

Seminar on the Rule of Law and the Internal Market of the EU/EEA

In many European jurisdictions, the state of the rule of law has deteriorated significantly over the past few years. Until now, this problem has been dealt with mainly by human rights scholars and constitutionalists. However, since the landmark ruling in the T-791/19 *Sped-Pro* case, it is clear that democratic backsliding affects business law too. Therefore, it is not surprising that this problem gained the attention of several scholars who gathered at a seminar on the subject of “The Rule of Law and the Internal Market of the EU/EEA”. The seminar was organized on 19 May 2023 by the Centre of Antitrust and Regulatory Studies (Faculty of Management, University of Warsaw), the Institute of Legal Sciences of the Polish Academy of Sciences, and the University of Oslo (the Central Europe Chapter of the Academic Society for Competition Law helped with the organisation too).

The seminar was opened by Maciej Taborowski (Professor, Institute of Legal Sciences, Polish Academy of Sciences) who provided participants with a recap of the jurisprudence of European courts concerning the rule of law. His presentation was titled: ‘Relationship between the EU Internal Market and the Value of the Rule of Law’. Professor Taborowski stressed that the ECJ has already confirmed the status of the rule of law as a founding value and a part of the identity of the European Union.¹ Therefore, the rule-of-law jurisprudence of the ECJ should be also applicable in the context of the EU’s internal freedoms (such as freedom of movement of goods, services etc.). However, as the presenter noted, those freedoms oftentimes rely on mutual trust (e.g., in the area of mutual recognition of standards that were established in the *Cassis de Dijon*² case). As a result – whenever the presumption that the member respects the rule of law is rebutted, EU internal freedoms may be impaired.

In the following presentation, Mateusz Grochowski (Assistant Professor, Institute of Legal Sciences, Polish Academy of Sciences; Senior Research Fellow, Max Planck Institute for Comparative and International Private Law) discussed the private law dimension of the rule of law crisis. Professor Grochowski noted that the proper functioning of a single market needs an efficient mechanism of enforcement of private law judgments issued in a different member state. However, it is possible that rule-of-law deficiencies in a particular member state would render (at least in some situations) judgments issued by courts of that member state unenforceable (this is already a case of European Arrest Warrants³). The presenter showed possible negative consequences of such a situation for the functioning of the internal market.

The following presentation was given by Maciej Bernatt (Professor, Centre for Antitrust and Regulatory Studies, University of Warsaw) and concerned the relationship between the rule of law and the EU competition law. Professor Bernatt was drawing conclusions from his previous work in that area (Bernatt, 2022; 2021). According to the presenter, the rule of law crisis poses particular threats to the effective competition law enforcement. This is because several competition law procedures include a mechanism of cooperation between the European Commission and national

¹ Cf. Case C-157/21 *Poland v Parliament and Council* [2022] ECLI:EU:C:2022:98, para 145.

² Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECLI:EU:C:1979:42.

³ Cf. Case 216/18 PPU *LM* [2018] ECLI:EU:C:2018:586.

competition authorities which could be impaired if national competition authority was not independent or objective. A good example are merger control referrals – even though the European Commission has a general duty to assess every merger that falls into its jurisdiction, there are referral procedures that allow for transferring some cases to national competition authorities, among others at the request of one of such authorities. The presenter noted that so far the European Commission has not been referring to rule of law considerations while rejecting referral requests from the Polish Competition Authority (UOKiK) even in cases with an “obvious” political component.⁴

The last presentation was given by Christophe Hillion (Professor, University of Oslo) who reflected upon the rule of law enforcement in the EEA context. Professor Hillion was building his argumentation on the basis of his article (at the time it was not published) (Hillion, 2023). According to the presenter, EFTA countries are in a worse position than their EU counterparts, since no mechanism would allow for an interstate dispute between an EFTA country and an EU member state before the ECJ (EU countries can institute the proceedings defined in Art. 259 TFEU against each other). Therefore, EFTA countries do not have an efficient mechanism to protect the rights of their citizens who may be negatively affected by rule of law backsliding in some EU countries. This weakens the position of citizens of those countries on the EEA internal market. Therefore, Professor Hillion proposes to allow EFTA countries to sue the European Commission for the failure to act if it did not bring an infringement proceeding against the country violating principles of the rule of law.

After the session, Sybe de Vries (Professor, Utrecht University; Honorary Judge, District Court of Rotterdam, the Netherlands), Małgorzata Kozak (Assistant Professor, Utrecht University), Kati Cseres (Assistant Professor, University of Amsterdam) and Dawid Miąsik (Professor, Institute of Legal Sciences, Polish Academy of Sciences; Judge, the Supreme Court of Poland) reflected upon the presentations. After comments made by invited guests, attendees of the seminar could ask additional questions. The discussion was long and fruitful.

The presenters will likely continue researching the nexus between the rule of law and the EU internal market. This is very important since it seems that the number of cases related to the intersection of those two areas of European law will likely be growing.

References

- Bernatt, M. (2021). The double helix of rule of law and EU competition law: An appraisal. *European Law Journal*, 148.
- Bernatt, M. (2022). *Populism and Antitrust: The Illiberal Influence of Populist Government on the Competition Law*. Cambridge University Press.
- Hillion, Ch. (2023). The EU External Action as mandate to uphold the rule of law outside *and* inside the Union. *Cambridge Journal of European Law*, 228.

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⁴ See, for instance, Commission Art. 9(3) decision dated 6.02.2018 COMP/M.8665 *Discovery/Scripps*.