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RESEARCH ARTICLE

Competition in Times of Democratic Crisis: Domestic Judicial Reforms and the Effectiveness of EU Competition Law

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Abstract
Democratic backsliding is becoming increasingly widespread, filtering into not just constitutional law but other areas of substantive Union law. This article explores this phenomenon by focusing on how domestic judicial reforms spread to the day-to-day operation of EU competition law. It references two fundamental principles of Union law – mutual trust and effective judicial protection – before focusing on the European Competition Network, which requires national competition authorities to cooperate when discharging their duties under Union law. Lastly, it discusses the systemic consequences this can have for the operation of EU competition law, the internal market, and EU law more broadly.

Keywords: EU law; competition law; judicial independence; mutual trust; effective judicial protection; rule of law

I. Introduction

The link between democracy and competition law has received widespread academic coverage, both in the EU and beyond.[1] In recent years, however, EU law scholarship has increasingly turned towards the specific developments witnessed in both Poland and Hungary, two countries that have undergone a well-documented process of democratic backsliding.[2] In the latter country, notes Cseres, a set of reforms to the Hungarian Competition Act has 'tarnished the young but effective competition law system that developed … in the period after 1989'.[3] In Poland, writes Bernatt, 'the relocation of judicial review of competition law cases to the Extraordinary Control Chamber', brought about through the Law on the Supreme Court of 2017, has 'raise[d] doubts concerning whether the guarantees of

[1] See, eg, E Fox, 'Antitrust and Democracy: How Markets Protect Democracy, Democracy Protects Markets, and Illiberal Politics Threatens to Hijack Both' (2019) 46 (4) *Legal Issues of Economic Integration* 317; E Deutscher and S Makris, 'Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus' (2016) 11 (2) *Competition Law Review* 181; M Bernatt, *Populism and Antitrust: The Illiberal Influence of Populist Government on the Competition Law System* (Cambridge University Press, 2022), chs 3–5.

[2] On Poland, see L Pech and KL Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3; and L Pech, P Wachowiec, and D Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 *Hague Journal on the Rule of Law* 1. On Hungary, see G Halmai, 'An Illiberal Constitutional System in the Middle of Europe' in *European Yearbook of Human Rights* (2014) 497; and M Bánkuti, G Halmai, and KL Scheppele, 'Hungary's Illiberal Turn: Disabling the Constitution' (2012) 23 (3) *Journal of Democracy* 138.

[3] K Cseres, 'Rule of Law Challenges and the Enforcement of EU Competition Law: A Case-Study of Hungary and Its Implications for EU Law' (2019) 14 (1) *Competition Law Review* 75, at 75 and 87–88.

judicial independence in hearing such cases are sufficient'.[4] In both cases, the process surrounding the appointment of the presidents of their respective national competition authorities (NCAs) has raised questions about their level of de facto independence vis-à-vis their executives.[5]

This article focuses on the enforcement of EU competition law to address a broader question: to what extent does democratic backsliding within certain Member States affect the operation of EU economic law beyond that Member State's own borders? It will be argued that, as democratic backsliding has consolidated in certain Member States, its consequences are no longer confined to constitutional law *stricto sensu*. As a result, the Union's 'rule of law crisis'[6] is entering a new stage in its evolution: one in which its impact is increasingly affecting the operation of substantive EU law. Faced with this scenario, a second, related problem arises: namely, how to remedy the consequences of rule of law backsliding in integrated systems such as that underlying the European Competition Network (ECN). Addressing this question will require an analysis of whether, and, if so, how, the toolbox developed within the Area of Freedom, Security, and Justice (AFSJ) can be employed in the context of EU competition law. This question, as well as the legal and normative tensions it raises, will be the focus of the latter part of this article.

In order to explore these issues, the present article will proceed as follows. First, it will set out its 'building blocks', arguing that domestic rule of law–related developments are 'channelled' into the internal market through the principles of mutual trust and effective judicial protection (Section II). It will then focus on the case study in question, discussing why democratic backsliding poses a threat to the ECN (Section III.A), how mutual trust can be suspended within the framework of Directive 2019/1 (Section III.B), and whether it can be suspended in competition law more broadly (Section III.C). After setting out a proposal to amend the 2019 Directive in order to safeguard the ECN's operation (Section III.D), Section IV will conclude.

II. The building blocks: mutual trust and effective judicial protection

Understanding the impact of the rule of law crisis on EU competition law requires the bridging of a seemingly wide gap: that between democratic backsliding, a phenomenon that can be thought to pertain to (domestic) constitutional law, and substantive Union law. For present purposes, two building blocks will be employed to carry out this exercise: mutual trust and the principle of effective judicial protection (PEJP).

[4] M Bernatt, 'Rule of Law Crisis, Judiciary and Competition Law' (2019) 46 (4) *Legal Issues of Economic Integration* 345, at 350–352.

[5] M Bernatt, 'The Double Helix of Rule of Law and EU Competition Law: An Appraisal' (2021) 27 (1–3) *European Law Journal* 148, at 153–157.

[6] For the purposes of this article, the 'rule of law crisis' will be understood as the sustained process of democratic backsliding that some EU Member States have witnessed since 2010. This is not to say, however, that similar developments did not take place prior to 2010: on how the 'Haider affair' led to the drafting of Article 7 TEU, see W Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider' (2010) 16 (3) *Columbia Journal of European Law* 385. Similarly, it is not suggested that the Member States referred to throughout this article – primarily Hungary and Poland – are the only ones to have engaged in calculated violations of EU law in the past: on this point, see, eg, M Reynolds, S Macrory, and M Chowdhury, 'EU Competition Policy in the Financial Crisis: Extraordinary Measures' (2011) 33 (6) *Fordham International Law Journal* 1670, at 1713–1720. However, the systemic dimension of the backsliding witnessed in Poland and Hungary makes them stand out, both politically and legally. In relation to Hungary, a 2022 resolution from the European Parliament concluded that the country was no longer a full democracy but a 'hybrid regime of electoral autocracy': see the European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902 R(NLE)). In relation to Poland, the capture and irregular composition of numerous judicial bodies, not least the Constitutional Tribunal, has given rise to systemic problems in the operation of the rule of law, as acknowledged by the ECtHR in *Wałęsa v Poland* App no 50849/21 (23 November 2023). The democratic decline witnessed in both countries has also been addressed by democracy indices such as V-Dem: see, eg, M Nord and others, *Democracy Report 2024: Democracy Winning and Losing at the Ballot* (V-Dem Institute, 2024) 17.

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The principle of mutual trust is of 'fundamental importance' in EU law.[7] As set out by the Court of Justice of the European Union (CJEU), it requires Member States, 'save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law'.[8] Alongside the principle of mutual recognition, 'which is itself based on mutual trust', the latter 'allow[s] an area without internal borders to be created and maintained'.[9] It is therefore central not only to the AFSJ, as the Court has repeatedly emphasised, but also to the very operation of Union law.[10]

Mutual trust is particularly relevant in facilitating the phenomenon addressed in this article because of its clear link with the rule of law crisis. As the latter has become entrenched in certain Member States, national courts in other countries have become increasingly sceptical of the actions of their executive and judiciaries. This has been particularly obvious in relation to Poland's judicial reforms, which have themselves given rise to a considerable number of rulings by the CJEU and the European Court of Human Rights (ECtHR).[11] The *systemic* dimension of this crisis was most recently highlighted by the Strasbourg Court, which noted:

> At present, that is to say eighteen months after the *Advance Pharma sp. z o.o.* judgment, there are as many as 492 pending … cases concerning the judicial reform in Poland. Most of them concern the alleged breach of the right to an independent and impartial tribunal established by law under Article 6 § 1 of the Convention on account of the applicants' cases having been heard by formations of the Supreme Court, ordinary courts or administrative courts including judges appointed to their office in the defective procedure involving the [National Council of the Judiciary] as established under the 2017 Amending Act.[12]

In other words, in a legal order that is premised on *trust* between its Member States, there has instead been an obvious increase in judicial and legal *distrust*, both vertically (through an increasing recourse to supranational courts, which have therefore acquired an increasingly central role) and horizontally (through a greater involvement by other domestic judiciaries).[13]

However, focusing solely on mutual trust can provide only a partial explanation for the phenomenon addressed throughout this article. A more promising research avenue is provided, instead, by addressing both mutual trust *and* the PEJP, a general principle of EU law derived from the Court's

[7] Joined Cases C-562/21 PPU and C-563/21 PPU *Openbaar Ministerie (Tribunal established by law in the issuing Member State)* ECLI:EU:C:2022:100, para 40.

[8] *Opinion 2/13 (Accession of the European Union to the ECHR)* ECLI:EU:C:2014:2454, para 191, restated in Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* ECLI:EU:C:2016:198, para 78, and more recently in Case C-158/21 *Puig Gordí and Others* ECLI:EU:C:2023:57, para 93.

[9] See Case C-699/21 *EDL* ECLI:EU:C:2023:295, para 30; and Joined Cases C-562/21 PPU and C-563/21 PPU *Openbaar Ministerie*, para 40.

[10] K Lenaerts, 'La Vie Après l'Avis: Exploring the Principle of Mutual (yet Not Blind) Trust' (2017) 54 (3) *Common Market Law Review* (2017) 805, at 809.

[11] Some of the leading CJEU judgments include: Case C-204/21 *Commission v Poland (Independence and private law of judges)* ECLI:EU:C:2023:442; Case C-791/19 *Commission v Poland (Disciplinary regime for judges)* ECLI:EU:C:2021:596; and Joined Cases C-585/18, C-624/18, and C-625/18 *AK and others (Independence of the disciplinary chamber of the Supreme Court)* ECLI:EU:C:2019:982. Conversely, the ECtHR has addressed these developments in rulings such as *Tuleya v Poland* App nos 21181/19 and 51751/20 (6 July 2023); *Juszczyszyn v Poland* App no 35599/20 (6 October 2022); *Xero Flor w Polsce sp. z o.o. v Poland* App no 4907/18 (7 May 2021); and *Zurek v Poland* App no 39650/18 (16 June 2020).

[12] *Wałęsa v Poland* App no 50849/21 (ECtHR, 23 November 2023). More recently, this figure was revised to around 700 pending applications: see "Rule-of-law" cases against Poland adjourned (*ECHR*, 20 November 2024). https://www.echr.coe.int/w/-rule-of-law-cases-against-poland-adjourned#:~:text=The%20processing%20of%20applications%20submitted,adopt%20general%20measures%20following%20the.

[13] Although Poland has been the main focus of the case law, it is not the only example of such horizontal judicial distrust: for a recent example, albeit in a radically different context, see Case C-158/21 *Puig Gordí*, in which a Belgian court cast doubt on the jurisdiction of the Spanish Supreme Court for the purposes of the execution of an EAW.

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jurisprudence[14] and subsequently constitutionalised through the Lisbon Treaty and Article 47 of the Charter of Fundamental Rights (CFR).[15] As with mutual trust, an in-depth analysis of the PEJP, its evolution, and its implications would be beyond the scope of this article.[16] However, neither the impact of democratic backsliding on EU law nor the case study discussed in this contribution can be understood without addressing it.

Düsterhaus has identified '[t]wo broad situations in which mutual trust and effective judicial protection may give rise to conflicting obligations'.[17] The first such situation arises '[w]here there is no effective remedy or fair trial to contest a measure referring a person's situation from one Member State's jurisdiction to another' – for example, in cases where a defendant challenges a European arrest warrant (EAW) issued by a Member State which the defendant argues infringed his Article 47 CFR rights. The latter, on the other hand, involves situations 'where there is no effective remedy or fair trial to contest the recognition and enforcement of a home State measure abroad'.[18] This can arise, for example, in the context of civil justice, where certain regulations have removed – or severely curtailed – the *exequatur* procedure, thus affording national courts very little autonomy to scrutinise decisions handed down in other Member States.[19]

The tension between the obligations posed by mutual trust and those derived from the PEJP lies at the heart of the challenge which the rule of law crisis poses to the operation of EU law. This problem is made yet more acute by what Episcopo has labelled the 'regulatory insufficiency' of EU law: namely, that the Union 'largely relies on the substantive and procedural rules' of its Member States for its enforcement.[20] The decentralised enforcement of Union law, traditionally referred to as the 'national procedural autonomy' of the Member States,[21] means that a national judge faced with a case from a Member State that he has reasons to distrust will be confronted with conflicting obligations: as well as balancing questions of mutual trust with those of effective judicial protection, that judge will have to assess whether the obligations derived from the case law of the ECtHR are compatible with those derived from EU law, and how they respectively play out in any given case.

This, particularly in light of the EU's hitherto failed accession to the European Convention on Human Rights (ECHR), has given rise to a 'delicate exercise of interpretation and application of norms' by national courts.[22] Often, Moraru notes, they will be tasked with bridging the gap between the divergent standards of the CJEU and the ECtHR. This is an exercise that courts repeatedly face in criminal cooperation and in asylum cases,[23] but also in those concerning EU civil

[14] Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* ECLI:EU:C:1986:206, paras 18–19.

[15] For a recent landmark judgment highlighting the constitutional dimension of the PEJP – which, as the Court of Justice has argued, applies in all fields covered by EU law – see Case C-204/21 *Commission v Poland (Independence and private law of judges)*. See also L Pech, 'Doing Justice to Poland's Muzzle Law' (*Verfassungsblog*, 13 June 2023) https://verfassungsblog.de/doing-justice-to-polands-muzzle-law/.

[16] See for such purposes S Peers and others (eds), 'Article 47', in *The EU Charter of Fundamental Rights: A Commentary*, 2nd ed (Hart, 2021); and F Krenc and E Penninckx, 'Article 47 – Droit à un recours effectif et à acceder à un tribunal impartial' in F Picod, C Rizcallah, and S Van Drooghenbroeck (eds), *Charte des droits fondamentaux de l'Union européenne: Commentaire article par article*, 3rd ed (Bruylant, 2020) 1215.

[17] D Düsterhaus, 'Judicial Coherence in the Area of Freedom, Security – Squaring Mutual Trust with Effective Judicial Protection' (2015) 8 (2) *Review of European Administrative Law* 151, at 157.

[18] Ibid, 157.

[19] Ibid, 161–170.

[20] F Episcopo, 'The Vissicitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law Before National Courts' in P Craig and G de Búrca (eds), *The Evolution of EU Law*, 3rd ed (Oxford University Press, 2021) 275, at 277.

[21] P Craig and G de Búrca, *EU Law: Text, Cases and Materials*, 7th ed, UK version (Oxford University Press, 2020) 273.

[22] M Moraru, '"Mutual Trust" from the Perspective of National Courts: A Test in Creative Legal Thinking' in E Brouwer and D Gerard (eds), *Mapping Mutual Trust: Understanding the Role of Mutual Trust in EU Law*, Working Paper EUI/MWP 2016/13, 37–58, at 48.

[23] Ibid, 44–45. See the landmark judgments in Joined Cases C-411/10 and C-493/10 *NS and ME v Secretary of State for the Home Department and Others* ECLI:EU:C:2011:865; and in Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*. Both will be addressed in greater detail in Section III.C.

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justice.[24] As this article illustrates, they are also likely to arise in the context of EU competition law.

In the competition law context, however, two separate PEJP-related issues can be identified. On the one hand, domestic judicial reforms can raise questions about *judicial* independence: that is, about the independence of courts tasked with hearing competition law appeals.[25] This is most famously the case in Poland, where such appeals have been transferred to the Extraordinary Control and Public Affairs Chamber, a chamber which the ECtHR declared to violate Article 6(1) of the ECHR in *Wałęsa v Poland* and which the Court of Justice excluded from the preliminary reference mechanism in *Krajowa Rada Sądownictwa*.[26] On the other hand, reforms of – and appointments to – NCAs can also raise questions about the compliance of these administrative authorities with EU law. As will be set out later, these scenarios can have consequences for the operation of the ECN. More broadly, however, NCAs' obligation to comply with the requirement of independence can give rise to questions of (quasi-)judicial independence in their application of EU competition law: for example, when enforcing – or, indeed, choosing *not* to enforce – Articles 101 or 102 TFEU. This is particularly the case in relation to cartel investigations, which on top of 'increasingly severe fines'[27] can sometimes lead to the imposition of custodial sentences,[28] and which may therefore give rise to quasi-criminal enforcement by national authorities.[29] In such cases, upholding the fundamental rights of defendants will be essential to ensure the legitimacy – and even the validity, as the *Żurek* doctrine might suggest[30] – of any decision handed down by a domestic court. Upholding said rights will require, among other things, complying with the PEJP, both under the EU Treaties (Articles 19 TEU and 47 CFR) and under the ECHR (Article 6).

Where both such issues arise – in other words, where the independence of both the NCAs and the courts comes into question – the distinct problems raised by democratic backsliding may be conflated, both in practical terms and in their theoretical analysis. However, and although the present article will mostly deal with the former, their distinct nature, and their respective implications, are nonetheless worth highlighting.

Finally, it is worth noting that the importance of the PEJP, and therefore of national courts' compliance with Articles 19 TEU and 47 CFR, is not merely internal: it is also essential for their participation in the preliminary reference mechanism, which has been referred to as the 'keystone' of the judicial system established by the Treaties.[31] Indeed, it has long been established that, for the purposes of Article 267 TFEU, a 'court or tribunal' wishing to engage in the preliminary reference procedure

[24] M Weller, 'Mutual Trust within Judicial Cooperation in Civil Matters: A Normative Cornerstone – A Factual Chimera – A Constitutional Challenge' (2017) 35 *Nederlands Internationaal Privaatrecht* 64, at 90–92. Most famously, see the ECtHR's ruling in *Avotiņš v Latvia* [GC] App no 17502/07 (23 May 2016), especially at paras 113–116.

[25] In relation to subsequent actions for damages, eg, the Damages Directive refers to both national competition authorities and 'review courts': see Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1, recitals 34–36 and Art 9.

[26] See respectively ECtHR, *Wałęsa v Poland*; and Case C-718/21 *Krajowa Rada Sądownictwa (Maintien en fonctions d'un juge)* EU:C:2023:1015.

[27] S De Sanctis, 'Cartel Offences: Quasi-criminal Enforcement for Criminal Behaviour?' in V Franssen and C Harding (eds), *Criminal and Quasi-criminal Enforcement Mechanisms in Europe: Origins, Concepts, Future* (Hart, 2022) 271, at 272.

[28] This is not the case in Poland itself, where competition law violations simply give rise to financial sanctions. However, some Member States do envisage custodial sentences for cartel or bid-rigging offences: see B Agrawal, 'Whither Criminal Cartel Enforcement in the EU? A Law and Economics Assessment' (2023) 1 *Erasmus Law Review* 46, at 47–48.

[29] De Sanctis, 'Cartel Offences'.

[30] See Case C-487/19 *WŻ (Chambre of extraordinary control and public affairs of the Supreme Court – Nomination)* ECLI:EU:C:2021:798, annotated in R Mańko and P Tacik, 'Sententia Non Existens: A New Remedy under EU Law? Waldemar Żurek (W. Z.)' (2022) 59 (4) *Common Market Law Review* 1169, at 1176.

[31] For example, in Case C-430/21 *RS (Effects of the decisions of a constitutional court)* ECLI:EU:C:2022:99, para 73; and *Opinion 2/13*, para 176.

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must both be independent and constitute a court or tribunal 'established by law'.[32] Where domestic judicial reforms render this impossible, their participation in the preliminary reference mechanism may be compromised,[33] putting at risk both the rights of applicants relying on this procedure and the very operation of the 'complete system of legal remedies and procedures'[34] set out in the Treaties. The Court's landmark judgment in *Krajowa Rada Sądownictwa*[35] provides the best – but not the most recent[36] – example of how this can come about.

In light of this, and while mutual trust must feature heavily when understanding the impact that democratic backsliding can have upon the operation of substantive EU law, any such research endeavour will also have to address the PEJP and the jurisprudence that has emerged from Article 47 CFR: it is precisely at the intersection between the two, it is suggested, that the most interesting developments are taking place. The following sections will address this intersection by reference to one specific case study: namely, the consequences of democratic backsliding upon the operation of the ECN.

III. The case study: cooperation between Member States within the ECN

The previous section has set out how mutual trust and the PEJP, which play a transversal role in the operation of Union law, can channel domestic democratic developments into the EU's legal order, acting as 'legal transmission belts' from the former into the latter. Building upon this framework, the present section will provide an example of this phenomenon by focusing on the operation of the ECN.

Member States' cooperation in the application of EU competition law is governed by Regulation 1/2003[37] and Directive 2019/1,[38] both of which provide a framework for their cooperation by prescribing a set of procedural and substantive obligations that NCAs must abide by. Since the framework governing the ECN is underpinned by mutual trust, as the General Court held in the *Sped-Pro* judgment,[39] domestic measures that jeopardise the operation of mutual trust between NCAs can prove an existential threat for the ECN. The following sections will discuss how this phenomenon can unfold.

[32] Case C-132/20 *Getin Noble Bank* ECLI:EU:C:2022:235, para 66; Case C-274/14 *Banco de Santander* ECLI:EU:C:2020:17, para 51 and the case law cited therein. Note, however, that the Court of Justice has acknowledged that the assessments under Arts 267 TFEU and 47 CFR serve different purposes and may therefore take different factors into consideration: C-132/20 *Getin Noble Bank*, para 74.

[33] C Reyns, 'Saving Judicial Independence: A Threat to the Preliminary Ruling Mechanism?' (2021) 17 (1) *European Constitutional Law Review* 26.

[34] *Opinion 1/09 (Agreement Creating a Unified Patent Litigation System)*, ECLI:EU:C:2011:123, para 70.

[35] Case C-718/21 *Krajowa Rada Sądownictwa*.

[36] At the time of writing, a further five orders have been handed down in which the Court of Justice, applying *Krajowa*, has declared inadmissible requests for preliminary rulings from the Extraordinary Control and Public Affairs Chamber: see Case C-22/2 *T. (Audiovisual programmes for children)* EU:C:2024:313; Case C-390/22 *Rzecznik Finansowy* EU:C:2024:419; Case C-720/21 *Rzecznik Praw Obywatelskich (Polish extraordinary appeal)* EU:C:2024:489; Case C-43/22 *Prokurator Generalny (Polish extraordinary appeal II)* EU:C:2024:459; Case C-810/23 *Kancelaria B.* EU:C:2024:543. In November 2024, the reasoning in *Krajowa* was extended to a single-judge formation of the Civil Chamber of the Supreme Court: see Case C-326/23 *Prezes Urzędu Ochrony Konkurencji i Konsumentów* EU:C:2024:940.

[37] Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty [2003] OJ L1/1.

[38] Directive (EU) 2019/1 of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L11/3.

[39] Case T-791/19 *Sped-Pro SA v European Commission*, ECLI:EU:T:2022:67, paras 85 and 88. In *Sped-Pro*, the applicant, a Polish company, sought the annulment of a decision by the Commission not to examine its complaint on the grounds that the Polish NCA was best placed to do so. In its second plea before the General Court, the applicant argued that this rejection infringed its right to effective judicial protection under Art 19 TEU, read in light of Arts 2 TEU and 47 CFR. It did so, according to the applicant, because the systemic and generalised deficiencies in the rule of law in Poland, evidenced by the capture of its courts and the lack of independence of its NCA, meant that the Commission should have examined the complaint itself, rather than holding that it was for the Polish NCA to do so.

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A. Democratic backsliding as a threat to the European Competition Network

The ECN comprises the European Commission and Member States' competition authorities. 'The network is a forum for discussion and cooperation in the application and enforcement of [EU] competition policy' and 'provides a framework for the cooperation of European competition authorities in cases where [Articles 101 and 102 TFEU] are applied.'[40] Under Directive 2019/1, there are three main contexts in which 'mutual assistance' between two or more NCAs (for present purposes, authorities 'A' and 'B') may prove necessary. First, this will be the case where B carries out inspections or interviews for the purposes of an investigation on behalf of A, in which case A will be able to appoint an official to witness these interviews or inspections.[41] Second, such mutual assistance is required where A requests that B notify a party based in Member State B of any preliminary objections or other documents related to the application of Articles 101 and 102 TFEU in Member State A.[42] Third, these instances may arise where A requests that B enforce a decision – for example, on a fine or a penalty payment – issued by A.[43]

These scenarios are governed by a set of 'general principles of cooperation', both formal and substantive, which are set out in Article 27 of the Directive. These principles include that requests to execute fines or penalty payments comply with the national law of the requesting Member State; that such requests contain the information required by the 'uniform instrument' established by the Directive; and that the final decision (to execute or refuse the request) be taken solely in accordance with said instrument.[44] Most interestingly, as will be discussed, Article 27(6) also sets out two instances in which NCAs may refuse the execution of a request: whereas Article 27(6)(a) mandates compliance with certain procedural requirements, Article 27(6)(b) constitutes a classic public policy exception.

Regulation 1/2003 and its explanatory notices[45] also contain a set of mechanisms that rely on cooperation between national authorities: among others, they require NCAs and the Commission to cooperate when allocating cases,[46] when sharing information or evidence about ongoing investigations,[47] and when advising one another on proceedings initiated by any given national authority.[48]

The 2019 Directive, in other words, establishes a system of conditional mutual recognition: it is governed by a presumption that the executing states will give effect to requests for cooperation, but subject to two specific instances – set out in Article 27 – in which they may ensure that the relevant procedural and substantive requirements have been complied with. Indeed, the notions of 'mutual assistance' and 'mutual cooperation', which underlie the mechanisms outlined earlier, presuppose a minimum standard of trust in other national authorities. If authority A cannot rely on authority B complying with its obligations under Union law, it is very unlikely to cooperate to the extent required by EU competition law. In other words, and as is the case with mutual trust in the AFSJ, NCAs must be able, 'save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law'.[49]

In the case of competition law, compliance with Union law involves upholding the standards set out in the 2003 Regulation and the 2019 Directive, including those related to NCAs' adherence to

[40] Commission Notice on cooperation within the Network of Competition Authorities [2004] C101/3 (Network Notice), para 1.

[41] Directive 2019/1, Art 24(1).

[42] Ibid, Art 25.

[43] Ibid, Art 26.

[44] Ibid, Arts 27(1)–(4).

[45] For present purposes, see the Network Notice.

[46] Network Notice, paras 5–30.

[47] Regulation 1/2003, Art 12; Network Notice, paras 16–28.

[48] Regulation 1/2003, Art 14.

[49] Case T-791/19 *Sped-Pro SA*, paras 84–85, by reference to *Opinion 2/13*, para 191.

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fundamental rights when implementing EU competition law[50] and those on their independence vis-à-vis their national governments.[51] Where it becomes obvious that a Member State is falling short of such standards – for example, because its NCA ceases fully to comply with its obligations, or owing to judicial reforms that have brought judicial independence into question – it may no longer be possible for other national authorities to uphold the presumption set out in the Court's case law.[52] As will be developed later, it is here that the link between recent developments in the AFSJ and those in EU competition law becomes most obvious.

B. Suspending mutual trust: a precedent and its lessons for the ECN

As has been argued, where there is concrete evidence that a 'tainted'[53] NCA is not complying with the minimum safeguards required by EU law – such as those of independence laid out in the 2019 Directive – the effectiveness of the EU competition framework may be jeopardised. This can arise, for example, where requests for cooperation involving certain Member States cannot be properly executed. Similarly, it can arise where NCAs begin to carry out exhaustive checks, thereby slowing down the cooperation mechanisms set out in the different legal instruments.

There are three main ways in which 'clean' and 'tainted' NCAs may be required to cooperate within the framework established by the 2019 Directive. In the first such scenario, a 'clean' NCA will receive a request from a 'tainted' NCA which it wishes to reject, for example because it suspects that the request is politically motivated or because it considers that the necessary procedural guarantees have not been complied with. In the second such scenario, a 'clean' NCA submits a request for cooperation to a 'tainted' NCA but receives an unsatisfactory response: for example because it questions, once again, whether the relevant procedural requirements have been complied with. Finally, there can arise a situation in which, faced with an alleged violation of Union law which requires both authorities to cooperate, the 'tainted' NCA refuses to act for reasons of political convenience.

Where such misgivings are substantial – for example, where NCAs entertain *serious* doubts that parties' procedural rights are not being complied with in a certain Member State, or where a pattern emerges of a NCA's enforcement activity being unduly influenced by the government – a situation can arise in which the second step in the Court's mutual trust case law – namely, the 'exceptional circumstances' doctrine – could be triggered.[54] In such cases, it is not inconceivable that mutual trust within the ECN could be suspended, or at least curtailed, vis-à-vis certain Member States.

The questions discussed throughout this article, which focus on the extent to which NCAs can suspend their cooperation vis-à-vis 'tainted' authorities, are particularly relevant in relation to the first scenario; in the second and third scenarios, refusing to engage with a 'tainted' authority will obviously be of little use to the 'clean' NCA, and therefore to the ECN more generally. However, two points are worth making. First, addressing the first scenario is important in itself, providing valuable insight into how to limit the impact of 'tainted' NCAs upon the operation of cross-border competition

[50] Directive 2019/1, Art 3.

[51] Ibid, Art 4.

[52] M Borgers, 'Putting the "Trust" in Antitrust: The Impact of the Rule of Law Crisis on Trust between National Competition Authorities under Regulation 1/2003' (LLM thesis, University of Amsterdam, 2021), pp. 27–28.

[53] This article will use the term 'clean' NCA to refer to a national authority that complies with the requirements set out in Union law. Conversely, a 'tainted' NCA will be one that is faced with questions about its compliance with these requirements. Although the term 'captured' is often used by commentators in the context of democratic backsliding, this article will instead refer to 'tainted' NCAs. By encompassing a wider range of practices that may contravene EU law whilst falling short of the traditional 'capture' of an administrative authority, this term is arguably better at reflecting the legal and administrative complexities underlying the governance of these authorities across the EU's Member States.

[54] Borgers, 'Putting the "Trust" in Antitrust', 29–30. On the 'exceptional circumstances' doctrine, see L Macano, 'The Systemic and the Particular in European Law – Judicial Cooperation in Criminal Matters' (2023) 24 (6) *German Law Journal* 962; and C Rizcallah, 'The Principle of Mutual Trust and the Protection of Fundamental Rights in the Area of Freedom, Security and Justice: A Critical Look at the Court of Justice's Stone-by-Stone Approach' (2023) 30 (3) *Maastricht Journal of European and Comparative Law* 255, at 261–267.

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enforcement. Second, and no less importantly, doing so will shed light on broader questions – such as the role played by mutual trust or the PEJP in the governnce of the ECN – which will help us understand how the second and third scenarios can be addressed by 'clean' authorities.

Before engaging with how mutual trust could be suspended within the ECN, however, it is worth addressing the case of the European Network on Councils of the Judiciary (ENCJ), which provides a (limited) precedent of why, and under what circumstances, a collegiate body can choose to expel one of its members for rule of law–related reasons.

The ENCJ is an association that brings together national councils of the judiciary from across Europe. Its aim, according to its statutes, is 'the improvement of cooperation between, and good mutual understanding amongst', national councils both in the EU Member States and in candidate countries.[55] In September 2018, after the Polish government's threefold judicial reform package had entered into force, the ENCJ agreed to suspend the membership of Poland's National Council of the Judiciary (KRS), one of its constituent national bodies. It did so because, owing to the aforementioned reforms, the KRS was deemed no longer to fulfil the basic requirement for membership of the Network: namely, that national councils be 'independent of the executive and legislature and ensure the final responsibility for the support of the judiciary in the independent delivery of justice'.[56]

The argument put forward by the ENCJ, which was developed in its successive position papers, was essentially one of mutual trust.[57] Given that membership of the Network required 'cooperation between, and good mutual understanding amongst, the Councils of the Judiciary', it also mandated 'a common responsibility to uphold … the rule of law and the independence of the judiciary within that order'. As a result of the 'extreme circumstances' of the Polish reforms, however, those minimum safeguards – and therefore the mutual trust required for ENCJ membership – could no longer be presumed by the other members of the Network. In October 2021, seeing as 'no improvements in the functioning of the KRS had been noted' following the suspension, and that the situation had, in fact, 'further deteriorated', the ENCJ moved to expel the KRS. To this date, there is no indication that the KRS will rejoin the ENCJ any time soon.

The comparison between the ENCJ and the ECN is far from perfect. To begin with, there is no secondary legislation governing the relationship between national judiciaries, whether on an individual or on a systemic level. Additionally, whereas Article 6(4) of the ENCJ Statutes expressly envisages the expulsion of a member that commits 'serious breaches' of its aims and objectives, no analogous provision exists in the legal instruments governing the ECN. Nor is the ENCJ, ad hoc body, subject to the same legal obligations as the ECN. However, there is nonetheless a very close link between the events that led to the KRS's expulsion and the developments which this extract builds on when discussing how the effectiveness of EU competition law can be undermined. This is the case for five reasons.

First, because the KRS's expulsion resulted *directly* from the judicial reforms this article builds on. Second, because the ENCJ's reasoning draws on both the pillars set out earlier: mutual trust (cooperation and mutual understanding between national councils are raised when explaining why the KRS's actions have fallen short of the standards required by the Network) and effective judicial protection (the ENCJ repeatedly highlights the need for national councils to stand up for judicial independence in their respective countries). Third, because the consequences which the ENCJ feared – namely, that

[55] Statutes, Rules, and Regulations of the International Not-for-Profit Association European Network of Councils of the Judiciary (i.n.p.a.), Art 3, www.encj.eu/statutes (ENCJ Statutes). All links in this article last accessed 28 November 2024.

[56] 'ENCJ Suspends Polish National Judicial Council – KRS' (ENCJ, September 2018) www.encj.eu/node/495. See also 'Position Paper of the Board of the ENCJ on the Membership of the KRS of Poland': https://shorturl.at/UDDkb. The KRS's expulsion from the ENCJ was addressed by the ECtHR in *Dolińska-Ficek and Ozimek v Poland* App nos 49868/19 and 57511/19 (8 November 2021), in which the Strasbourg Court acknowledged the KRS's lack of independence vis-à-vis the Polish executive and legislature, as well as the incompatibility of the judicial appointment procedure involving this body with Art 6(1) of the Convention: see *Dolińska-Ficek and Ozimek v Poland*, particularly at paras 353–357.

[57] As well as the 'Position Paper of the Board' (n 55), see 'Proposal of the Executive Board of the ENCJ to Expel KRS': https://shorturl.at/6DlRv.

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the KRS's lack of independence would result in a breakdown in mutual trust that could jeopardise the functioning of the Network as a whole – are very similar to those which, as this article hypothesises, could arise in the context of the ECN. Fourth, because a close reading of the ENCJ's statutes showcases some operational similarities between the ENCJ and the ECN – in the exchange of information, the sharing of best practices, and the provision of expertise – that strengthen this comparison.[58] Finally, because the analogy illustrates that, where certain national legislative and political developments can give rise to a breakdown in mutual trust within a similarly structured collegiate network, radical measures may be warranted to protect the network's 'bad apple' from contaminating the rest of the bunch.

As is argued throughout this article, the consequences of this breakdown of mutual trust will not be limited to bodies operating within the AFSJ:[59] the latter can also have a very real impact on the operation of Union competition law. The suspension of mutual trust within the ECN, which will be discussed in the following section, provides the first example of said impact.

C. *Suspending mutual trust for the purposes of the 2019 Directive*

Having explored the precedent of how mutual trust was suspended within the ENCJ, how, if at all, could this be carried out within the ECN? In principle, there are two possible legal bases for this suspension, which could be either ad hoc or systemic.

On the one hand, where substantial concerns arise concerning a given NCA, other national authorities could conceivably rely on the 2019 Directive to refuse the execution of *individual* cooperation requests by the 'tainted' NCA. The legal basis for this can be found in Article 27(6)(b) of the Directive, the public policy exception that allows a national authority to suspend the execution of a request under Articles 25 or 26 of the Directive where it is 'able to demonstrate reasonable grounds showing how the execution of the request would be manifestly contrary to public policy in the Member State in which enforcement is sought'.[60]

Understanding how national courts are to interpret this provision is far from straightforward: at the time of writing, the Court of Justice has not handed down any decisions on its interpretation.[61] However, since public policy exceptions are common in Union law, including in legislative instruments dealing with economic matters,[62] there are analogous provisions which can be drawn on when assessing its possible scope. Given that its structure and wording are reminiscent of the public policy exception contained in Article 45(2) Brussels I-*a* Regulation and its predecessors,[63] it is conceivable that the Court of Justice could choose to interpret Article 27(6)(b) of the 2019 Directive in a similar manner.

For the purposes of this article, two main patterns can be gleaned from the case law on the public policy exceptions in the successive Brussels Regulations. On the one hand, the Court of Justice has made it repeatedly clear that, although the public policy exception is to be applied by national courts, its outer limits must be set by the Court itself.[64] Therefore, national courts do not have unfettered

[58] Compare Art 4 of the ECNJ Statutes with Arts 12 and 18 of Regulation 1/2003 and Arts 24–27 of Directive 2019/1.

[59] Although the ENCJ is not an EU body, Art 4 of its statutes holds that it operates 'within the framework of the creation of the European Area of freedom, security and justice'.

[60] Directive 2019/1, Art 27(6)(b).

[61] See https://curia.europa.eu/juris/recherche.jsf?language=en#.

[62] See T Corthaut, *EU Ordre Public* (Kluwer Law, 2012).

[63] See Art 45(1)(a) of Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) OJ L351/289 (Brussels I-*a*), preceded by Article 34(1) of Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L12/1 (Brussels I); and by Article 27(1) of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters OJ L299/32.

[64] This approach goes all the way back to C-7/98 *Krombach* ECLI:EU:C:2000:164, paras 22–23.

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discretion when defining what constitutes 'public policy' for the purposes of the Regulations: instead, they will have to ensure that the factors they rely on do not exceed those outer boundaries.[65] On the other, the Court of Justice has also endorsed a strict interpretation of the public policy exception: although its case law makes increasingly frequent references to fundamental rights, and in particular to Article 47 CFR,[66] mutual trust and mutual recognition are deemed fundamental in ensuring the AFSJ's effectiveness. For this effectiveness to be achieved, exceptions such as Article 45(2) of Regulation 1215/2012 must be interpreted narrowly, and only 'manifest' breaches of parties' fundamental rights can justify suspending mutual trust for the purposes of the Regulation.[67] The test which has been set for the exception to be triggered, in other words, is by no means easy to achieve.

However, although the case law on different civil justice instruments is underlaid by the need to facilitate mutual recognition and to ensure the effectiveness of the AFSJ – sometimes, arguably, at the expense of effective judicial protection[68] – the Court of Justice has also set clear limits to the operation of mutual trust within this framework. Indeed, it has recalled that the application of such instruments by national courts constitutes an 'implementation' of Union law for the purposes of Article 51(1) CFR, and must therefore comply with the fundamental rights contained therein.[69]

In *Cornelius de Visser*,[70] a case concerning the limits of Regulation 805/2004,[71] it held that the abolition of checks in the state of enforcement was inextricably linked to sufficient guarantee of observance of rights of the defence; where the defendant was unaware of the proceedings instituted against them, such guarantees would be lacking and the Regulation precluded the certification of the enforcement order issued against them.[72] In *eco cosmetics and Raffeisen Bank*,[73] the Court of Justice concluded that, where the minimum requirements for service of documents in Regulation 1896/2006[74] had not been fulfilled, the defendant's procedural rights would be violated. Indeed, if this was detected *after* the payment order had been issued, the executing state would have to allow the defendant to raise this irregularity and would have to render the payment order invalid.[75] As Storskrubb notes, the rights of the defence were further strengthened in *Imtech Marine*,[76] in which the Court held that national courts faced with a request for a European enforcement order must satisfy themselves that their national legal system allows for a full review of the judgment in question when the circumstances for such a review, which are set out in the Regulation, are satisfied.[77]

[65] See, most recently, Case C-590/21 *Charles Taylor Adjusting Ltd* ECLI:EU:C:2023:633, paras 33–34; Case C-633/22 Real Madrid EU:C:2024:843, para 35.

[66] For example, in Case C-112/13 *A v B and Others* ECLI:EU:C:2014:2195, paras 51 and 58. Although this case concerns Art 24 of the Brussels I Regulation, the Court expressly noted that *all* provisions thereof must be interpreted in a way that, within the scope of its objectives, respects fundamental rights, including Art 47 CFR.

[67] See, eg, Case C-619/10 *Trade Agency v Seramico* ECLI:EU:C:2012:531, paras 48–51; Case C-302/13 *flyLAL-Lithuanian Airlines* ECLI:EU:C:2014:2319, paras 45–49.

[68] Case C-559/14 *Rudolfs Meroni* ECLI:EU:C:2016:349, paras 38 and 41; Case C-681/13 *Diaego Brands* ECLI:EU:C:2015:471, para 68, or Case C-302/13 *flyLAL-Lithuanian Airlines*, paras 45–49.

[69] Case C-156/12 *GREP* ECLI:EU:C:2012:342, paras 31 and 43; Case C-559/14 *Meroni*, paras 43–44.

[70] Case C-292/10 *G v Cornelius de Visser*, ECLI:EU:C:2012:142, discussed in E Storskrubb, 'Mutual Trust and the Dark Horse of Civil Justice' (2018) 20 *Cambridge Yearbook of European Legal Studies* 179, at 190.

[71] Regulation (EC) No 805/2004 of the European Parliament and of the Council creating a European Enforcement Order for uncontested claims [2004] L143/15.

[72] Case C-292/10 *G*, para 68.

[73] Joined Cases C-119/13 and C-120/13 *eco cosmetics and Raffeisenbank* ECLI:EU:C:2014:2144.

[74] Regulation (EC) No 1896/2006 of the European Parliament and of the Council creating a European order for payment procedure [2006] OJ L399/1.

[75] Storskrubb, 'Mutual Trust', at 191.

[76] Case C-300/14 *Imtech Marine Belgium NV v Radio Hellenic SA* ECLI:EU:C:2015:825.

[77] Storskrubb, 'Mutual Trust', at 190. In *Imtech Marine*, the Court expressly referred to Art 47 CFR at para 38.

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Although the issues highlighted herein are raised in the particular context of civil justice, it is argued that the balance struck by this line of case law could be applied by analogy when fleshing out the scope of the public policy exception in the 2019 Directive. A national competition authority could argue, in other words, that although mutual cooperation must generally predominate, it is entitled to ensure that its counterpart has upheld the parties' procedural rights, including those derived from Article 47 CFR.[78] If these requirements are not complied with, it could plausibly call for its suspension in the particular case before it – for example, by refusing to execute a request for the enforcement of a penalty payment where it suspects that a party's fundamental rights have been manifestly breached, or by delaying its execution until it has obtained further information about the procedure that has been followed before the requesting state. In such cases, Article 27(6)(b) provides the tools through which to address said concerns, enabling competition authorities to assess whether these considerations are sufficiently serious to outweigh any concerns about mutual recognition or mutual trust and, where necessary, suspending mutual trust on a one-off basis.

D. Suspending mutual trust beyond the 2019 Directive

Beyond the public policy exception in the 2019 Directive, could NCAs faced with such concerns conceivably choose to suspend their cooperation on a more systemic level: for example, by suspending the general operation of Articles 11 or 12 of the 2003 Regulation vis-à-vis specific Member States? Arguably, it is here that the Polish KRS's expulsion from the ENCJ provides the best analogy: after all, the ENCJ relied on mutual trust-like arguments *permanently* to suspend its cooperation with the KRS. As will be set out here, however, this would not be easy, either legally or in practice.

Given that the 2003 Regulation does not include a public policy provision, or indeed any other clause allowing for a suspension of cooperation vis-à-vis a given national authority, Member States that sought to limit the operation of mutual trust within the ECN's framework would have to rely on the case law of the Court of Justice on the AFSJ. In particular, they would have to draw on the jurisprudence on the limits of mutual trust – one which arose in relation to the transfer of asylum seekers under the Dublin Scheme,[79] which was exported to judicial cooperation in criminal matters,[80] and which the General Court recently extended to competition law in the aforementioned *Sped-Pro* judgment.[81]

Of course, the by-analogy application of *LM* to the competition law context is far from uncontroversial and raises many delicate questions, both of a general nature and in the specific context of Union law. On the one hand, it can be queried whether the by-analogy application of a judicial test developed in relation to one specific legislative instrument (in this case, the EAW Framework Decision[82]) to a wholly different legislative context (the enforcement of EU competition law by the European Commission or by national competition authorities) is normatively defensible.[83] On the other, one can legitimately question whether the *Sped-Pro* ruling ought not be limited to its peculiar context: the specific procedure before the European Commission, or the fact that one of the companies in

[78] Indeed, the fact that the 2019 Directive provides a clear list of procedural and substantive rights could be thought to make this assessment easier, since NCAs would not be required to engage in a wholly abstract assessment but would instead be able to rely on the Directive itself.

[79] Joined Cases C-411/10 and C-493/10 *NS and ME*.

[80] Most notably, in Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* and in Case C-216/18 PPU *LM v Minister for Justice and Equality (Deficiencies in the system of justice)*, ECLI:EU:C:2018:586 (*LM*).

[81] Case T-719/19 *Sped-Pro*.

[82] Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member [2002] OJ L190/1 (EAWFD).

[83] On the limits of reasoning by analogy in EU law, see K Langenbucher, 'Argument by Analogy in European Law' (1998) 57 (3) *Cambridge Law Journal* 481, at 502–521. More generally, see M Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice* (Cambridge University Press, 2014).

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question was state-owned, could each call for a narrow interpretation of the General Court's judgment.[84] However, whilst acknowledging this, and for the purposes of this section, it will be presumed that the judgment constitutes good law and can therefore be relied on by courts operating within the Union's legal order.

As highlighted, suspending the operation of mutual trust in individual cases beyond the specific context of Article 27(6)(b) of Directive 2019/1 would require carrying out the two-step analysis established in the post-*Aranyosi* case law. First, the national authority in question would have to point to systemic or generalised deficiencies in the requesting Member State. (In the present case, such deficiencies would presumably have to impact upon the operation of its national competition authority.) Second, it would have to identify the impact of those generalised deficiencies on the individual case before it.[85] Only if both limbs were complied with would it be able to suspend its cooperation vis-à-vis its counterpart.

Even if the two-step test were satisfied, it is unlikely that any such suspension of mutual trust could be general in nature or whether it would affect only the individual case in question. In relation to the EAW, both the EAWFD[86] and the Court of Justice[87] have made it clear that a generalised suspension can take place only where the European Council has handed down a decision pursuant to Article 7(2) TEU.[88] No such *ex ante* limitation can be found either in the 2003 Regulation or in the 2019 Directive, both of which limit themselves to stating that fundamental rights must be complied with when their respective provisions are being implemented. Although this could be relied on to argue that national authorities implementing the competition *acquis* have greater leeway than those operating within the confines of the EAWFD, there is little reason to believe that the Court of Justice, faced with such a request, would endorse a radically different conclusion in the context of competition law, one in which fundamental rights concerns are less salient than in the AFSJ.

Even if, in individual cases, it were legally possible to suspend the operation of mutual trust within the ECN by extending *LM*, this exercise would give rise to considerable practical difficulties. This is particularly the case in relation to the second limb – the individual assessment – which the Court has defined stringently in its increasingly extensive body of case law.[89] Although this restrictive interpretation has been defended as an attempt to prevent the fragmentation of the AFSJ,[90] it has been criticised by numerous commentators for being unduly narrow and for placing a seemingly unsurmountable burden on individuals bringing cases before national courts,[91] for example when trying to demonstrate that generalised legal and political developments (such as judicial reforms) have an impact on individual applicants.[92]

[84] On the latter, see R Ferreira Gomes, '*Sped-Pro* v. *Commission*: Beware of the Rule of Law' (2023) 7 (1) *European Competition and Regulatory Law Review* 76, at 79.

[85] Case C-216/18 PPU *LM*, para 68.

[86] EAWFD, recital 10.

[87] Joined Cases C-562/21 and C-563/21 *Openbaar Ministerie*, para 64.

[88] As noted by C Rizcallah, 'The Principle of Mutual Trust', 262.

[89] Case C-216/18 PPU *LM*, paras 68 and 75; Case C-562/21 *Openbaar Ministerie*, paras 83–86.

[90] K Lenaerts, 'On Checks and Balances: The Rule of Law within the EU' (2023) 29 (3) *Columbia Journal of European Law* 25, at 43.

[91] Space constraints preclude a more in-depth analysis of these critiques and their merits. However, they are discussed at length in the following articles: P Bárd, 'In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law' (2021) 27 (1–3) *European Law Journal* 185; P Bárd and J Morijn, 'Luxembourg's Unworkable Test to Protect the Rule of Law in the EU: Decoding the Amsterdam and Karlsruhe Courts' Post-LM Rulings (Part I)' (*Verfassungsblog*, 18 April 2020), https://shorturl.at/rAeMp; M Krajewski, 'Who Is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges' (2018) 14 (4) *European Constitutional Law Review* 792, at 804–806 and 811; W Van Ballegooij and P Bárd, 'The CJEU in the Celmer Case: One Step Forward, Two Steps Back for Upholding the Rule of Law within the EU' (*Verfassungsblog*, 29 July 2018) https://shorturl.at/l1KJA.

[92] T Wahl, 'Refusal of European Arrest Warrants Due to Fair Trial Infringements' (2020) *eucrim* 321, at 324.

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As Borgers has noted, these evidentiary difficulties could be yet more acute in disputes involving EU competition law. Whereas cases involving the execution of an EAW have a clear individual impact on the defendant in question, and therefore make it easier to fulfil the second *LM* limb, this need not always be the case in relation to competition law. This is the case because 'the demands of the internal market and competition law are, for the most part, general in nature', and the selective (non-)enforcement of competition law is often difficult to link to specific market operators, who may struggle to demonstrate the requisite specific impact.[93] In a sense, this problem is reminiscent of the difficulties faced for many years, under the stringent test set out in *Plaumann*,[94] by applicants whose interests were affected by a legal act but who struggled to establish that they were 'individually concerned' by the act in question.[95]

A good illustration of these procedural difficulties is provided, albeit in a slightly different context, by the dispute in *Sped-Pro* itself. Although the applicant argued that the Commission had 'infringed its obligation to handle the complaint within a reasonable time' in taking more than two years to address its complaint, and despite the General Court's willingness to entertain this argument, the latter concluded that, on the facts, the applicant had failed to demonstrate how this alleged infringement had had an *actual* impact on its ability to defend itself during the proceedings in question.[96] Of course, this need not mean that applying *LM* to competition cases is impossible: as long as the parties in question can demonstrate that they were individually affected by the systemic developments taking place within the Member State in question – for example, as a result of a violation of the PEJP – the door is left open for them by *Sped-Pro*. However, Wahl's detailed study of national courts' approach to the suspension of mutual trust in the execution of EAWs showcases just how high a bar the Court of Justice has set.[97] There is little reason to think that this bar would be much lower in competition law cases.

Whatever the likelihood of mutual trust being suspended within the ECN, the mere fact that this question can be seriously entertained shows one way in which national legislative developments such as those described earlier in this article can pose a threat to the enforcement of EU competition law. By calling into question the existence of mutual trust vis-à-vis certain Member States, such national developments can threaten the operation of a network that is dependent on competition authorities trusting one another when carrying out many of the functions set out in Regulation 1/2003 and Directive 2019/1.

E. An alternative approach: could 'tainted' NCAs be suspended from the ECN?

The previous sections have explored two possible ways in which the impact of 'tainted' NCAs upon EU competition enforcement could be contained. It has first been asked whether individual requests for cooperation could be suspended *within* the framework provided by the 2019 Directive. Building on this, it has been queried whether other suspensions of cooperation could be envisaged, for example by suspending the application of EU secondary law beyond the scope of the Directive. Although the former has been shown to be legally feasible, the latter has been shown to be more difficult, both legally and in practice. Before concluding, it is therefore worth exploring two further scenarios: first, whether a 'tainted' NCA could be suspended from the ECN itself; and second, more broadly, whether

[93] Borgers, 'Putting the "Trust" in Antitrust', 30–31.

[94] Case 25/62 *Plaumann* ECLI:EU:C:1963:17.

[95] On this point, see A Albors-Llorens, 'Sealing the Fate of Private Parties in Annulment Proceedings? The General Court and the New Standing Test in Article 263(4) TFEU' (2012) 71 (1) *Cambridge Law Journal* 52, at 52. For a different approach to standing in cases involving the internal market, see the 'substantial adverse effect' criterion in relation to state aid decisions adopted under Art 108(3) TFEU (eg in Case C-453/19 P *Deutsche Lufthansa v Commission* ECLI:EU:C:2021:608, paras 59–62).

[96] Case T-791/19 *Sped-Pro*, paras 25 and 29–31.

[97] See Wahl, 'Refusal of European Arrest Warrants'.

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NCAs can be thought to have a *primary law* obligation not to cooperate with 'tainted' NCAs regardless of whether secondary legislation provides for this possibility.

In relation to the second such possibility, it is unlikely that the EU treaties, as they currently stand, provide a sufficiently robust legal basis upon which Member States' competition authorities could rely to refuse cooperation with 'tainted' competition authorities.

However, a possible normative case for the first such proposal – namely, the suspension of 'tainted' NCAs from the ECN – has already been made throughout this article. To begin with, it has been noted that the very nature of EU competition enforcement, and in particular of the ECN, renders the former particularly vulnerable to 'tainted' national authorities, which can jeopardise the operation of EU competition within a Member State and, in doing so, can threaten the uniform application of the competition *acquis* throughout the internal market. It has also been suggested that the centrality of mutual trust and the PEJP to competition enforcement renders the latter 'legal transmission belts,'[98] channelling developments in one Member State into the totality of the internal market. Building on this, it has been argued that Union law ought to be able to protect itself from such internal challenges, minimising the impact that these 'tainted' authorities can have upon its legal order. Notwithstanding this, the legal mechanisms to give effect to this protection have been shown to be far from clear: although the suspension of individual requests for cooperation may indeed be possible under the public policy clause contained in the 2019 Directive, a systemic suspension of the application of EU secondary law has been shown to be more difficult, both normatively and legally.

The possibility of suspending an NCA from the ECN is not envisaged in any of the documents establishing the latter: neither the 2019 Directive, nor the Network Notice, nor the Joint Statement of the Council and the Commission[99] refers to this possibility. And although the case of the ENCJ has been discussed, its precedential value has been shown to be limited: it is neither a body governed by EU law, nor does it establish how European judges are to interact with one another on an individual basis to the extent to which the 2019 Directive governs the interaction between NCAs. In other words, the possibility of using the existing EU legal framework to address the problems raised in this article is remote. This does not mean, however, that a solution cannot be envisaged. It is submitted that Member States could, for example, amend the 2019 Directive to provide for such safeguards. In fact, the timing for this reform could hardly be better: according to Article 35 of the Directive, the Commission must present a report on its transposition and implementation by 12 December 2024, and 'may review the Directive and, if necessary, present a legislative proposal [for its reform]'.[100]

A legislative amendment that provided for the possibility of suspending an NCA's membership of the ECN would not only grant this decision greater legal and political legitimacy; it would also help to clarify some of the procedural and substantive issues that any such suspension raises. Procedurally, several questions arise. To begin with, would the Commission or the Member States be tasked with proposing a national authority's suspension? Either scenario would have profound implications for the allocation of competences within EU competition enforcement, and hence for the latter's constitutional architecture: whereas affording this competence to Member States would provide a further avenue for the 'transnational judicial review'[101] of other authorities' conduct, an approach that could upset the presumption of mutual trust which the Court of Justice has placed at the heart of Union law,

[98] A term borrowed from D Düsterhaus, 'Judicial Coherence in the Area of Freedom, Security and Justice', 157.

[99] Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, https://shorturl.at/DDl7u, although at para 3 it is noted that: 'This Joint Statement is political in nature and does therefore not create any legal rights or obligations. It is limited to setting out common political understanding shared by all Member States and the Commission on the principles of the functioning of the Network.'

[100] Directive 2019/1, Art 35.

[101] On which, see C Warin, 'A Dialectic of Effective Judicial Protection and Mutual Trust in the European Administrative Space: Towards the Transnational Judicial Review of Manifest Error?' (2020) 13 (4) *Review of European Administrative Law* 7; and, by analogy, G Íñiguez, 'The Enemy Within? Article 259 TFEU and the EU's Rule of Law Crisis' (2022) 23 (8) *German Law Journal* 1104, at 1116–1119.

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granting this prerogative to the Commission would render the latter an 'enforcer of last resort' within the ECN, introducing a 'vertical' dimension into the Network's largely horizontal architecture. Once a suspension was proposed, could the final decision to suspend an NCA be taken by the national authorities acting within the ECN or would it have to be adopted by the Council,[102] as is the case under recital 10 of the EAW Framework Decision? Would qualified majority voting (QMV) suffice or would a higher threshold[103] be required? Once again, all of these questions would have institutional ramifications stretching beyond the specific scenario raised by this article.

Any such legislative amendment would also have to address the substantive implications of suspending national authorities. It would need to consider, for example, whether any such decision would result in a full suspension from the ECN or whether its effects would be of a more limited scope. Similarly, it would have to clarify whether (and, if so, how) a suspension could be revoked: would the 'tainted' NCA have to satisfy certain 'milestones', for example in relation to its independence? If so, who would set them and monitor them? Finally, in order to ensure the coherence of the Union's rule of law toolbox, a legislative amendment could set out how this suspension mechanism could interact with other soft law and hard law instruments designed to protect the rule of law within the European Union. These could include the different budgetary conditionality instruments,[104] the European Semester, or the annual Rule of Law Report. In providing for all of this, however, the EU legislator would have to be careful not to overstep the mandate of the NCAs or the Network, a move that could upset the allocation of competence between the national authorities and the Commission.

The aforementioned questions, which are by no means exhaustive, illustrate the difficulties that any amendment to the 2019 Directive would raise. However, the legal and political picture presented throughout this article also highlights the importance of considering these issues: faced with growing concerns about the independence of national regulatory authorities across the Union,[105] modifying the 2019 Directive to ensure that the Union's toolbox is fit for purpose may be one of the best ways of safeguarding competition enforcement within the ECN, and hence within the EU more broadly. Given that the 2019 Directive is up for review by the end of 2024, there may be no better time to ask these questions. However, this will require both the EU legislator and the NCAs to step in, acknowledging the 'capture' of some of their counterparts and expressing their political willingness to modify the legal framework within which they operate.

IV. Conclusion

This article has sought to illustrate how domestic judicial developments in the EU's Member States can have an impact on the effectiveness of EU competition law throughout the internal market. It has been shown that this impact can encompass the operation of the ECN, which may see many of its functions jeopardised if mutual trust between national competition authorities breaks down. Other such examples have not been addressed throughout this article. However, it is argued that similar consequences will also be faced in other areas of competition enforcement, including the judicial enforcement of EU competition law in the Member States or the operation of follow-on actions for damages brought under Article 9 of the Damages Directive, both of which rely on mutual trust and on the PEJP. This can have a further, existential consequence: namely, that such reforms result in

[102] Presumably sitting in its COMPET configuration, on which see: www.consilium.europa.eu/en/council-eu/configurations/compet/.

[103] As required, eg, under the procedures of Arts 7(1) (four-fifths majority) and 7(2) (unanimity) TEU.

[104] For a detailed analysis of these instruments, see L Detre, A Jakab, and T Lukácsi, 'Comparing Three Financial Conditionality Regimes and Their Application to Hungary: The Conditionality Regulation, the Recovery and Resilience Facility Regulation, and the Common Provisions Regulation' (Max Planck Institute, 2023).

[105] Although this article has mostly drawn on examples from Poland and Hungary, it has already been noted that this issue is not confined to those Member States. For a case concerning the dismissal of the president (and a board member) of a regulatory authority in an 'old' Member State, see the Court's judgment in Case C-424/15 *Ormaetxea Garai and Lorenzo Almendros* ECLI:EU:C:2016:780.

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a gradual fragmentation of the internal market, where the Union's competition law *acquis* ceases to apply in a uniform manner across all Member States.[106] Indeed, as has been set out, it is the horizontal role that both mutual trust and the PEJP play in the operation of EU competition law that renders the latter particularly vulnerable to democratic backsliding within the Member States, of which judicial reforms provide perhaps the best example.

Although much of the focus has been on Poland and Hungary, two Member States affected by a far-reaching rule of law crisis, the main premise set out throughout this article – that the systemic impact set out here results from the central role which mutual trust and the PEJP play in the operation of EU competition law – makes this analysis applicable *beyond* said countries. After all, questions about how Member States apply EU law are as old as the Union itself, and the lessons that exploring such questions can teach us – about the effectiveness of Union law, about how the latter is to be implemented domestically, and about how to strike the balance between mutual recognition and effective judicial protection – are of significant value for all Member States.

Returning to the specific context of democratic backsliding, however, further important questions are raised by this research. On the one hand, it must be queried whether the AFSJ's approach to mutual trust – epitomised by the *Aranyosi* and *LM* judgments – ought to be extended to competition law in the first place. In other words, even if it is acknowledged that democratic backsliding can spread – and *is* spreading – into other areas of substantive EU law, do their respective peculiarities call for a different approach from that embraced in the AFSJ?[107] The evidentiary and procedural difficulties highlighted throughout this article, in particular in cases of non-enforcement by domestic authorities, may call for a distinct approach for economic contexts, for example through a less restrictive interpretation of the second *LM* limb. In the context of direct actions, it may also warrant a more flexible standing test – one that acknowledges the peculiarities of rule of law backsliding, the difficulties it may pose for those seeking to exercise their right to effective judicial protection, and the need for the Union to adapt to a changing legal, social, and political context, as other European courts have done in recent months.[108] Although this article focuses on EU competition law, it is suggested that its lessons could apply more broadly.

On top of this, it can be asked whether Union law already provides adequate tools to address the legal spillovers explored in this article. Are public policy provisions, such as that contained in Article 27(6) of the 2019 Directive, enough to mitigate the consequences of this phenomenon? If such provisions *are* deemed sufficient, is there any need to 'export' the AFSJ case law beyond the instances set out in Article 67 TFEU, or can a piecemeal approach – one that utilises the specific instruments contained in EU secondary legislation – be envisaged? Conversely, if it is thought that such provisions *are* insufficient, what additional tools can be envisaged, and does the delicate balancing exercise at stake require that the EU legislator, rather than the Court of Justice, steps in?[109] The manifold issues raised by these questions have been illustrated in relation to the 2019 Directive itself, an amendment of which could contribute to strengthening the operation of the ECN.

Needless to say, competition law is not the only area of Union law in which such questions may arise.[110] It does, however, provide a good example of how they might play out. As democratic backsliding becomes a structural aspect of the EU's political and legal reality, addressing these concerns

[106] On the danger of this resulting in 'legal black holes' within the EU's legal system, see RD Kelemen, 'Is Differentiation Possible in Rule of Law?' (2019) 17 *Comparative European Politics* 246, at 258.

[107] Similar questions were raised, albeit in a different context, in S Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council Got It Wrong?' (2004) 41 (1) *Common Market Law Review* 5.

[108] In the context of climate change, see the ECtHR's judgment in *Verein Klimaseniorinnen v Switzerland* App no 53600/20 (9 April 2024).

[109] On the latter, see D Sarmiento, 'A Comment on the CJEU's Judgment in LM' (2018) 25 (4) *Maastricht Journal of European and Comparative Law* 385.

[110] As illustrated, eg, by M Bernatt and A Jones, 'Populism and Public Procurement: An EU Response to Increased Corruption and Collusion Risks in Hungary and Poland' (2022) 41 *Yearbook of European Law* 11.

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will become increasingly important. It is by facilitating such discussions, and by understanding how the present rule of law crisis can be harnessed to improve the operation of substantive EU law, that this article seeks to contribute to the academic (and political) debate.

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