

The Pro-Democratic Role of Competition Law: From Diagnosis to the Analysis of Political Risks

Maciej Bernatt

Setting the stage

Context:

- Current debates on EU competitiveness/innovation
- but more crucially (?) erosion of democracies and geopolitics

Competition law and policy part of it: Debate on goals of competition law and ongoing evolutions linked in particular to rise of digital markets and now AI.

So what role of competition law today? Can it be seen as a pro-democratic instrument? What endangers the role of competition law?

Approach

A lecture draws on my legal–doctrinal research on EU and national laws and empirical study of variety of sources (literature and expert reports, agencies’ and courts case–law, agencies’ annual reports supplemented with context–specific in–depth interviews) concerning Hungary (2010–2020) and Poland (2015–2020) supplemented with the study of the U.S. since the beginning of Donald Trump presidency and examples from other jurisdictions.

Populism and Antitrust

The Illiberal Influence of Populist Government on the Competition Law System

Maciej Bernatt



CAMBRIDGE

Structure

Part 1. Democracy and Competition Law: Exploring Substantive and Procedural Links

Paper: [Democracy and Competition Law](#) (2024)

Part 2. Politicization of Competition Agencies and Instrumentalization of Enforcement

Papers:

[Politicization of Competition Agencies: Framework Fit for Trump Era](#) (2025)

[The Rising Instrumentalisation of Competition and Antitrust Enforcement](#) (2026, with Ariel Ezrachi)

Definitions

Democracy

- ❖ **Narrow understanding:** democracy is “a system in which incumbents lose elections and leave office when the rules so dictate” (Przeworski and others, Democracy and Development, 2000)

vs.
- ❖ **Broad understanding:** goes beyond the majoritarian theory and includes the protection of civil liberties and media freedom, separation of powers, and respect for rule of law (Sadurski, Equality and Legitimacy, 2008), i.e. constitutional (liberal) democracy

Democratic backsliding

“the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate, or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party” (Scheppele and Pech, 2017)

⇒ **a gradual process of reversal** (different from an undemocratic status quo or democratic shortcomings existing in any democracy)

Rule of Law and Illiberalism

Anti-arbitrariness as a key notion

Krygier argues that the rule of law should be defined by its purpose or end, not merely by its institutional forms or formal checklists: Its central aim is the reduction and taming of arbitrary power.

The rule of law exists to ensure that power — particularly state power — is exercised in ways that are not arbitrary, unpredictable, or uncontrolled.

Part 1.
**Pro-democratic role of
competition law**

Competition (antitrust) law

Rules about:

- A) Anticompetitive agreements (prohibition)
- B) Monopolisation or abuse of dominance (prohibition)
- C) Mergers (control of)

Example: Reg. 139/2004

Article 2, Reg. 139/2004 states that

“a concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market”

Evolution - role of competition law

- 1) History (U.S., Western Europe, Central-Eastern Europe and Global South)
- 2) Evolution: Chicago school and more economic approach
Consumer welfare as a disputed concept
- 3) Practice today and empirical studies, e.g. Stylianou, Iacovides (2020)

Question about the relation of competition law and democracy subject to debate:
Deutscher (theory), Fox (Global South), Waller (process), Ezzachi/Robertson (digital markets), Crane (U.S.)

Empirical question: when actually competition enforcement promotes/safeguards democracy?

Substantive link (1)

Check on the use/abuse of market power

- ❖ may help in preserving democracy
- ❖ imposes limits on the use of market power

Areas:

- ❖ media markets
- ❖ markets where links with political power exist (SOEs, politically connected private firms' power)

vs.

cartel of high-end restaurants which raises prices

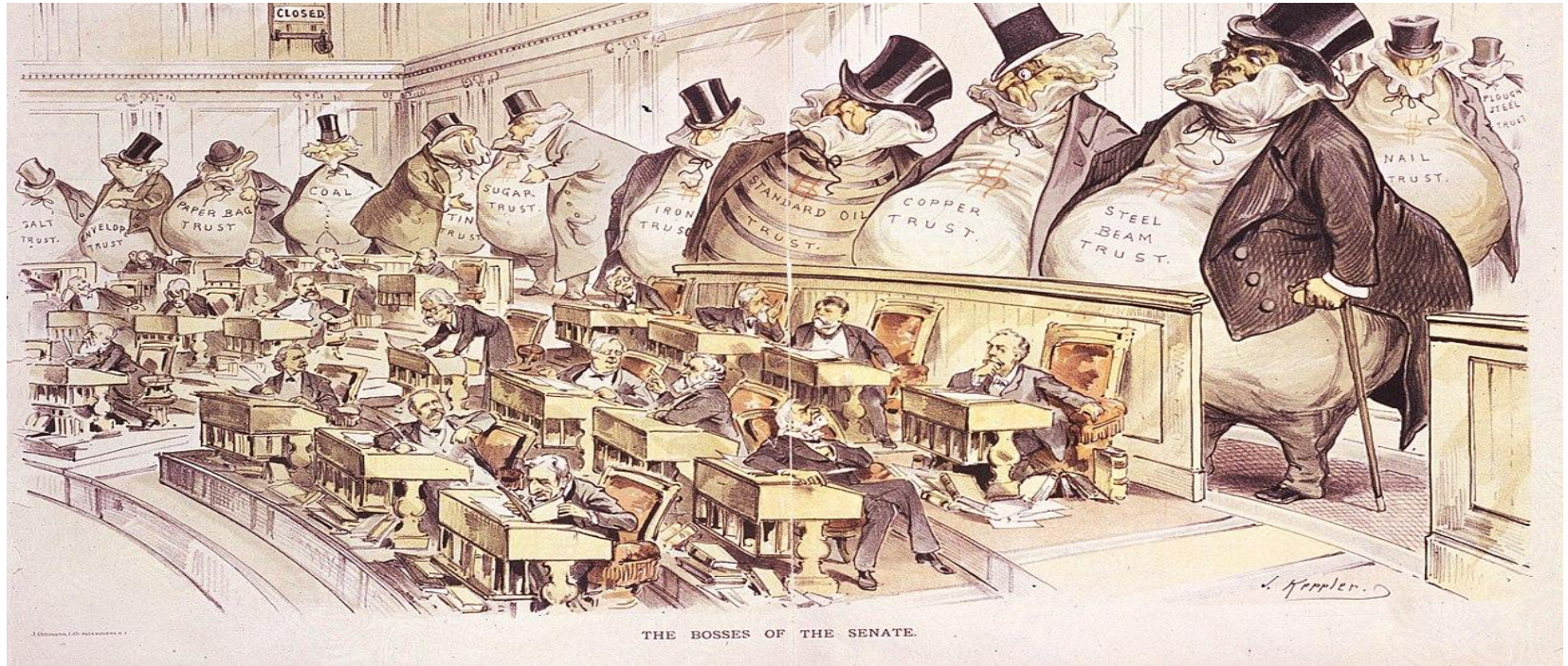
In line with

❖ Ordoliberal school of thought:

Individual freedom guaranteed by market mechanism — but it is self-destructive (market power undermines the market mechanism and limits individual freedom) — state needs to order and structure the market — this policy power is limited by economic constitution directing and restraining government action: Competition law is both about market power and societal concerns – unfettered market untenable by society.

In line with

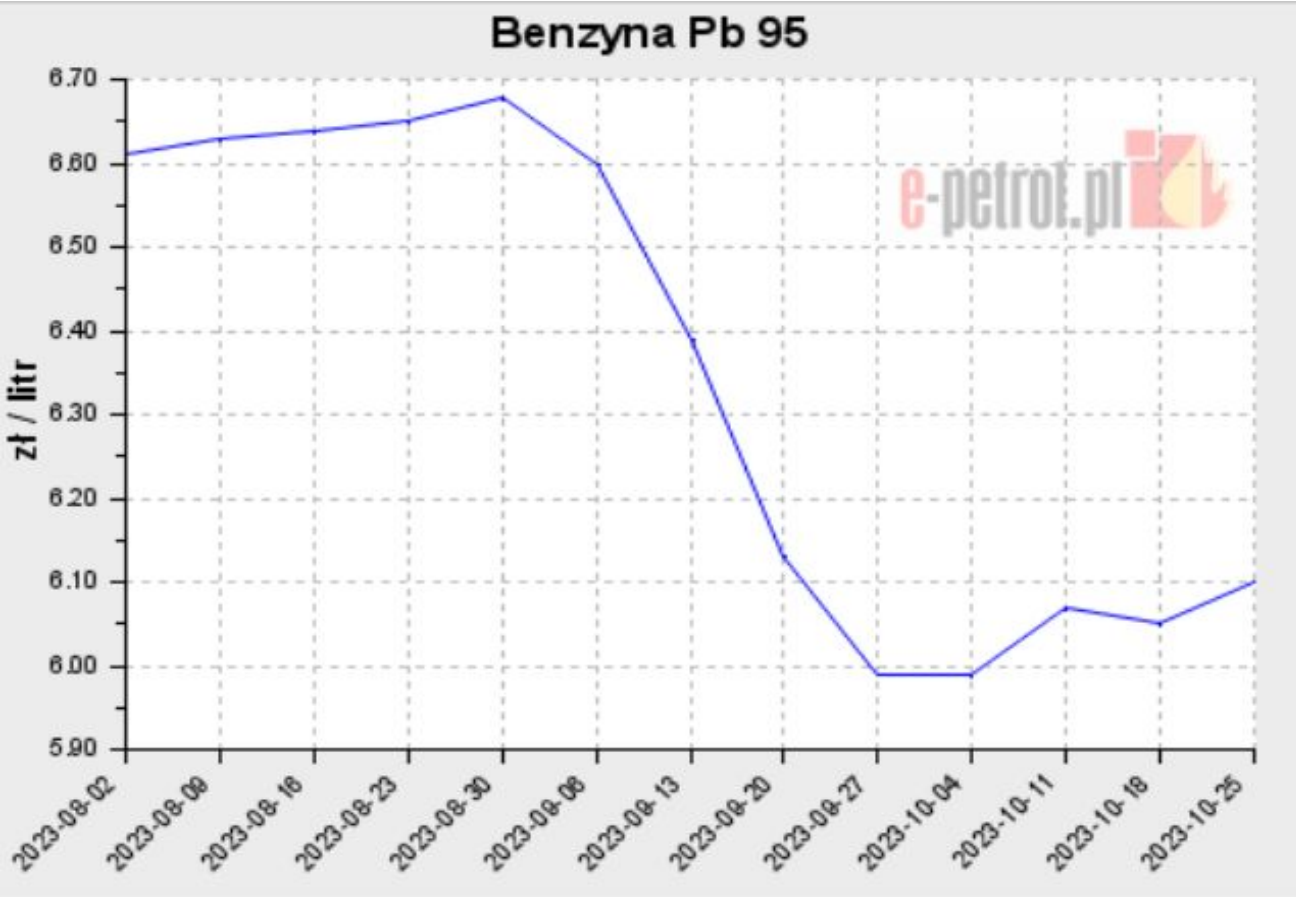
The history of U.S. antitrust and legislative intent (Pitofsky 1979)



Northern Pacific Railway, 356 U.S. 1 (1958):

“The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, **while at the same time providing an environment conducive to the preservation of our democratic political and social institutions**”

Areas: the case of underenforcement against SOEs



Areas: Media

Acquisition of Radio Zet by government-critical Agora Media group: dubious merger prohibition relevant for media plurality in Poland (overturned by court)

- Substantive link: Media pluralism
- Procedural link: Rule of law and independence (administrative vs. judicial level), reinforcing relation



Pre-merger: (1) RMF - 40%, (2) Radio Zet - 20%, (3) Time 15%, (4) Polskie Radio 15%, (5) Agora 10%, (6) Cyfrowy Polsat up to 5%, Independent up to 5 %

Post-merger: (1) RMF - 40%, (2) Radio Zet+Agora - 30%, (3) Time 15%, (4) Polskie Radio 15%, (5) Cyfrowy Polsat up to 5 %, (6) Independent up to 5 %

Areas: Media

Acquisition of Polska Press by Orlen:
Transaction reinforcing
pro-governmental media power cleared
by competition agency (and upheld by
court)

- Substantive link: risk of foreclosure
in media distribution; media
plurality as an independent goal (?)
- Procedural link: rule of law ignored
by Orlen, weak judicial review



Substantive link (2)

Access to diverse sources of information: *Google Android*



EU General Court: Google practice deprived competitors of offering to consumers alternatives to Google's general search service, i.e. Google Search. As a result, Google harmed consumers' interest in having more than one source for obtaining information on the internet. Those practices also restricted the development of search services which would reply to consumers' interests in being offered search services which better protected their privacy or contain specific linguistic features.

The GC held that such consumer interests were 'not only consistent with competition on the merits, in that they encouraged innovation for the benefit of consumers, **but were also necessary in order to ensure plurality in a democratic society**' (para. 1028)

Substantive link (3)

Promotion of socio-economic and environmental values as an element of democracies (listed in modern national constitutions):

right to food, right to healthcare, right to clean environment

vs

protection of market values in constitutions (freedom of economic activity, right to property)

[Competition law through the lenses of national constitutions](#) (JAE, 2025)

Journal of Antitrust Enforcement, 2024, 00, 1–31
<https://doi.org/10.1093/jaenfo/jnae047>
Article

OXFORD

Competition law through the lenses of national constitutions: connecting competitive markets with socio-economic and environmental values

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ABSTRACT

Example: South Africa

- In October 2021, the Constitutional Court decided the *Mediclinic* merger case concerning the companies providing hospital services.
- The contentious issue was whether the merger would significantly affect poor, uninsured patients by raising the prices of the services offered.
- Court: the application of competition law is part of the constitutional obligation of state to promote social rights: *‘maintaining or increasing the scope for choice of essential and much-needed services with particular regard to the plight of the financially under-resourced or the vulnerable, should always be at the back of the decision-makers’ minds when dealing with mergers’*

Procedural link

Institutions (competition agencies and courts) and procedures in competition law built to safeguard decision-making against political pressure and capture by private interest: rule of law as a key constitutional democracy value safeguarded within competition law system

Link with substantive element: rule of law based competition law reinforces rule of law in democracy (check on abuse of power)

Maciej Bernatt, The Double Helix of Rule of Law And EU Competition Law: An Appraisal, European Law Journal 2021, <https://ssrn.com/abstract=4199235>

Part 2: **Politicization**

What is the major challenge today?

Emerging Political Trend: Shift from 'rule of law' to '**rule by law**' in many countries worldwide; **an outcome**, not a process.

Impact on Institutions: competition agencies face increasing political pressure.

Threat: the roles of agencies as rule of law-based institutions is at stake.

My approach

I distinguish incidental politicization from problematic/impermissible politicization.

I explain that **politicization is problematic** when linked with implementation of **illiberal politics** which rejects core constitutional-democratic principles (rule of law and checks and balances) and is characterized by arbitrary use of state economic powers » **risks for the rule-of-law-based nature of competition law enforcement.**

I propose ‘Illiberal Blueprint’ describing recurring patterns signaling when “red lines” are crossed.

Different Meanings of Politicization

Politicization carry different interpretations in the literature.

Neutral/positive view:

Seen as increasing influence of elected politicians over administrative agencies.

Considered a way to enhance democratic accountability.

Negative view:

Seen as undermining the principle that agencies should act based on law, not political interests.

Risks shifting enforcement from the public interest to the short-term interests of the ruling political group.

Politicization in Practice

Some degree of politicization is arguably unavoidable.

Legal safeguards for agency independence are limited (especially compared to courts).

EU example:

Independence mainly protected through rules on non-dismissal without cause (ECN+Dir.)

Selection/appointment must be transparent but may still be political in process and outcome.

Agency heads may be appointed by prime ministers or presidents, and may even be politicians.

Gaps Between Formal and Actual Independence

Research shows a gap between *de iure* (formal) and *de facto* (actual) independence.

A legally “independent” agency may still face political pressure in practice.

Annual budget approval by national parliaments can create a pressure point.

Conversely, an agency may lack legal independence but still behave independently *de facto*.

Implications for Competition Agencies

Politicization cannot be fully eliminated in real-world governance.

Mechanisms promoting accountability inevitably involve some risk of politicization.

Recognizing this risk does not imply that politicization should be uncritically accepted.

Important to continue developing safeguards, especially when systemic risks to the agency's functioning or independence are present.

What type of politicization is problematic? The case of illiberal politics

So what is the major challenge today?

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Why Distinguish Types of Politicization?

Not all politicization of competition agencies is the same.

Key challenge: separating acceptable political influence from harmful interference.

Depth of interference (e.g., meddling in individual cases) can identify clear abuses—

but depth alone is not always sufficient.

Need a qualitative test: politicization with what kind of politics?

Why Illiberal Politics Are Problematic

If competition law supports democracy + market economy, then:

→ it is politicization by illiberal politics that becomes genuinely harmful.

Illiberal politics:

Reject constitutional-democratic norms.

Undermine checks, balances and rule of law.

Disrupt market economy fundamentals.

Such interference threatens the rule-of-law basis of competition enforcement.

The Concept of Systemic Risk

Systemic risk = when political interference threatens the rule-of-law framework.

EU case-law:

Systemic rule-of-law breaches rebut the presumption of mutual trust in Member States.

What the Implementation of Illiberal Politics Looks Like

A. In the Political–Legal System

Capture of constitutional courts, enabling laws that undermine the constitutional order.

Undermining judicial independence—including courts adjudicating competition cases.

De-professionalizing the civil service: Political staffing, removal of open competitions, mass replacement of officials.

Weakening independent regulators and media capture.

» Result: **Concentration of unchecked power, erosion toward autocracy, and rising risks of arbitrary state action.**

B. In the Economy

Shift toward a state-centred, “patriotic” economic model that expands arbitrary state discretion.

Capture of key economic actors by political allies; growing political use of SOEs.

State monopolization of multiple markets; favoritism for national capital.

Replacement of markets with state-controlled sectors: Exclusive rights, sector-specific taxes, barriers tailored to domestic firms.

Procedural safeguards dismantled: Weak judicial review, immediate enforceability of regulators’ decisions.

Example - Media Capture in Hungary

Szeidl, Szucs, *Media Capture Through Favor Exchange*, *Econometrica*, Vol. 89, No. 1 (2021), 281–310

Daily newspapers: Magyar Nemzet and Metropol owned by Simicska

Graphs (Szeidl, Szucs) shows:

- share of state-owned firms advertising depending on the period:

Graph 1 - Effect of ownership change in Metropol for state-owned advertising

Graph 2 - Effect of fallout for corruption coverage

- coverage of corruption: Graph 3

Szeidl, Szucs, graph 1

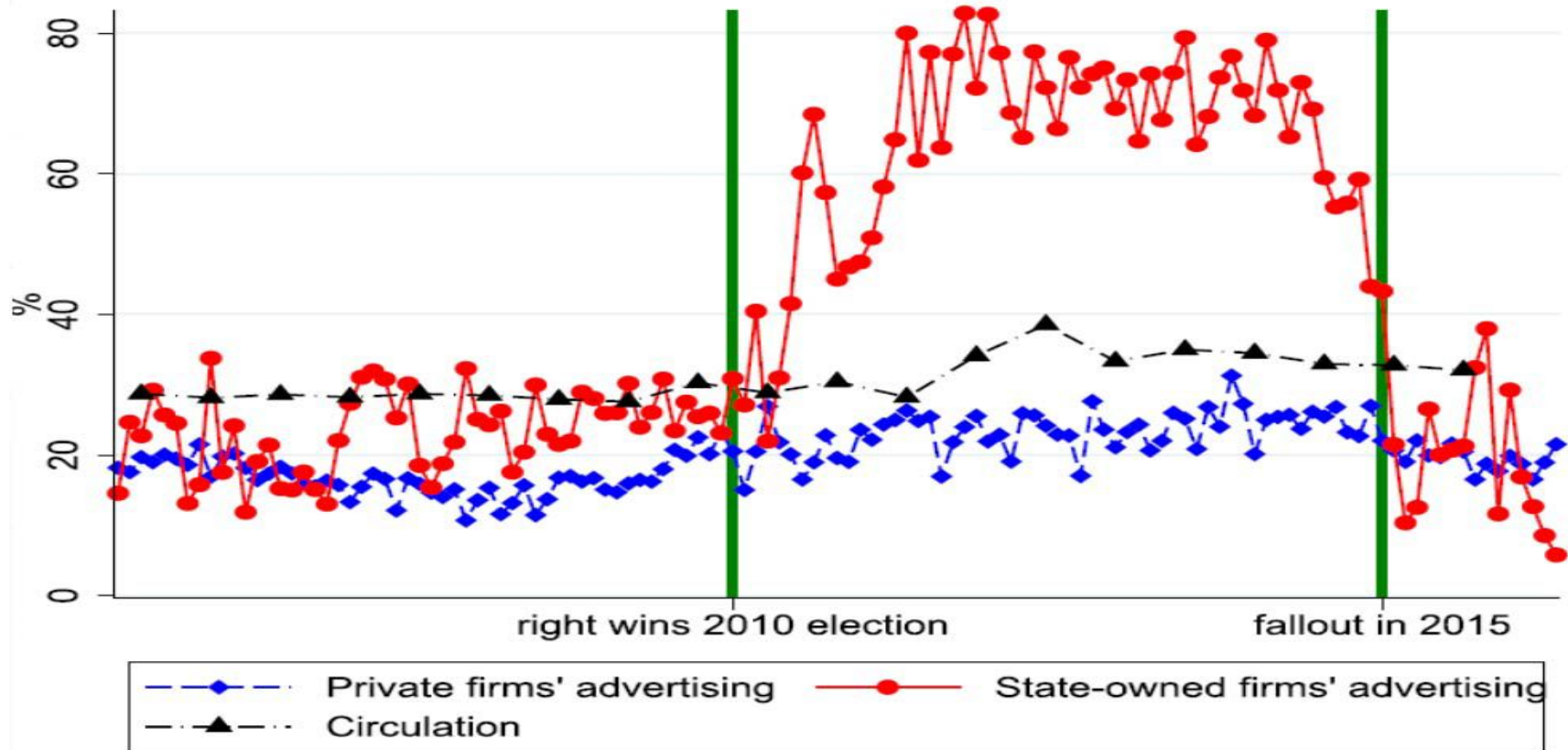


FIGURE 3.—Share of investor's dailies around fallout, R/All .

Szeidl, Szucs, graph 2

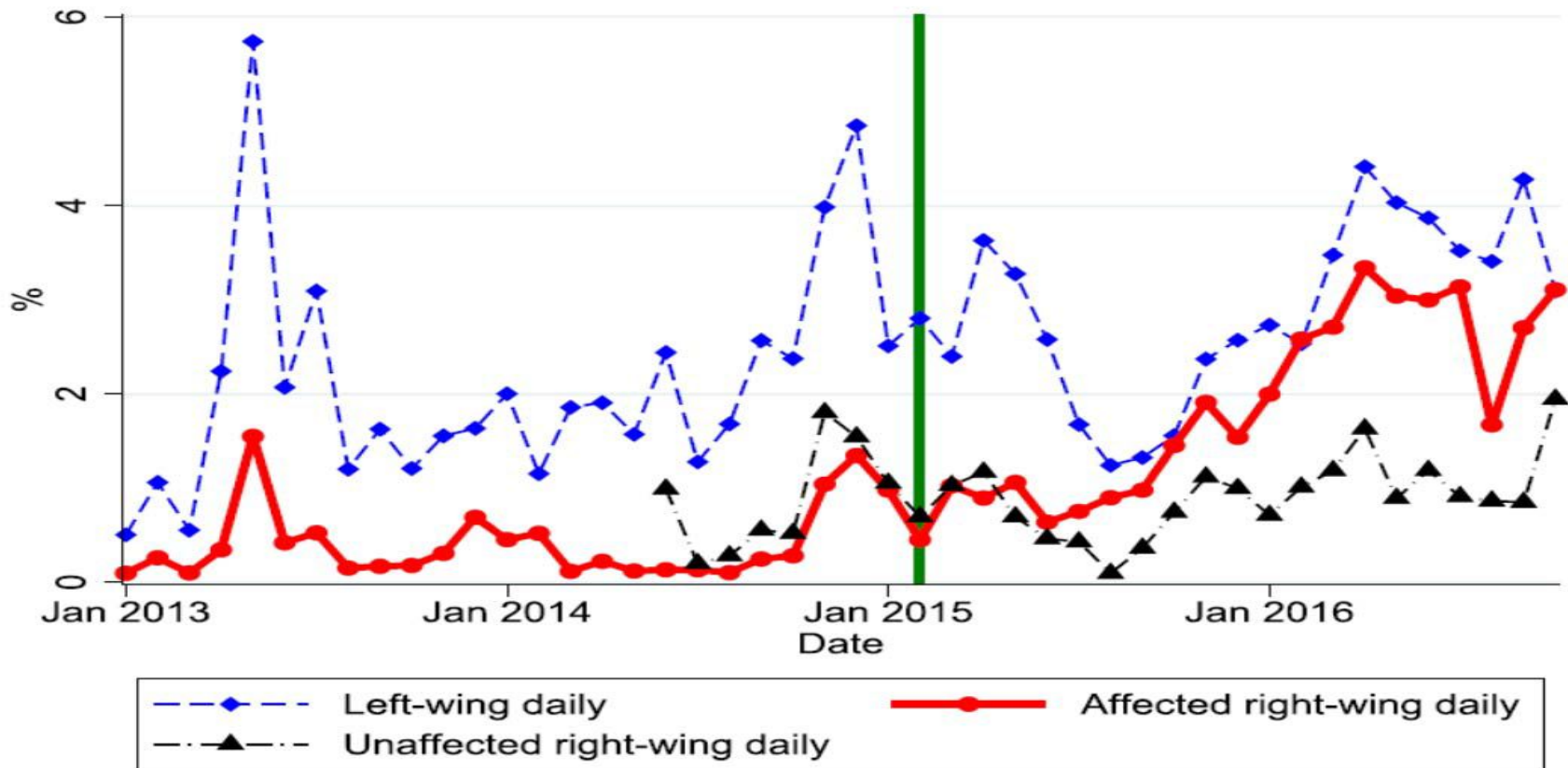


FIGURE 5.—Coverage of corruption scandals around fallout.

How it matters

Competition as a central mechanism organizing the market and competition law situated in broader liberal democratic surroundings → the move away from rule of law and rise of state's discretionary power with respect to economy brings risk of competition agencies' politicization.

Example: the weakening of the independence of the judiciary is likely to undermine the safeguards against their error and potential abuse of power.

Example: the growing arbitrary power of the state in the economy, combined with economic nationalism, puts the competition agency in a difficult position in carrying out its duties as a neutral guardian of competition

Illiberal Blueprint

Operational Independence

Politically-Driven Appointment Process.

Limited Autonomy of Decision-Makers.

Negative Perception of the Agency's Independence.

Interference into the Agency's Decision-Making Process.

Agency's self-restraint.

U.S. example

Dismissal of two democratic FTC Commissioners Alvaro Bedoya and Rebecca Kelly Slaughter by Donald Trump in March 2025, despite the lack of legal basis to do so in the FTC Act and in contravention of *Humphrey's Executor*.

Dismissals are not incidental: they are part of broader, systemic overhaul of independent administrative agencies (in July a federal judge reinstated Slaughter, which was blocked by the Chief Justice Roberts on 8 September; pending case).

The FTC Chairman strongly aligns with President Donald Trump's 'America First' agenda and views the FTC as an extension of the presidential administration (see also Calkins).

Operating capabilities

Change of leaders and weak replacements.

Attrition of senior staff and staff with special knowledge.

High staff fluctuation.

Insufficient financial resources.

U.S. example

Attrition of the FTC staff (94 people leaving the FTC in spring 2025).

Dismissals policy of the Department of Government Efficiency.

Budget cuts?

Powers

Limitation of the scope of competences with respect to antitrust enforcement and merger review.

Prioritization of consumer cases over antitrust cases.

U.S. example

Recurring proposals in the U.S. Congress to strip the FTC from its powers to enforce antitrust laws.

Enforcement

Instrumentalisation of enforcement.

Self-restraint with respect to politically-connected firms.

U.S. example

FTC investigations to understand how technology platforms deny or degrade users' access to services based on the content of their speech or affiliations (clear political motivation revealed)

Precedential remedies: in the Omnicom/Interpublic Group merger decision Omnicom prevented from coordinating with other advertising agencies to restrict advertising based on political or ideological viewpoints

FTC and DOJ decision to join the case of the alleged collusion by BlackRock, Vanguard and State Street to reduce U.S. coal production through their participation in the Net Zero Asset Managers (NZAM) industry-wide initiative supporting firms in reaching climate-neutrality goal (clear political motivation revealed)

The DOJ's lawsuit to block the merger HPE/Juniper ended with a settlement after reported pressure from the White House just before the beginning of court trial; two top deputies of Assistant Attorney General removed from office after opposing the settlement

Advocacy

Agency's advocacy initiatives ignored.

Lack of agency's reaction to anticompetitive regulatory measures.

U.S. example

FTC is directly implementing the President's deregulation agenda in line with his executive order.

FTC political bias is the agency's early July workshop on gender affirming care for minors experiencing dysphoria (earlier FTC deferred to medical expertise).

Courts

Political pressure on courts and judges

Legal changes bringing risks to judicial independence

U.S. example

The current U.S. presidential administration is at odds with independent judiciary and exerts a pressure on judges by criticizing their rulings, and denying to execute them.

The integrity of the system will rely on whether the U.S. Supreme Court will manage to uphold rule of law in the U.S.

The future of independent administrative agencies highly uncertain (the unitary theory of the executive)

Conclusions

Conclusions

1. Competition law: market-corrective mechanism but also prodemocratic tool
2. Risk: illiberal politics affecting political and economic systems » rule of law, checks and balances, abuse of state economic powers » politicization of competition agencies and instrumentalization of enforcement

Reaction

Consensus within academic community as to red lines (even if disagreements in other areas).

Naming (and blaming) »» accountability.

Protecting agencies' independence and functioning judicial review is essential for maintaining a credible, rule-of-law-based competition system.

Procedures and established analytical tools matter »» safeguard against abuse.

Thank you!

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[SSRN Profile](#)

Impact on the democratic legal order

The practice of rule by populists is a challenge to the main institutions and values of liberal democracy, most notably pluralism, separation of powers, checks and balances, rule of law, media freedom, minority rights (illiberalism)

Democratic backsliding and concentration of power as a result of rule of populist governments

Rule of law crisis

Practice

- ❖ Capture of constitutional courts
- ❖ Dismantling of professional civil service
- ❖ Early retirement age of judges + disciplinary measures
- ❖ Courts capture
- ❖ Narrow legalism
- ❖ Evasion of constitution and supranational legal norms
- ❖ Abuse in the use of data protection law

Impact on the Market Economy

Departure from liberal, market-oriented vision of economy □
growing role of state in the economy + state as an owner +
economic patriotism

Concentration of both political and economic power

Practice: Markets

- ❖ Nationalisation and monopolisation of selected sectors of economy (e.g. school books, cigarettes)
- ❖ Political capture of SOEs and patronage
- ❖ Acquisitions and consolidation in the bank, media and energy sectors involving SOEs (departure of foreign companies), pro-incumbent policies (energy market)
- ❖ Hidden protectionists measures (e.g. turnover taxes)
- ❖ Loopholes in procedural protection in economic law

Relevance for Media Markets

- ❖ Safeguards against abuse of power: independent courts
- ❖ Allies: NGOs, civil society, autonomous academia (CEU)
- ❖ Regulatory/supervision authorities: capture of media authorities and abuse of power (extension of concessions for private broadcasters)
- ❖ Statutory anti-constitutionalism → parallel institutions (National Media Council in PL) and its role in public media capture
- ❖ National economy characteristics and ownership structure: **takeovers** (in 2020, the takeover of Index.hu in Hungary by a pro-government businessman led to the dismissal of the independent editor-in-chief and newsroom staff; takeovers by SOEs) and **advertisements allocation** → decline of editorial freedom

Risks specific to media markets

- ❖ Journalistic freedoms: surveillance by secret services (Pegasus spyware), security laws (Hu in 2023 aimed to target left wing journalists), SLAPP, independent journalist targeted in the media as foreign (Soros) agents, Sovereignty Defense Office in Hu
- ❖ Polarisation: public media capture and pro-government propaganda (lack of plurality of content), microtargeting
- ❖ Censorship: investigations by media supervision authority and withdrawal of 'Nie' magazine from newstands (documentary about John Paul II's knowledge of child abuse within the Catholic church), harsh fine for a bookseller of book with LGBT content (lack of plastic cover)
- ❖ Finances: state funding of public service media providers (truly public service remit which reinforces pluralism should only be financed)
- ❖ Editorial independence

Result for democratic process

Significant media bias towards ruling parties and the misuse of state resources hindered voters' ability to make informed choices (OSCE about Hungarian 2022 elections)