

# THE LINKS BETWEEN HUMAN RIGHTS AND THE SINGLE EUROPEAN MARKET: DISCRIMINATION AND SYSTEMIC INFRINGEMENT

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*The aim of this article is to prove that the legal system of an EU member state in which weakening of democratic rights and distortion of the constitutional system of checks and balances takes place also hurts the frameworks of the single market. The best example for this situation can be seen in Hungary nowadays. The connection between constitutional principles and single market regulations is not as obvious as it seems. Many would claim that multinational companies do not need basic rights to perform well. However, this is not true. Anti-democratic developments create a framework that not only results in institutional, legal and sociological changes, but also hurts free competition leading to a loss in profit. There is a great chance that a country rife with breaches of fundamental rights will, as a spill-over effect, also face a large number of single market regulation breaches.*

## I. INTRODUCTION

Hungary's government has repeatedly found itself in the crosshairs of critics both international and domestic. Its detractors point to two major issues. First is the barrage (hundreds) of anti-democratic laws and actions that have been passed over the last five years. These rules have created an illiberal state in the Zakarian sense<sup>1</sup> (we could also freely call it a state moving towards authoritarianism, if not already there). Such a non-cooperative member state may indeed not conform to the loyalty clause as set out in Article 4 of the Treaty on the European Union. That clause makes it an obligation for member states to facilitate the achievement of the Union's tasks and refrain from any measure that could jeopardise the attainment of the Union's objectives.<sup>2</sup> A great number

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<sup>1</sup> F. Zakaria, "The Rise of Illiberal Democracy". *Foreign Affairs*, Nov/Dec 1997 22.

<sup>2</sup> F. Casolari, "EU Loyalty After Lisbon: An Expectation Gap to Be Filled? The EU after Lisbon", Springer, 2014, 93-133

of publications have been written on this topic.<sup>3</sup> Most authors tend to support a tool or action that could be used effectively against such countries, without involving EU internal politics (and especially by leaving domestic and EU politicians more or less out of such a decision). Such measures could be used to freeze funds for states that breach human rights, or enable EU institutions to use more effective tools. A table of the most significant anti-democratic actions in Hungary (typically issues of rule of law) can be seen below.

	Violates general constitutional principles	Violates Strasbourg law	Strasbourg action	Violates EU law	EU action	Hungary's response
<b>Adoption, content and amendments to the new Fundamental Law<sup>4</sup></b>	partly	partly	Venice Commission report <sup>5</sup>	N/A	Minor criticism <sup>6</sup>	Some amendments
<b>Extensive use of so-called cardinal laws (2/3 majority required to amend)</b>	yes	controversial	Venice Commission report <sup>7</sup>	N/A	N/A	N/A

<sup>3</sup> See e.g. B. Bugarič, "Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge. LSE 'Europe in Question' Discussion Paper Series. <http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper79.pdf>; K. Kovács, G. Attila Tóth, "Hungary's Constitutional Transformation", in *European Constitutional Law Review*. Vol. 7, 2, (2011), 197; Editorial Comments. "Hungary's new constitutional order and "European unity" in *Common Market Law Review*, vol. 49, 3, (2012), 878.; A. Gábor Tóth (ed.), "Constitution for a Disunited Nation – On Hungary's 2011 Fundamental Law", Budapest: CEU Press 2012; B. Majtényi, "Legislative Stupidities in the New Hungarian Constitution", in *Pace diritti umani - Peace Human Rights* (2012) 121–126.; J.-W. Müller, "Should the EU Protect Democracy and the Rule of Law inside Member States?" in *European Law Journal*, Vol. 21, I. 2, (2015), pp. 141–160; E. K. Jenne, C. Mudde, "Hungary's Illiberal Turn: Can Outsiders Help?" in *Journal of Democracy* Vol. 23, 3 147–155.; K. L. Scheppele, "What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions" [http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbruselsversion\\_en.pdf](http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbruselsversion_en.pdf); A. von Bogdandy, P. Sonnevend (eds.) "Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania", CH Beck, Hart, Nomos, 2015.; U. Sedelmeier, "Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession" in *JCMS*, Vol. 52, 1, (2014), pp. 105–121.

<sup>4</sup> I. Vörös "The constitutional landscape after the fourth and fifth amendments of Hungarian Fundamental Law", in *Acta Juridica Hungarica*, Vol. 55, 1 (2014), pp. 1–20

<sup>5</sup> Opinion on the Fourth Amendment to the Fundamental Law of Hungary. Adopted by the Venice Commission at its 95th Plenary Session, Venice, 14–15 June 2013. CDL-AD(2013)012-e.; M. Bánkuti, G. Halmai, K. L. Scheppele, "Hungary's Illiberal Turn: Disabling the Constitution" in *Journal of Democracy*, Vol. 23, 3, (2012), pp. 138–46.; See also [http://www.venice.coe.int/webforms/documents/?pdf=CDL\(2013\)023-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL(2013)023-e)

<sup>6</sup> The European Commission reiterates its serious concerns over the Fourth Amendment to the Constitution of Hungary, [http://europa.eu/rapid/press-release\\_IP-15-4673\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4673_en.htm)

<sup>7</sup> Opinion on the Cardinal Acts on the Judiciary that were amended following the Adoption of Opinion CLD-AD(2012)001 on Hungary, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2012\)020-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)020-e)

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them in Parliament)						
Changes to the electoral system <sup>8</sup>	yes	partly	Venice Commission reports <sup>9</sup>	N/A	report of the EP (Tavares report) <sup>10</sup>	No effective changes
Limitation of power and change of composition of Constitutional Court (only government now nominates judges)	yes	controversial	Venice Commission reports	controversial	N/A	N/A
Some provisions that had been ruled unconstitutional by the Constitutional Court were immediately re-written into the constitution by the 2/3 majority	N/A	N/A	N/A	N/A	N/A	N/A
Discrimination against and forced retirement of judges	yes	yes	Baka case <sup>11</sup> and some other cases <sup>12</sup>	yes	infringement procedure <sup>13</sup>	compensation
National Office for the Judiciary was allowed to reassign court proceedings (transfer cases)	yes	yes	Hagyó case <sup>14</sup>	N/A	N/A	Partly modified (only judges may be moved between courts, not cases) <sup>15</sup>
Claim that the public prosecutor is not acting independently <sup>16</sup>	yes (if proven)	yes (if proven)	N/A	N/A	N/A	N/A
Media law allowing						

<sup>8</sup> See the OSCE report, <http://www.osce.org/odihr/elections/hungary/121098>

<sup>9</sup> CDL-REF(2013)034-e Comments of the Government of Hungary on the Draft Opinion on the Fourth Amendment to the Fundamental Law of Hungary. [http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2013\)034-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2013)034-e); CDL-AD(2012)012-e, Joint Opinion on the Act on the Elections of Members of Parliament of Hungary adopted by the Council for Democratic Elections at its 41st meeting ( Venice, 14 June 2012) and the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012) [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2012\)012-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)012-e)

<sup>10</sup> Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)). A7-0229/2013, PE508.211v04-00.

<sup>11</sup> *Baka v. Hungary* (application no. 20261/12).

<sup>12</sup> Application no. 45438/12 *József BELEGI and Others against Hungary* lodged on 20 June 2012; Application no. 45434/12 *J.B. and 66 Others against Hungary*, lodged on 20 June 2012.

<sup>13</sup> Case C-286/12., *European Commission v Hungary*. ECLI:EU:C:2012:602

<sup>14</sup> Case Of *Hagyó v Hungary* (Application no. 52624/10).

<sup>15</sup> See also Constitutional Court decision 36/2013. (XII. 5.) AB.

<sup>16</sup> Some opposition leaders were kept in prison for years without getting charged, see the above-mentioned Hagyó case.

<b>strong control over the media, government politicians make publishers fire independent journalists</b>	yes	yes	Venice Commission report <sup>17</sup>	N/A	Tavares report mentions this problem, <sup>18</sup> negotiations started	Minor changes
<b>The institution of the data protection ombudsman was ended</b>	N/A	N/A	N/A	yes	Infringement procedure <sup>19</sup>	N/A
<b>Discrimination against religious communities</b>	yes	yes	Magyar Keresztény Mennonita Egyház case <sup>20</sup>	N/A	N/A	N/A
<b>Obligatory teaching of works by Nazi authors in public schools</b>	N/A	N/A	N/A	N/A	N/A	N/A
<b>Curtailment of LGBT rights</b>	N/A	N/A	N/A	N/A	N/A	N/A
<b>Bringing criminal sanctions from the age of 12 (lowering of age limit from 14)</b>	N/A	N/A	N/A	N/A	N/A	N/A
<b>Obligatory community service (mainly for Roma), lack of action by law-enforcement authorities in cases of racially motivated crime</b>	N/A	N/A	Venice Commission Report <sup>21</sup>	N/A	Tavares report mentions this problem <sup>22</sup>	N/A
<b>Government attack against NGOs and the Norway fund</b>	yes	N/A	N/A	N/A	N/A	N/A

By way of a response, the EU applied political pressure. Several disputes and decisions took place in the EP. One of the most important documents adopted was an EP report<sup>23</sup> authored by Rui Tavares, an MEP in the Group of Greens/European Free Alliance. His work was a thorough analysis of human rights violations, and the EP (even

<sup>17</sup> Report By Nils Muižnieks Commissioner For Human Rights Of The Council Of Europe Following His Visit To Hungary From 1 To 4 July 2014. [https://tdziegler.files.wordpress.com/2014/12/commhdh201421\\_en.pdf](https://tdziegler.files.wordpress.com/2014/12/commhdh201421_en.pdf)

<sup>18</sup> Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)). A7-0229/2013, PE508.211v04-00.

<sup>19</sup> Judgment of the Court (Grand Chamber) of 8 April 2014. *European Commission v Hungary*. ECLI identifier: ECLI:EU:C:2014:237.

<sup>20</sup> *Magyar Keresztény Mennonita Egyház and Others v Hungary* (application nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12).

<sup>21</sup> Report By Nils Muižnieks, *supra*, note 17.

<sup>22</sup> Report on the situation of fundamental rights: standards and practices in Hungary, *supra*, note 18.

<sup>23</sup> Report on the situation of fundamental rights: standards and practices in Hungary, *supra*, note 18.

with its EPP majority) approved it. Furthermore, some infringement procedures were initiated (see below). However, compared to the seriousness of the human rights violations, there were only few actions, and they did not touch on core issues of democracy.

The second important point is that due to the economic crisis and failed economic policies of the current and former governments in Budapest, fiscal policy has become subject to harsh criticism. Due to a chronic structural budget deficit, EU cohesion funds allocated to Hungary were suspended several time, and also funds for other purposes like road development funds were suspended. Moreover, economic pressure culminated in an excessive deficit procedure that was eventually lifted in 2013. One could argue that the economic pressure was also a ‘tool’ for pulling the country towards democracy and the two problems (democratic and economic) somehow merged. In the absence of suitable tools, ‘disciplining’ of the member state shifted to this field where it seemed to function more effectively.

However, besides concerns for democracy and worries over economic problems, there exists a third issue that was less discussed by scholars – namely, the continuously growing conflict between the founding principles of the common European market and nationalistic protectionism. PM Orbán has recently declared that he desires an “illiberal state”, one that is “perhaps not even a democracy”, and that he finds Russia, China, Turkey and India to be good examples of such systems because they serve the needs of post-crisis economies better than traditional democracies. Against this interpretation of “democracy” even the New York Times<sup>24</sup> and some governments including Norway implored the European Union to intervene. Yet the EU has not started an Article 7 procedure, created for the breach (or endangerment) of fundamental rights in a member state. One reason for not doing so (besides internal politics, especially the powerful position of the European People’s Party in the EP) could be that the EU seemingly believes that even if human rights are not fully granted in a member state, economic rights should still be exercised. Fundamental rights and basic values are thus pushed into

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<sup>24</sup> The New York Times Editorial Board: *A Test For the European Union*. [http://www.nytimes.com/2014/08/02/opinion/a-test-for-the-european-union.html?\\_r=0](http://www.nytimes.com/2014/08/02/opinion/a-test-for-the-european-union.html?_r=0)

the background and the importance of economics and business is highlighted and placed centre stage.

Nonetheless, this is a false starting point. An illiberal state cannot function properly in a free market like the single European market. In this sense, we can assert that the single market is not an independent entity. Based on its logic of non-discrimination, it functions like a “little brother” to fundamental rights. This logic was built upon equality, and even though there are situations in which discrimination seems to be allowed (such as discrimination based on consumers’ habitual residence),<sup>25</sup> such cases are rare and exceptional. The fundamental value of the system of regulations in the single market lies in anti-discrimination. Central to it is the idea that all of us, including companies and individuals, irrespective of citizenship and seat, are equal. We may feel that single market regulations are an extended field of constitutional principles. Article 2 of the Treaty on the European Union (“TEU”) itself declares that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to Member States’ societies in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women prevail. One of the basic principles of our countries – rule of law – cannot function alongside institutionalised corruption, discrimination against foreigners or repeated breaches of human rights. These rights are granted to companies as well as individuals. In the EU, there is generally no scope for discrimination against foreign companies or their Hungarian subsidiaries, branches or agencies of foreign companies (Art 49 TFEU). Anti-discrimination serves as the most important fundament for creating fair markets and open competition in member states. Without it, competition becomes unbalanced and limited, which ultimately causes harm at both micro and macro levels (e.g. to consumers). Furthermore, any discrimination based on nationality shall be prohibited (Art 12 and 61 TFEU). If we think about the historical dimension, we can also reverse the order of importance of single market regulations and human rights: the frameworks of the single market were created in the late sixties, while the newcomer, namely EU human rights policy as a system was created far later. From a reverse perspective, the stronger ‘older brother’ is the single market. If its rules are breached, the erosion will also spill over into

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<sup>25</sup> H. Schulte-Nölke, “Gibt es ein Recht der europäischen Verbraucher, nicht von Unternehmern wegen ihrer Staatsangehörigkeit oder ihres geographischen Aufenthaltsorts diskriminiert zu werden?” in *Transformacje*, 3/2014.

constitutional principles. Yet we still see people (even from outside Hungary) sympathizing with PM Orbán's nationalism because they feel that nationalist politicians can end the rule of banks, multinational companies, "foreign" capital and the inflow of foreigners, and their countries' economies also suffer from "multinational economic disease". This is in line with the latest tendencies in the world for rising reactionary tribalism: a movement claiming<sup>26</sup> that multinational ties only hurt national interests and lead to a loss of identity and nihilism.<sup>27</sup> However, research shows that in the longer term, well-functioning markets must be free and competitive,<sup>28</sup> even if state intervention is necessary in some instances. The popularity of ill-conceived economics carries the danger that if they are allowed in one country, other countries may also apply them.<sup>29</sup>

Stemming from the nationalistic agenda, some of the new Hungarian legislation has adversely affected the internal market, especially the free movement of goods, services and capital. The main assumption of the government – sometimes openly admitted – is that Hungarian companies serve the national interest better than foreign ones, that Hungarian products are better than imported ones and that buying Hungarian products is better for the Hungarian economy. In several instances the actions are not correspond to earlier accomplishments of the EU (e.g. the guidelines set the 'Buy Irish' case).<sup>30</sup> Interestingly, in rhetoric and public discourse, by 'foreign product' nationalists

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<sup>26</sup> R. J. Antonio "After Postmodernism: Reactionary Tribalism" in *American Journal of Sociology* Vol. 106, No. 1, (2000), pp. 40-87.

<sup>27</sup> However, deeper research in a pool of 155 countries show that the "length of time a country is not subject to authoritarian regimes is positively related to economic growth and the level of per capita income" and also that "countries with an autocracy for the average number of 36 years had GDP per capita that was approximately 25% lower than non-autocratic countries, all other things remaining equal." A. Carden, H. S. James Jr., "Time Under Authoritarian Rule and Economic Growth", in *University of Missouri – Columbia, CORI Working Paper No. 2007-02* p. 11. The reason for this is that "institutional knowledge takes time to evolve for it to be fully complementary to quality market based institutions". p. 12.

<sup>28</sup> Art Carden, Harvey S. James Jr., "Time Under Authoritarian Rule and Economic Growth", *supra*, note 27.

<sup>29</sup> See e.g. Hungarian MOL Harassed In EU Entrant Croatia. [http://www.jamestown.org/single/?tx\\_ttnews%5Btt\\_news%5D=38122&no\\_cache=1#.VR0RI PysVxo](http://www.jamestown.org/single/?tx_ttnews%5Btt_news%5D=38122&no_cache=1#.VR0RI PysVxo)  
[http://mol.hu/images/pdf/A\\_MOL\\_rol/Mediaszoba/Kozlemenyek/Open\\_letter\\_web\\_210x297\\_eng.pdf](http://mol.hu/images/pdf/A_MOL_rol/Mediaszoba/Kozlemenyek/Open_letter_web_210x297_eng.pdf).

<sup>30</sup> Case 249/81. Judgment of the Court of 24 November 1982. *Commission of the European Communities v Ireland*. European Court Reports 1982 Page 04005.

also mean products produced by local affiliates of foreign companies in Hungary. As a result, several European companies have been pushed out of the market by the government and several free market competition law rules flouted, even though foreign companies in the country produce 75% of GDP<sup>31</sup> and 80% of exports<sup>32</sup>. Furthermore, as a side effect of protectionism, internal corruption has grown. Right now we are seeing the rise of local oligarchs reaching new highs, while measures proposed by professionals to avoid problems are being completely ignored.<sup>33</sup> In summary, lobbying is taking place uncontrolled.<sup>34</sup> This is not a special phenomenon: with protectionism corruption may also grow.<sup>35</sup>

In theory, the Treaty on the Functioning of the European Union ('TFEU') creates a framework for four freedoms. According to the 'law in books', goods, services, capital and persons may move freely in the European Union (or, to be more precise, in the European Economic Area). In conformity with this, the Union shall comprise a customs union that shall cover all trade in goods (Art. 28 TFEU). Moreover, all discriminatory taxes or quantitative restrictions on imports or exports and measures having equivalent effect shall be prohibited among member states (Art. 34-35 TFEU). In practice, this means that there is no room for discrimination between goods in the EU, irrespective of their origin. If a company imports German beer into Hungary, it can be sold under the same conditions as Hungarian beer. The same is true regarding handling of companies: no discrimination is allowed between a company owned by foreign persons or companies and a locally owned one. The basics of these rules can be found in Article 49 TFEU, which expresses that restrictions on the freedom of establishment of nationals of a

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<sup>31</sup> The foreign direct investment (FDI) rate in the GDP was around 74.9% in 2012, see [file:///C:/Documents%20and%20Settings/tczigler/Dokumentumok/Downloads/HITA\\_ce%CC%81ges-angol\\_%20\(1\).pdf](file:///C:/Documents%20and%20Settings/tczigler/Dokumentumok/Downloads/HITA_ce%CC%81ges-angol_%20(1).pdf)

<sup>32</sup> D. Hegedüs, "From Front-runner's 'Euphoria' to Backmarker's 'Pragmatic Adhocracy' Hungary's Ten Years within the European Union in a Visegrad Comparison". in DGA Panalyse 7, 10. 2014, available at <https://dgap.org/en/think-tank/publications/dgapanalysis/front-runners-euphoria-backmarkers-pragmatic-adhocracy> „...80 percent of Hungarian exports stem from multinational companies operating within Hungary.”

<sup>33</sup> Transparency International, "Corruption Risks in Hungary - 2011 Report", [http://www.transparency.hu/uploads/docs/Corruption\\_Risks\\_in\\_Hungary\\_2011\\_-\\_NIS\\_Executive\\_Summary.pdf](http://www.transparency.hu/uploads/docs/Corruption_Risks_in_Hungary_2011_-_NIS_Executive_Summary.pdf)

<sup>34</sup> Transparency International, "Lifting The Lid On Lobbying: National Report Of Hungary. Lobbying In An Uncertain Business And Regulatory Environment", [http://www.transparency.hu/uploads/docs/lobbi2014\\_web\\_eng.pdf](http://www.transparency.hu/uploads/docs/lobbi2014_web_eng.pdf)

<sup>35</sup> M. Mahdi Ghodsi, "Corruption and the Level of Trade Protectionism", in *Ekonomia Journal*, 2012, vol. 30.



Member State in the territory of another Member State shall be prohibited. It also stresses that freedom of establishment shall include the setting up and managing undertakings under the same conditions as laid down for the country's own nationals. Article 54 TFEU also states that companies or firms formed in accordance with the law of a member state shall be treated in the same way as individuals who are nationals of member states. Consequently, based on the logic of EU law, no member state (MS) may demand (directly or indirectly) that a foreign company registered in the EU – for example – pay more tax than local companies. Moreover, there are also unified rules for competition law as well as for state aid: according to these, a state has very limited latitude to aid local companies and even non-financial, unrealised funding is prohibited.<sup>36</sup> These provisions have been in place for decades; in certain areas even longer: e.g. the free movement of goods between member states was established at the end of the sixties.

Nationalism and national identity have regularly conflicted with the rules of the free market, and in all of the above-mentioned areas has caused states to struggle to come in line with EEC/EC/EU rules. Several of the leading cases before the European Court of Justice (“CJEU”) have been in connection with protectionist state measures. To mention but a few: the Costa case<sup>37</sup> on nationalization, the issue of golden shares in companies held by states<sup>38</sup>, the exaggerated emotions all around Europe regarding the free purchase of land,<sup>39</sup> the Dassonville<sup>40</sup> and Cassis de Dijon<sup>41</sup> cases on selling foreign

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<sup>36</sup> Judgment of the General Court (Sixth Chamber) of 20 September 2012. *French Republic v European Commission*. Case T-154/10. ECLI:EU:T:2012:452 Similar findings can be seen in Case C-672/13 Judgment of the Court - 19 March 2015 OTP Bank (not yet published).

<sup>37</sup> Case 6-64. Judgment of the Court of 15 July 1964., *Flaminio Costa v E.N.E.L.* ECLI:EU:C:1964:66.

<sup>38</sup> C. Gerner-Beuerle, “Shareholders between the market and the State. The VW Law and Other Interventions in the Market Economy”, 49 Common Market Law Review, (2012) 1, pp. 97-143.

<sup>39</sup> For the latest hungarian changes on land purchase liberalisation see eg. B. Kovács, “New law expands the field for agricultural land purchases”, in *EMEA Legal Insights Bulletin*, 2013. [http://www.bakermckenzie.com/files/Uploads/Documents/EMEA/EMEALIB/Sept%202013/nl\\_emea\\_hungarylegalinsights\\_sep13.pdf](http://www.bakermckenzie.com/files/Uploads/Documents/EMEA/EMEALIB/Sept%202013/nl_emea_hungarylegalinsights_sep13.pdf).

<sup>40</sup>Case 8-74. Judgment of the Court of 11 July 1974. *Procureur du Roi v Benoît and Gustave Dassonville*, ECLI:EU:C:1974:82.

<sup>41</sup> Case 120/78. Judgment of the Court of 20 February 1979, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*. ECLI:EU:C:1979:42.

goods.<sup>42</sup> Looking at the issue in the wider context of international trade, we should also mention the US-EU disputes related to state assistance for Airbus and Boeing.<sup>43</sup>

In Hungary, the dynamics of commercial law have changed fundamentally over the last few years, in line with heavy nationalistic rhetoric against foreign companies. Some of the new rules may violate the notion of the free market while conforming to the letter of EU law. Others are clearly contrary to some provisions of competition law in the EU. Looking at the political aspect, the government has started a domestic ‘fight for independence’, which has an effect on human rights and the market as well. The government has tried to counter scathing international opinion with nationalistic, arrogant statements as part of an aggressive campaign against the EU. For example, in a speech PM Orbán has accused the EU of imperialism, of double standards hurting Hungary, and directly compared its methods to those of the communist regime and the Soviet Union. However, the rhetoric of the governing party seems to be different (softer and less combative) outside Hungary, for example during negotiations with the EU. Thus, it may be concluded that such rhetoric serves to maintain a ‘war-like’ situation on domestic media, which may result in a boost to voter support. However, even if rhetoric is only an element of government communication, that does not mean we should overlook human rights and single market violations. How the rules of the single market are enforced is closely related to the way human rights are treated. The approach to rule-of-law problems is also detectable in the field of commerce. One reason for this could be that if a government does not want the basics of rule-of-law to be respected, its approach to commerce will also be in line with this notion. Thus, the link, namely anti-discrimination – which connects these two fields – is also not respected, thus distorting the market. If a sort of ‘justice’ idealized by the government overwrites the principle of equality, it has a direct and immediate effect on commerce and makes it biased.

The next chapter contains a rundown of the fields in which discrimination has become institutionalised in the market.

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<sup>42</sup> J. Hojnik, “Free Movement of Goods in a Labyrinth: Can Buy Irish Survive the Crises?” in *CMLR* (2012)291-326.

<sup>43</sup> For the background see J. D. Kienstra, “Cleared For Landing: Airbus, Boeing, and the WTO Dispute over Subsidies to Large Civil Aircraft.”, in *Northwestern Journal of International Law & Business*. Vol. 32, 3, pp. 569-303.

## II. SINGLE MARKET PROBLEMS

Regarding market problems, we can allocate three main types of issues. In a number of cases, there exists unhealthy symbiosis between government and businesses loyal to the party. In other cases, the state wants to attain certain sectors of the market, and the purpose of such purchases remains unclear. Lastly, in some instances foreign interests (such as those of Russia) and government initiatives mix in business in a strange and unhealthy way. In this chapter, we will scratch the surface of the most important related case law.

### *First Example of Problems: Unhealthy Symbiosis Between Government and businesses loyal to the party*

One major problem is that the Hungarian government has been building out a landscape of businesses loyal to the government. This has been done in two ways.

Firstly, in a number of cases, through the use of EU funding.<sup>44</sup> This first approach is very common in the construction industry, and it is one reason for the exceptional number of construction sites all over the country. Due to dubious circumstances surrounding payments to companies, the European Commission stopped transfers of funds to the country at the start of 2014 and the EU reduced the amount transferred by at least 90 to 120 billion forints (about 25% of all funding for such purposes).<sup>45</sup> Later, road development funds<sup>46</sup> and the funds of the Economic Development Operational Programme (in the amount of 700 billion forints) were also

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<sup>44</sup> According to [atlatszo.hu](http://atlatszo.hu) (a website dedicated to state transparency), several businessmen loyal to the government have received an excessive number of state tenders. One of the winning leaders of public procurements, especially of construction contracts was businessman Lajos Simicska, who had headed the Tax Authority between 1998 and 1999 during the era of the first Fidesz government while he also served as the financial director of the party. Just one of his companies, Közgép Zrt. received 430 billion forints (approx. 1.3 billion euros) from public procurement in 2013. Later, when the government wanted to constrain his business activity, he broke from the governing party after 25 years of cooperation.

<sup>45</sup> EU may withhold funding to Hungary over road construction bidding rules <<http://www.politics.hu/20140123/eu-may-withhold-funding-to-hungary-over-road-construction-bidding-rules/>>

<sup>46</sup> <<http://budapestbeacon.com/economics/ec-formally-suspends-road-development-funds-assesses-huge-penalty-on-hungary/25323>>

suspended. However, this seems to be a rather inadequate response to the issue, since most of the actions were started because of formal issues.

Secondly, state and company capture is being conducted through a legal environment that advantages government-friendly companies against foreign competitors. This approach is very typical in countries with a protectionist agenda, and is done through state legislation. Such measures are obviously contrary to EU law, while the corruption mentioned above is unlikely to be proven by courts or police. A typical area affected has been the supermarket sector. Some domestic companies support the government and in compensation, it also aids them. A good example of such a relationship is the “alliance” between CBA, the largest Hungarian supermarket chain and the government. According to press news, CBA even asked its employees to support the government and has been present at pro-government rallies,<sup>47</sup> openly evangelized Viktor Orbán<sup>48</sup> while receiving huge benefits (see below). Thus, not only does state capture exist; the governing parties use the state to intellectually capture companies for political purposes, and the two actions make up one group of problems: this is the reason some of the well established social scientists call the Hungarian state a so called “mafia state”.<sup>49</sup>

Distortion of the taxation system shows how this strange relationship with certain companies works. The government tried to introduce several taxes discriminating against foreign companies. One of the best-known related court cases was the Hervis case<sup>48</sup> (Hervis is a subsidiary of SPAR Österreichische Warenhandels AG). The new tax law compelled affiliated companies to pay extra taxes while concerns such as CBA – groups of companies organised in a franchise system – did not have to pay any extra tax. As a result, most companies that had to pay were foreign. Hervis was obliged to pay a proportion of its turnover as a special tax, where turnover was defined as the total turnover achieved in Hungary by all of its affiliates.<sup>49</sup> Hervis instigated legal proceedings

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<sup>47</sup> B. Magyar (ed), “Magyar polip - A posztkommunista maffiaállam ([Hungarian polip - The post-communist Maffia State]”. Noran Libro Kiadó, 2013.

<sup>48</sup> Case C-385/12: Judgment of the Court (Grand Chamber) of 5 February 2014 (request for a preliminary ruling from the Székesfehérvári Törvényszék – Hungary) – *Hervis Sport- és Divatkereskedelmi Kft v Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága*. OJ C 93, 29.3.2014, p. 10.

<sup>49</sup> In cross-border taxation such problems been before the European Court, see Case C-196/04. 62004CJ0196: Judgment of the Court (Grand Chamber) of 12 September 2006. *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*. ECR 2006 I-07995; T. O'Shea, “The UK's CFC rules and the freedom of establishment: Cadbury

against the tax, and the Hungarian court requested that the CJEU make a preliminary ruling on the nature of the Hungarian law. In its ruling, the CJEU stressed that the law had the effect of disadvantaging entities linked to other companies within a group over entities that were not part of such a group. This was the result of the combination of two characteristics of the special tax. First, the tax rate was steeply progressive with turnover, in particular in its upper band.<sup>50</sup> Second, the tax base was defined, for taxable entities belonging to a group of companies, as the consolidated turnover of all the ‘linked’ taxable entities of the group. However, in the case of CBA, it was limited to the turnover of each taxable entity on an individual basis (just like in the case of entities such as independent franchisees). This means that the taxable entities belonging to a group of companies was taxed on the basis of fictitious turnover figures. As a result, the CJEU found that according to Article 49 TFEU (on the freedom of establishment) and Article 54 TFEU (on the equal treatment of companies) the tax was discriminative against companies which have their headquarters in another member state. As a result, the tax was revoked, but later reintroduced with another name (“food chain inspection fee”). This is a special tax on supermarkets payable on their income, scaling exponentially. However, franchises have to pay differently as business groups. Thus, because the company structure of domestic, Hungarian-owned supermarkets is typically a franchise system, it seems that this newer tax will also be discriminatory against foreign companies, since most of those who have to pay a higher tax will be foreign companies. For example, Tesco paid 600 million forints in 2014, while in 2015 it will have to pay 12 billion forints.<sup>51</sup> The same is true for Spar, having paid 325 million forints and having to pay 9 billion forints for the two years, respectively. According to press news, the tax on CBA (and other domestic chains such as Coop, Réál) will not change significantly in

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Schweppes plc and its IFSC subsidiaries ± tax avoidance or tax mitigation?” in *EC Tax Review* (2007) pp. 13-33.

<sup>50</sup> The rate was 0.1% between HUF 500 million and HUF 30 billion, 0.4% between HUF 30 and HUF 100 billion and 2.5% above HUF 100 billion.

<sup>51</sup> Bizonyos boltok felé lejt a pálya [Some Shops Receive Incentives]. 168 óra, <http://www.168ora.hu/itthon/bizonyos-boltok-fele-lejt-palya-132153.html>.

future because of their franchise system. As an answer, the EU started an infringement procedure against the country, and banned the state to levy the tax.<sup>52</sup>

In the ensuing tussle, the government has also banned the activity of supermarket chains that aren't profitable over any two-year period. Among others, this could include Tesco (with a yearly loss of 43.1 billion forints in 2014) and Spar (with losses of 11 billion). The government had also banned supermarket (hypermarket) building back in December 2011. From that date, no commercial facilities above 300 square meters in area have been allowed to be built (this is the so-called “mall-stop” law, which also resulted in EU infringement proceedings).<sup>53</sup> Finally, Sunday trading by supermarkets was banned. This rule also serves the interests of smaller domestic supermarkets, some of which are allowed to open on Sunday. An interesting answer of the market was that consumers started a boycott against government friendly supermarkets, hereby causing a 25% loss in income e.g. for CBA. As an answer, the supermarket chain changed the name of several of its shops and continued to function this way.

Beside the above, domestic players have been granted other incentives. In 2012, the government passed a law that discriminated against foreign companies by creating the so-called “Erzsébet voucher” (Erzsébet utalvány) and “Széchenyi card” (Széchenyi kártya). Previously, three major multinational firms had been issuing the bulk of such food vouchers (Sodexo, Chèque Déjeuner and Edenred). The vouchers could be given to employees as a tax-free benefit. For a while after the new legislation, only the new state-issued voucher could be given this way, while tax on the other three vouchers was set at 51%. Upon launch, the new vouchers would only be accepted at three domestic supermarket chains, all under sole Hungarian ownership, and most state institutions shifted to using the new vouchers in place of those by the three foreign companies. The EU has initiated infringement proceedings regarding this tax.<sup>54</sup>

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<sup>52</sup> State aid: Commission opens two in-depth investigations into Hungary's food chain inspection fee and tax on tobacco sales. IP/15/5375.

<sup>53</sup> [Commission opens new infringement procedure against Hungary](http://freehungary.hu/index.php/56-hirek/2832-commission-opens-new-infringement-procedure-against-hungary) <<http://freehungary.hu/index.php/56-hirek/2832-commission-opens-new-infringement-procedure-against-hungary>>

<sup>54</sup> Internal Market: the Commission has brought Hungary before the Court of Justice to contest restrictive conditions on the issue of luncheon vouchers and other benefits in kind [http://europa.eu/rapid/press-release\\_IP-13-578\\_en.htm](http://europa.eu/rapid/press-release_IP-13-578_en.htm).

As a result of market distortion, pseudo-independent NGOs can spend billions of forints on pro-government advertising. In most cases, such NGOs receive funding from private companies that have benefited through significant profit hikes thanks to the government's policies. Money also flows from companies directly into the ruling party's budget, enabling it to spend far more on advertisements than the opposition in the parliamentary elections of 2014. Consequently, some sectors of the market became heavily influenced by politics, and independent market rationality has been supplanted by political interests – thus, foreign companies have become obstacles to party financing. This effect clearly shows that there exists a connection between the re-shaping of democratic principles and the market. Rule of law is a part of the market and serves as an institution creating its framework for proper functioning. Rule of law principles for businesses are a part of liberal democracy just as constitutional principles are.

#### *Second Example of Problems: State Presence in Commerce*

Besides corruption, there exists another way for the state to infiltrate the market: by starting to behave like an independent actor. It must be highlighted that a limited number of such actions could be considered normal. For example, even in Western Europe states sometimes buy banks, cooperate with them on financing, nationalise some part of the market if it seems to be beneficial for society. Yet a high level of government presence is held to be unhealthy.

In Hungary, perhaps the best example of such actions has been the government openly expressing its desire for foreign banks to leave the country, and it also introduced special taxes on banks. The head of the Central Bank (the former finance minister) also announced that he believes four major banks should leave the country in one to 15 years. Their actions are also in line with this approach: the government made an offer to buy Raiffeisen's Hungarian organization (the deal eventually fell through). In 2014, it bought a major domestic bank from its foreign owners (Hungarian Foreign Trade Bank - MKB), as well as another major domestic bank (Budapest Bank). In early 2015, the government bought 15% of ERSTE Bank Hungary (other 15% was purchased by the European Bank for Reconstruction and Development). It also nationalized most of the assets of the private pension system, thereby seizing private savings accounts totalling approximately

10 billion euros. Subsequently, in 2014 it also enacted legislation that outlaws most voluntary pension funds. Moreover, it also nationalized most assets of credit unions, including Takarékbank, a traditionally independent network of local credit unions providing financial services. Then the government inexplicably re-privatised the sector: according to press news, it was worth 800 billion forints but was sold for only 9 billion. Sándor Demjén, the head of the Union of Credit Unions called this scheme institutionalised stealing in the domestic press. However, the Constitutional Court approved the law: in their interpretation, property rights had not been violated.<sup>55</sup>

Such anti-market actions can create a lot of headaches for scholars and EU officials. In theory, such actions are partially allowed in the EU legal framework, and in certain areas governments may have great discretion to act. In most cases it is not independent companies that receive subsidies, but rather the government creates state property. This is especially so in the banking sector. However, in the long term, this can lead to state-capitalism, which is clearly contrary to EU rules. Moreover, if companies are subsequently sold off to domestic businessmen, this can serve corruption and the purposes of state capture. Again, discrimination against foreign companies is connected to domestic interests, including political party interests.

*Third example: Russian Presence and Government Aims Mix in Business*

The third problem emerges when the government cooperates with certain foreign companies under opaque circumstances. There is a clear intention on the side of the Government to have the support background of Russian business actors behind them (and to also have good relationships with Chinese, Turkish and Saudi actors). According to press news, Hungary repaid its IMF loans earlier than planned, partly thanks to loans received from Eastern (especially Russian) markets. Furthermore, as announced in early 2014, Russia will get to expand Hungary's only nuclear power station and also lend Hungary €10 billion for this purpose – a huge sum that must be repaid by Hungarian taxpayers.<sup>56</sup> The Commission banned Hungary from cooperating with the Russians in

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<sup>55</sup> See Constitutional Court decision No 20/2014 (VII. 2.).

<sup>56</sup> For the government announcement see <<http://2010-2014.kormany.hu/en/ministry-for-national-economy/news/paks-power-station-instalments-to-be-paid-only-after-tranches-are-drawn>>



such a way (their main problem being that the sole source of fuel supply for the plant would be Russia).<sup>57</sup>

The Hungarian government also strongly supported the Russian-led South Stream pipeline. Parliament approved a bill on 3 November 2014 that allows any company to build pipelines in the country, and PM Orbán made several statements in which he expressed his view that the more sources we have for receiving gas, the better position we achieve.<sup>58</sup> It is also important to mention that in the latest debates between Russia and the EU, PM Orbán opposed using sanctions (although he voted for them in the European Council). Moreover, Russia is currently his model country. This is remarkable in the light of Russia having been one of the greatest enemies of Hungary's nationalists just a couple of years ago. Knowing that Russians allegedly paid for a Hungarian Member of the European Parliament to spy for them,<sup>59</sup> and also that they mostly support lobbying in Brussels through euro-skeptic officials and EP members, some Hungarian journalists also claim that there is strong Russian support behind the Hungarian government. In the context of Russia's intentions regarding Ukraine, this could be very much rational.

To summarize the issues, here is a table of the most important associated actions of the government.

	Main political aim	Relevant primary EU law sources	EU action	Reactions to criticism
<b>Pseudo-independent NGOs make government ads, receive money from businesses loyal to government (circle of corruption)</b>	Boosting party ads	Controversial	N/A	N/A
<b>Supermarkets advertise political parties and receive other benefits (see below)</b>	Boosting party ads	Art 49, 54-55 TFEU (free establishment of companies)	N/A	N/A
<b>Beneficial tax system for local supermarkets</b>	State and company capture	Art 49, 54-55 TFEU (free establishment of companies)	Hervis case (see above), infringement procedure <sup>60</sup>	No effective changes

<sup>57</sup> EU Hinders Hungary-Russia Atomic Deal in Blow for Orban. Bloomberg. <http://www.bloomberg.com/news/articles/2015-03-13/eu-stops-hungary-s-nuclear-pact-with-russia-in-setback-for-orban>

<sup>58</sup> EU Demands Hungary to Clarify Stance on South Stream. <http://www.naturalgaseurope.com/eu-hungary-south-stream>

<sup>59</sup> <http://www.foreignaffairs.com/articles/141492/mitchell-a-orenstein-and-peter-kreko/a-russian-spy-in-brussels>

<sup>60</sup> [http://europa.eu/rapid/press-release\\_IP-15-5375\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5375_en.htm)

<b>Voucher system (for local food and local supermarkets)</b>	State and company capture	Art 49, 54, 55, 56 TFEU (free establishment of companies)	Infringement procedure <sup>61</sup>	Some modifications
<b>Banning Sunday trading</b>	State and company capture, helping party friendly companies	No breach of Article 28 TFEU	N/A	N/A
<b>Closing supermarkets which do not make a profit</b>	Closing affiliates of foreign supermarkets	Art 49 TFEU (free establishment of companies)	N/A	N/A
<b>Banning the building of new shopping malls ('pláza stop')</b>	Supporting Hungarian companies	Art. 49 TFEU (free establishment of companies)	Infringement procedure	N/A
<b>Changes regarding land leases</b>	Creation of government friendly elite	Art. 63 TFEU (free movement of capital)	EU action	N/A
<b>Solution for the purchase of land by foreigners</b>	Controversial	Art. 63 TFEU (free movement of capital)	Infringement procedures <sup>62</sup> <sup>63</sup>	N/A
<b>Large amount of EU money for the construction industry</b>	State and company capture	Rules on transparency and rule of law	Funds partially stopped	N/A
<b>Tax fraud allowed for certain companies</b>	State and company capture, supporting local companies	Art 49 TFEU (free establishment of companies)	N/A	N/A
<b>Money for research institutions loyal to government</b>	Creation of party loyal elites	N/A	N/A	N/A
<b>Funding of numerous government-friendly universities</b>	Creation of party loyal elites	N/A	N/A	N/A
<b>Foreign currency loans – requiring conversion to forint</b>	Helping people	N/A	N/A	N/A
<b>Foreign currency loans – narrowing the scope of possible debtors (earlier method)</b>	Helping people	N/A	EU infringement action stopped	N/A
<b>Foreign currency loans – banks had to sue to maintain former contracts</b>	Populism	N/A	N/A	N/A
<b>Government insider trading in the Quaestor case</b>	Helping the political elite	Article 107 TFEU (state aid)	N/A	N/A
<b>Direct money for right wing newspapers</b>	Creation of party loyal media	Article 107 TFEU	N/A	N/A
<b>Businessmen loyal to government have bought commercial TV stations, publicly available TV stations are mostly loyal state TVs or pseudo-independent TVs</b>	Creation of party media	N/A	Some critics of media architecture	N/A
<b>Targeting the largest TV channel with special taxes (RTL tax)</b>	Creation of party media	Art 49 TFEU, Art. 107 TFEU (discrimination, state aid)	Infringement procedure <sup>64</sup>	Some changes
<b>Problems with radio frequencies</b>	Creation of party media	N/A	N/A	N/A
<b>Registration tax on cars</b>	Controversial	Art. 56 TFEU (discriminative tax)	Infringement procedure <sup>65</sup>	
<b>New law: anti-cartel actions of Competition Authority may be halted by ministry (agricultural products)</b>	State and company capture	Art. 101 TFEU (competition law)	Infringement procedure	N/A
<b>Possible creation of tobacco import monopolies</b>	State and company capture	Art. 49 TFEU	N/A	N/A
<b>Creation of tobacco shops</b>	State and company capture, helping party friendly business	N/A	N/A Infringement procedure (only some)	N/A

<sup>61</sup> [http://europa.eu/rapid/press-release\\_IP-13-578\\_en.htm?locale=FR](http://europa.eu/rapid/press-release_IP-13-578_en.htm?locale=FR)

<sup>62</sup> Free movement of capital: Commission opens infringement procedure against Hungary on rights of cross-border investors to use agricultural land [http://europa.eu/rapid/press-release\\_IP-14-1152\\_en.htm](http://europa.eu/rapid/press-release_IP-14-1152_en.htm).

<sup>63</sup> Financial Services: Commission opens infringement procedures against Bulgaria, Hungary, Lithuania and Slovakia on investor restrictions for agricultural land. [http://europa.eu/rapid/press-release\\_IP-15-4673\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4673_en.htm).

<sup>64</sup> [http://europa.eu/rapid/press-release\\_IP-15-4598\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4598_en.htm).

<sup>65</sup> [http://europa.eu/rapid/press-release\\_MEMO-14-589\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-589_en.htm).

			parts of tax law are problematic) <sup>66</sup>	
<b>Centralizing the school textbook market</b>	Controversial	controversial	N/A	N/A
<b>Special (sectorial) taxes on banks, energy, telecommunications</b>	Controversial	controversial	Procedure dropped <sup>67</sup>	Some changes
<b>State buying banks</b>	Pushing foreign banks out of the market	N/A	N/A	N/A
<b>Nationalizing the central assets of the private pension system</b>	Money for state budget	N/A	N/A	N/A
<b>Banning most private pension schemes</b>	N/A	N/A	N/A	N/A
<b>Nationalising the assets of credit unions, including Takarékbank</b>	State and company capture: sold	N/A	N/A	N/A
<b>Chip tax (for unhealthy foodstuffs)</b>	Well-founded	N/A	N/A	N/A
<b>“Liberalization” of home-made Pálinka</b>	Populism	Art 56. (discriminative tax)	Infringement procedure <sup>68</sup>	Minor changes
<b>State taking loans under worse conditions than those set by IMF</b>	Populism/supposed Russian help for the party	N/A	N/A	N/A
<b>Russians to expand nuclear plant</b>	Populism/supposed Russian help for the party	Art. 107 (state aid)	Commission action against the deal	N/A
<b>Supporting South stream (possibly failed)</b>	Populism/supposed Russian help for the party	Art. 4 TEU	EU statements	N/A
<b>State may only enter into contracts with transparent businesses</b>	Well founded	N/A	N/A	N/A
<b>Independence of the Central Bank changed</b>	Boosting government power	Art. 130 TFEU	Infringement procedure <sup>69</sup>	Minor changes

### III. LET US SEE THE FOREST FOR THE TREES: THE NEED FOR A MORE COMPREHENSIVE APPROACH TO SYSTEMIC BREACHES OF EU LAW

When discussing EU actions, we feel that the European Union is making the same mistake in the context of the single European market as it does when human rights breaches occur in Hungary. Their intention (especially in the initial period when such problems occurred) was to deal with issues one by one. However, the big picture could be more complex than that. According to Imre Vörös, a former judge of the Hungarian Constitutional Court, the parts of the regime (new laws) that violate human rights may be viewed as gears. The gears are connected, and the sum of their complexity may well

<sup>66</sup> [http://europa.eu/rapid/press-release\\_MEMO-14-293\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-293_en.htm).

<sup>67</sup> <http://www.reuters.com/article/2013/07/23/eu-hungary-tax-idUSL6N0FT2DJ20130723>.

<sup>68</sup> <http://hungarytoday.hu/cikk/ec-launches-infringement-procedure-hungary-palinka-tax-rules-28300>.

<sup>69</sup> Commission closes infringement procedure on the independence of the Hungarian central bank. [http://europa.eu/rapid/press-release\\_IP-12-803\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-12-803_en.htm?locale=en).

constitute a deeply anti-democratic regime. When the Venice Commission started to investigate breaches of human rights in Hungary, in its first reports it also only analyzed certain areas, and did not consider the system as a whole. Later, a more holistic approach was deemed more effective. On the EU's part, a good example of a more comprehensive analysis was the Tavares Report on Hungary. Similar observations could be made about single market regulations. We see the Commission constantly engaged in scuffles around individual cases, but there is no comprehensive approach that would evaluate the attitude of a state towards breaches of basic rules. Moreover, besides evaluating actions, we also have to take note that while some EU rules are breached, there is no proper answer from the EU. On Hungary's part, an almost chaotic legal system has emerged, with a large number of dubious laws. This means that in practice, some major rules of the single market amount to nothing more than *lex imperfectas* (rules without proper sanctions) in the sense that they are not followed and measures are not introduced by the Commission to enforce them. Furthermore, in certain cases it took years to start a procedure due to political reasons, thereby giving huge incentives to the companies involved. In other cases, the EU has remained silent and has exhibited a vague, uncertain attitude to the interpretation of the rules. In some cases (e.g. in the Pálinka case), Hungary introduced non-conforming measures to gain time (by setting a very low tax rate instead of the prescribed higher one). Furthermore, some of the legislation breaches basic constitutional principles and conflicts with either the Fundamental Law of Hungary, the European Convention on Human rights, or both. The enacting of such laws was clearly intentional on the part of the government, specifically because it is difficult to handle from outside.

In such chaos, analysing cases individually is not helpful because we may not grasp the full picture of the entire system. If we check the rules on supermarkets, selecting only a subset is not a good strategy for gauging the state of the market. It is far better to grasp some basic tenets of the government's new approach to business, which is undoubtedly here to stay. We must face up to a propensity for the government to routinely put aside EU law as well as national and international constitutional principles. We can see that these are not sporadic problems, but rather a system is being built, which openly favours domestic and partisan businesses, supermarkets as well as banks while pushing foreigners out of the market. These are not occasional, unfortunate actions, but carefully planned laws, which serve the interests of particular domestic groups, and are

obscured by a nationalistic myth. Moreover, they are also concealed by rhetoric against the EU. As such, this is a regime that opposes foreign businesses, but not in all areas. The banking sector and supermarkets are the most crucial arenas in this fight, while other sectors, such as the automotive industry (Mercedes, Audi and Suzuki all have factories in the country), with no domestic competitors are more or less unharmed.

At this point, we can establish that the actions of the EU have been weak and consistently sluggish. It has evidently been a strategy of the government to go up against EU rules, because it believed some of these laws could be bypassed without serious consequences. In several instances, it is questionable why the Commission has not initiated procedures. The website of the Commission is also not informative: we cannot see properly when and what procedures have been started; some actions have been stopped but we cannot tell when and why this has happened. Such a setup does not serve transparency: the European public deserves to be informed of actions related to governments, and also must be able to check documents related to such actions. Law should be separated from politics, and transparent mechanisms need to be applied. If a government is allowed 2 to 3 years to break foreign businesses, it can boost its strategy by moving into illegal territory. Over 2 or 3 discriminatory years some foreign businesses may go bankrupt or leave the country. In a minority of cases, the government had to amend laws. In these cases, changing the laws undoubtedly created extra work for the government, caused conflict with Brussels as well as harmed the reputation of the country. Yet it also resulted in some political success inside the country itself: at the domestic level, the “freedom fight” act is relatively successful from a political point of view. We can but suppose that the extra work was factored into the actions, and that the government judged the political and economic benefits of such actions being greater than the disadvantages. On the other hand, this does not seem to hold true for society at large (especially for lower echelons) because the two motivating factors, namely pure nationalism and corruption do not serve economies well.

The above-mentioned problems also show that fundamental rights have become more and more important for investors. The principle of anti-discrimination in the EU has become a priority for major businesses, which are regularly handled differently to domestic companies. Slowly but surely, companies must receive protection very similar to that enjoyed by humans. In this regard, the fact that multinational companies also

sometimes tend to follow bad local customs (see e.g. the Siemens corruption cases) is not an excuse. A reason for the strong capital out-flow observed could also be instability (such as unpredictable tax changes) and the discriminatory nature of the business environment.

There are several possible responses that could be given for such cases.

Firstly, the EU should develop tools for handling systemic infringements. This question brings us back to the possible answers suggested by scholars cited in the introduction of this paper, namely to responses for human rights breaches and systemic infringements of the European rules. Just as the European scholarly community has started to contemplate a system which could handle the destruction of rule of law in a member state and grasps that the Article 7 TEU procedure is not useful because it is mired in political games, so scholars should think of a system which would enable proper sanctions in case of the distortion of a domestic market and the appearance of institutionalised corruption. Even though there are some guarantees in the current system (such as receiving EU funding being contingent on rule of law and anti-corruption measures), a comprehensive analysis of market breaches is not available today. Moreover, the approach the Commission started to use lately, namely, that it bans the levy of taxes which does not seem to conform with EU law is also a good tool. Possibly, in individual cases, such interim actions could be used more often to stop such actions. The advantage of single market rules against human rights (namely, that strong and clear EU authority exists, unlike e.g. in the case of the Charter of Fundamental Rights) could be used this way.

Secondly, state corruption must be investigated in a more effective way. In a number of cases, as a result of high level corruption in the allocation procedures for EU funds, in an odd way the EU supports the existence of Euro-sceptic and corrupt governments and the elites surrounding them, disrespecting human rights and the free market. In such a system, money flows from the EU directly to domestic oligarchs.

Thirdly, at the political level, there must exist more effective instruments and processes for putting pressure on a government at the political level. In a system such as the EU, domestic planning of actions is extremely important: governments should have a plan of how to stick to the rules they produce within the framework of EU law. If notorious infringements occur, appropriate ways of wielding political pressure should

also be more transparent and available at the EU level. Moreover, the EU should be brave enough to use aggressive political tools in countries to explain its view (like advertisements). The reports adopted by the European Parliament do not serve this purpose well, since they are not followed by action.

Even if this sounds utopistic and idealistic because of present political reasons, economic constraint will probably slowly force the EU to adopt effective measures and procedures against those member states which try to reshape or distort the frameworks of the free and common market. Especially is this true, if it does not want other actors to follow a similar path and fall apart into individual states with no empathy towards each other.