body of the EU, meaning that it ensures that the provisions of the treaties, regulations, directives and decisions are implemented in accordance with the principles of EU law. In the field of competition law, Article 105 TFEU provides that the Commission shall ensure the application of the principles laid down in Articles 101 and 102 TFEU, shall investigate any suspected infringements of those principles and shall propose appropriate measures to bring any infringements that it finds to an end.

The Commission is also responsible for international co-operation in competition matters. For this purpose, the Commission co-operates on a regular basis with competition authorities from the countries with which the EU has concluded agreements.

When the Commission acts as the enforcer of EU competition law, it combines investigative, prosecutorial and adjudicative functions. Its adjudicative functions are split between the Directorate-General (DG) for Competition, which prepares decisions, and the College of Commissioners, which adopts the decisions.

During procedures to enforce Articles 101 and 102 TFEU, the Commission exercises judicial functions: it decides which cases to investigate among those that are notified to it and which not to pursue, what investigative measures to use, what facts to support with evidence, what questions to ask of and about the relevant undertakings and what measures to use to put an end to harmful behaviour.

The Commission has a parallel competence with the NCAs and the national courts to enforce competition law whenever a breach of Article 101 or Article 102 TFEU has taken place. As Ivo Van Bael has noted, «in addition to its pivotal role in the allocation of cases, the Commission retains some further control over the proceedings taking place before NCAs and national courts»[32].

Thus, the Commission cumulates three constitutional powers – that to initiate legislation, that to adopt legislation and that to enforce legislation – as the "brain" of EU competition law as well as three functions – investigative, prosecutorial and adjudicative – as the "hands" of EU competition law. As I see it, this arrangement is incompatible with the principle of the rule of law. In addition, as I have written earlier, the independence of both DG Competition and the Commissioners should be of growing concern, given this constitutional arrangement[33].

2.2. *The CJEU – the "heart" of EU competition law*

The CJEU is the interpreter of EU law. In this capacity, it provides impetus, clarification and dispute resolution. The CJEU has consistently interpreted the EU treaties to further an ever-closer Union[34]. Providing both stability and fluidity, the CJEU is the "heart" of EU competition law in that it exercises quality control over the Commission's

decisions through judicial review. Whenever a competition case ends with a formal decision by the Commission, that decision can be challenged before the General Court, which has jurisdiction at first instance in competition-law cases. The decisions of the General Court can be challenged before the CJEU, which thus functions as a court of appeal insofar as competition-law decisions of the Commission are concerned.

The grounds for seeking judicial review of a Commission decision are set out in Article 263 TFEU:

> The [CJEU] shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. […]
>
> It shall for this purpose have jurisdiction in actions brought […] on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

It is important to observe that Article 263 TFEU places the Commission's competition-law decisions in the same class of acts with the legislative acts of the EU, the acts of the Council and the acts of the Central Bank. This provision is considered by many scholars to reflect a limited jurisdiction that allows the CJEU to review the legality of the Commission's decisions but not to re-examine a competition-law case on its merits[35].

However, alongside this limited review of legality, any fines imposed can be the subject of an unlimited review by virtue of Article 261 TFEU, which states that regulations adopted by the European Parliament and the Council «may give the [CJEU] unlimited jurisdiction with regard to the penalties provided for in such regulations», read together with Article 31 of Council Regulation 1/2003, which provides that «the [CJEU] shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed».

3. *The rule-of-law deficit in EU competition law*

I submit in this paper that EU competition law suffers from a rule-of-law deficit attributable to a constitutional set-up in which the Commission does not comply with EU fundamental rights, in particular due process, when it enforces EU competition law. This rule-of-law deficit results from two concomitant processes: (1) the growth in importance of fundamental rights and of due process in the EU, and (2) the cloistered nature of EU competition law, which prevents it from accepting due process as a systemic organising principle.

3.1. *The growing vigour of due process in EU law*

Philip Alston and Joseph Weiler observed in 1998 that, whereas the EU was a staunch defender of human rights in both its internal and external affairs, it lacked a comprehensive or coherent human-rights policy at either level[36]. Since that time, however, the EU has made advances, mainly due to the

adoption of the Charter. As Mark Dawson recently noted, «the EU's crises and central policy dilemmas are seen and debated through the parameters of fundamental rights»[37], which are no longer on the periphery of EU action but central to the political debate over how the EU ought to act and evolve. A recent and telling example of this tendency is the adoption of the Digital Services Act and Digital Markets Act, both of which contain important provisions concerning fundamental rights although they regulate economic activity[38].

Congruently with the development of fundamental rights in the EU, the principle of due process has also grown in importance. A prime example is the evolution of the concept of independence reflected by Directive 1/2019, which was adopted to empower NCAs to be more effective enforcers of competition law in light of the direct applicability of Articles 101 and 102 TFEU[39]. To begin with, Article 3 of that directive provides that the NCAs and the Member States must respect fundamental rights when enforcing Articles 101 and 102 TFEU, and its Article 4 stipulates that the Member States must guarantee the independence of the NCAs when they enforce Articles 101 and 102 TFEU. Further, Directive 1/2019 imposes independence and impartiality standards that are very close to those formulated by the European Court of Human Rights (ECtHR). Specifically, Articles 4 and 5 of the directive stipulate that the Member States must meet certain structural, operational and budgetary standards to ensure the independence and impartiality of the NCAs. This textual prioritisation of fundamental rights in the enforcement of EU competition law is well in line with the constitutional design of the EU, which has fundamental rights at its core: according to Article 2 TEU, «[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights».

The development of the notion of fair legal process in the EU also illustrates the growing potency of due process in the EU. The CJEU confirmed early on that certain principles of law – common to all Member States – were such a fundamental part of the European legal order that they automatically formed part of EU law[40]. Those principles included the rights set out in the ECHR[41].

The CJEU went on to interpret the right to a fair legal process as comprising «the right to a tribunal that is independent of the executive power in particular»[42] as well as «the right to legal process within a reasonable period»[43]. In *Eurofood*, the CJEU noted that the right to be notified of procedural documents and, more generally, the right to be heard «occupy an eminent position in the organisation and conduct of a fair legal process», adding that, «[i]n the context of insolvency proceedings, the right of creditors or their representatives to participate in accordance with the equality of arms principle is of particular importance»[44].

The right to an effective remedy is another tenet of due process that has been growing in importance in the EU. The CJEU has invoked or relied on Article 47 of the Charter, which guarantees that right, in more than 800 cases since 2010[45]. It has often embraced a wide interpretation thereof. First, in cases concerning the review of restrictive measures such as the freezing of assets, the CJEU has stressed that, given that fundamental rights form an integral part of the EU legal order, the EU courts must ensure a full review of the lawfulness

of all the acts of the EU[46]. In a recent case, the CJEU stated the following:

> The effectiveness of the judicial review guaranteed by Article 47 of the Charter requires […] that, as part of the review of the lawfulness of the grounds which are the basis of the decision to include or to maintain a person's name on the lists of persons subject to restrictive measures, the Courts of the European Union are to ensure that that decision, which affects that person individually, is taken on a *sufficiently solid factual basis*. That entails a *verification of the factual allegations* in the summary of reasons underpinning that decision, with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, are substantiated[47].

Second, in relation to the right to an effective remedy concerning EU rules on asylum, the CJEU found that Article 47 of the Charter, read together with Articles 18 and 19(2) of the Charter, required that applicants for international protection should be able to enforce their rights effectively before a judicial authority[48].

3.2. *The cloistered nature of EU competition law*

The Commission's competition-law procedure has been tested against the fundamental-rights standards by the General Court on numerous occasions. Those challenging that procedure have either argued *in abstracto* that the overall enforcement procedure is flawed because the Commission acts as prosecutor, judge and executioner in the same case or *in concreto* that the rights of defence were not respected with regard to the facts of a particular case. Since most of the relevant judgments were delivered before the Charter entered into force, both the applicants and the judges relied on the ECHR as forming part of the general principles of EU law, in particular on Article 6 ECHR on the right to a fair trial.

As noted above, even before the adoption of the Charter, the CJEU recognised the existence and importance of the right to a fair trial in EU law in general and in EU competition law in particular[49]. Starting with *Schindler Holding and Others*, the General Court recalled the general principle of EU law that everyone is entitled to a fair legal process and made it clear that the design of this right under EU law was inspired by the fundamental rights that form an integral part of the general principles of EU law, drawing inspiration from the constitutional principles common to the Member States and from the guidance supplied, in particular, by the ECtHR[50]. The General Court has also stressed that the right to a fair legal process has been reaffirmed by Article 47 of the Charter. Before the entry into force of the Charter, the CJEU judges typically deferred to the Commission's assessment of the evidence in competition-law cases, maintaining that, in carrying out their legality review, it was not for them to substitute their own view for that of the Commission[51].

After the entry into force of the Charter, the CJEU changed its approach. In *Ziegler*[52], the Commission had found in its decision that a cartel had operated in removal services to and from Belgium for an extended period of time. The CJEU was asked, on appeal, whether the fact that this cartel had directly affected Commission staff entailed

that the Commission could not be considered an "impartial tribunal" for the purposes of Article 6 ECHR.

The CJEU began by pointing out that, according to its established case-law, the Commission – even when imposing heavy penalties – was not a "tribunal" within the meaning of the ECHR or the Charter[53]. However, the CJEU added that the Commission, during the administrative procedure before it, was nevertheless required to

> respect the fundamental rights of the European Union, which include the right to good administration enshrined in Article 41 of the Charter. In particular it is that provision, *not Article 47 of the Charter*, which governs the administrative procedure relating to restrictive practices before the Commission[54].

The CJEU went on to note that the requirement of impartiality under Article 41 of the Charter contained both a subjective element and an objective element. Subjectively, the Commission's administrative procedure would breach Article 41 if it could be shown that a Commission official who had been engaged in the investigation had shown bias. Objectively, there would be a breach if it was not possible to exclude any legitimate doubt as to bias on the part of the Commission[55].

In my opinion, the CJEU's test of independence in *Ziegler* is both a step forward and a step backward for the respect of due process in the EU. The CJEU appears to have imported the criteria for assessing impartiality from the case-law of the ECtHR, which has consistently held that the existence of impartiality must be determined on the basis of a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge, and an objective test to ascertain whether the tribunal itself, inter alia with regard to its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality[56]. On the one hand, this transfer of the ECtHR's test of impartiality into the substance of EU law means that the CJEU requires the institutions, bodies, offices and agencies of the EU to be more "tribunal-like" when they act as adjudicators. On the other hand, the fact that the CJEU considers that only Article 41 of the Charter applies to competition-law cases is a step backward because it deprives individuals of the right to an effective judicial remedy as provided by Article 47 of the Charter. In other words, with *Ziegler*, the CJEU both judicialises and de-judicialises EU competition law.

Before the entry into force of the Charter, the CJEU used Article 6(1) ECHR as a benchmark when it defined the principle of judicial protection and the right to a fair trial in EU law. In so doing, the CJEU opted for a high level of generality in the interpretation of these concepts. Given that the scope of Article 6(1) ECHR has since been enlarged, a corresponding widening of the concept of fair legal process in EU law should have taken place as well. However, this has not happened in competition law. Instead, the CJEU has reduced the level of generality by abandoning the Article 6(1) ECHR benchmark altogether. This is what I refer to as the "cloistered nature" of EU competition law.

3.3. *The risks entailed by the rule-of-law deficit in EU competition law*

The previous two sections have described what I refer to as the rule-of-law deficit in EU competition law, stemming from a con-

stitutional set-up in which the Commission does not comply with EU fundamental rights, in particular due process, when it enforces EU competition law. This deficit is not without its costs: it undermines the legitimacy of the EU, the proper functioning of the NCAs and the protection of EU citizens.

First, the cumulative exercise of investigative, prosecutorial and judicial powers in the field of competition law by the Commission – an institution that also cumulates three constitutional powers – sits at odds with EU legislation that promotes and requires the independence and impartiality of NCAs.

Second, NCAs are themselves held to an uneasy double standard. On the one hand, they must abide by EU law and the duties following from it. On the other hand, since all Member States are parties to the ECHR, the activity of the NCAs must also align with the case-law of the ECtHR. As shown earlier, the ECtHR and the CJEU have parted ways in their understanding of due process during administrative procedures. Whereas the ECtHR has found that «the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article [6(1) ECHR] restrictively»[57], the CJEU promotes a narrow interpretation of due process in competition-law procedures. This has a direct impact on NCAs, which must somehow ensure that their procedures respect both standards.

Third, the rule-of-law deficit affecting EU competition law also has an impact on EU citizens, because they are deprived of institutions that respect the rule of law. The view described earlier in this paper – that the rule of law must serve the goals of the internal market[58] – is dangerous, because it artificially creates a hierarchy between values. Such an embrace of utilitarianism is a nadir for the respect of the rule of law in Europe.

Finally, the rule-of-law deficit affecting competition law has ideological importance as well, because the value of the principle of the rule of law is being tarnished in a political system whose actors do not respect that principle despite preaching otherwise.

4. *Conclusion*

When President Franklin D. Roosevelt addressed the U.S. Congress in 1938 on the issue of curbing monopolies, he emphasised that «the liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself»[59]. For this reason, the United States after the Second World War embarked on an aggressive campaign of international cartel enforcement focused on the de-cartelisation and de-monopolisation of the defeated powers as part of an international order for the post-war world[60]. This was in line with Supreme Court Justice Louis Brandeis's idea that monopolies threaten democracy[61]. A closer analysis of EU competition law, however, shows that using law to pursue monopolies and other big-business practices creates a type of administrative or bureaucratic power that sits uncomfortably with democracy and the rule of law.

This article has argued that the current system of competition-law enforcement in the EU suffers from a rule-of-law deficit that stems, on the one hand, from the

growth in vigour of both fundamental rights and due process and, on the other hand, from the withering force of due process in EU competition-law proceedings. This rule-of-law deficit is not without importance, because it undermines the legitimacy of the EU, the proper functioning of the NCAs and the protection of EU citizens.

The idea that competition law is special and need thus not align with fundamental rights is not compatible with the respect of the rule of law. Changes should be undertaken to render the system of competition-law protection in the EU compatible with the requirements of due process and the rule of law.

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