

# The crisis, national economic particularism and EU law: what can we learn from the Hungarian case?

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## **Abstract**

This article examines the ability of EU law to address radical and sudden changes introduced by national governments pursuing particularistic economic policies in the wake of the global financial and economic crisis. It contends that strong-willed national governments relying on the very real political and legal power available to them in the national governance arena can interfere in national markets without EU law being able to prevent the potentially irreversible changes and without EU enforcement mechanisms being able to reverse infringements or restore national markets. Even though the infringement of EU law will eventually be established in the direct and indirect avenues available, compliance with the decisions delivered in them may not entail national governments completely renouncing their policy aims. As the example of Hungary shows, the changes introduced in national markets, such as the restructuring of competitive opportunities to the benefit of local economic operators, or the closing down of markets by means of excluding the predominantly foreign-owned incumbents, may actually remain unaffected by the operation of EU enforcement mechanisms.

# The crisis, national economic particularism and EU law: what can we learn from the Hungarian case?

## **Introduction**

The global financial and economic crisis put pressure globally on national governments to reconsider domestic policies with a view to addressing the consequences of the crisis and preventing similar occurrences. Within the European Union, some of the national policies adopted aimed at repositioning certain segments of the national economy within the Single Market, primarily in order to secure advantages to local economic operators, or to the State itself. In certain instances, these manifestations of national economic particularism, when carried out through measures involving direct discrimination, or intended selectiveness in their application, or through the arbitrary use of public powers enabled by a non-transparent and volatile legal and regulatory environment, affected the economic foundations of the Union and presented the EU enforcement mechanisms with a near unsolvable challenge. The enforcement of EU rules had to confront strong-willed national governments which were prepared to introduce far-reaching changes in national markets with little regard to their EU obligations and also to the rights and interest of individuals operating in those markets.

This article argues that, as demonstrated by the unfolding of events in Hungary after the crisis and especially after the elections in 2010, EU law and its enforcement may not in all circumstances be able to exclude national governments – using the very real political and legal powers available to them – from closing down or restructuring national markets as dictated by national particularistic policy and other interests. In case national governments act rapidly and assertively in the domestic arena, the EU enforcement mechanisms, which may be taken by surprise by such sudden and radical actions at the national level, will not be able to respond in time, and, because of the pace of their operation, they will provide just enough time for national governments to change, often irreversibly, the competitive conditions in the national markets affected. Furthermore, even when the violation of EU obligations is established, effective compliance with EU law, by means of giving effect to Commission decisions or ECJ judgments condemning the changes introduced, is by no means certain. The radical overhaul of national markets in pursuance of particularistic aims may be impossible to reverse and the original market conditions may be impossible to reinstate. The changes implemented may, thus, remain in place despite the prohibitions of EU law.

The article is structured as follows. Firstly, it examines the particularistic responses given by national governments to the global financial and economic crisis and their risks in connection with common EU policies, especially the controversial developments in recent years in some areas of Hungarian economic policy and regulation. This is then followed by an overview of what EU enforcement mechanisms may be able to achieve when confronted with national economic particularism, and by an analysis of their hiatuses highlighted by the instances of soft and hard enforcement dealing with the restructuring of certain markets in Hungary.

## **The crisis and national economic particularism**

The global financial and economic crisis placed national governments everywhere in the globe under pressure to produce policies which would enable States to weather the crisis, emerge from it socially and economically more resistant, and to prevent similar developments in the future.<sup>1</sup> There was a marked rise, even within the European Union, in ‘patriotic’ economic policies which aim at favouring, directly or indirectly, national industries,<sup>2</sup> and some States, including EU Member States, openly experimented with policies which – as declared – departed from mainstream policy solutions.<sup>3</sup> The particularistic instruments<sup>4</sup> adopted included conventional tools, such as providing State subsidies and other, less direct forms of State aid, comprehensive deregulation programmes, and foreign investment attracting schemes, and more controversial ones, such as the favouring in regulation of (certain) domestic economic operators, the closure or restructuring of entire markets, and even direct discrimination in regulation and/or in its implementation.<sup>5</sup> In the EU context, national policy developments raised questions not simply about the flexibility of EU obligations and subsidiarity in their implementation, but also about the ability of the Union to accommodate divergent models – ranging from more liberal to openly State-directed models – of the market economy.<sup>6</sup>

For the EU, the risk of particularistic national reactions to the pressures of the crisis lies foremost in the fragmentation of the Single Market and also in the eradication of goodwill, mutual responsibility and solidarity among the Member States as a result of practices of discrimination and favouritism to the benefit of domestic economic operators and of Member State free-riding and ‘beggar-thy-neighbour’ policies.<sup>7</sup> From the perspective of individuals in the Union, national economic particularism holds the possibility of national governments using public powers in an arbitrary, even in an abusive manner, and that national policies adopted in the ‘national (economic) interest’ will

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<sup>1</sup> *Global Financial Stability Report: Responding to the Financial Crisis and Measuring Systemic Risks*, Washington, D.C.: International Monetary Fund (2009); *Responding to the Economic Crisis*, Paris: OECD (2009). For a criticism of the EU’s responses, see Chiti and Teixeira, “The constitutional implications of the European responses to the financial and the public debt crisis”, 50 *CMLRev.* (2013), 683-708; Smits, “Correspondence: The European debt crisis and European Union law: comments and a call for action”, 49 *CMLRev.* (2012), 827-832; Ruffert, “The European debt crisis and European Union law”, 48 *CMLRev.* (2011), 1777-1805;

<sup>2</sup> See, for example, Bernitz and Ringe, *Company Law and Economic Protectionism: new challenges to European integration* (OUP, 2010), Chapter 1, and the Special Issue of the *Journal of European Public Policy* on “Economic patriotism: political intervention in open economies” (19:3 (2012)). From the jurisprudence of the ECJ, see, for instance, the attempt by Greece to maintain some restrictions in the local interest even in the measures introduced to rescue Greek public finances, Case C-244/11, *Commission v. Greece*, EU:C:2012:694.

<sup>3</sup> See, for instance, *Iceland’s unorthodox policies suggest alternative way out of crisis*, <<http://www.imf.org/external/pubs/ft/survey/so/2011/car110311a.htm>> (last visited 09 Jun. 2016); Tóth, “Coming to the end of the via dolorosa? The rise of selective nationalism in Hungary” in Lehndorff (ed.), *Divisive integration: the triumph of failed ideas in Europe* (ETUI, 2015), pp. 233-252.

<sup>4</sup> The notion of particularism, when used in the context of economic relations, denotes State conduct such as the exclusive promotion of one’s economic interests, economic nationalism (or patriotism), protectionism, exclusionary practices directed towards foreign economic operators, and the re-enclosure of national markets. On economic nationalism as a policy, see, foremost, List, *The National System of Political Economy* (trans. Sampson S. Lloyd), (Longman, 1909), and its interpretation, Levi-Faur, “Friedrich List and the political economy of the nation state”, 4 *Review of International Political Economy* (1997), 154-178.

<sup>5</sup> See the Special Issue of the *Journal of Common Market Studies* on “European perspectives on the global financial crisis” (47:5 (2009)). The defiance of EU obligations based on deliberate political decisions, as opposed to ‘benign’ non-compliance was extensively discussed in Krislov, Ehlermann and Weiler, “The political organs and the decision-making process in the United States and the European Community” in Cappelletti, Secombe and Weiler (Eds.), *Integration through Law* (Volume 1: Book 2) (de Gruyter, 1986), 61-85, at pp. 68, 77, 87.

<sup>6</sup> Snell, “Varieties of capitalism and the limits of European economic integration”, 13 *CYELS* (2012), 415-434.

<sup>7</sup> See, “Editorial Comments: Union membership in times of crisis”, 51 *CMLRev.* (2014), 1-12.

have little regard not only to EU obligations, but also to the rights and interests of individuals acting in the private (economic) domain. There is also the risk that the sudden and radical changes introduced in national markets find the enforcement mechanisms of EU law unprepared, and that by the time the violation of EU law is established the developments in the domestic arena may be impossible to reverse. The usual pace of operation of the different enforcement avenues may provide just enough time for strong-willed national governments to realize their particularistic objectives, and there is a real possibility that EU law will not be able to enforce from the Member States the reinstatement of the original market conditions.<sup>8</sup>

Hungary, which joined the European Union with a ‘functioning market economy’ and a credible government commitment to sustain that economic model,<sup>9</sup> responded to the crisis by adopting a policy mix which continued with, and in some respect reinforced that mixed model of capitalism<sup>10</sup> which had emerged from the process of post-1989 transition. The Hungarian economy evolved into a mixed market economy which is characterized by considerable State involvement in certain segments of the national economy, and which continues to suffer from significant structural asymmetries.<sup>11</sup> Its dynamic, growth- and added-value generating sectors which produce to export markets are owned predominantly by foreign investors.<sup>12</sup> Domestic investors and economic operators have been confined to the domestically oriented segments of the national economy which after the liberalization and privatization process of the 1990s were left untouched by foreign investors.<sup>13</sup> The export-oriented sectors are as a general rule subjected to market mechanisms and competition.<sup>14</sup> The sectors producing to the domestic market, mainly in the service economy, including public services, have often been spared, by political choice, from the pressures of competition, and governments have been reluctant to abandon practices of direct State intervention, for example, through price regulation or State ownership, in those markets.<sup>15</sup>

The policy direction adopted after the crisis, especially after the 2010 elections, maintained, and in certain respect deepened this structural asymmetry,<sup>16</sup> and sectors focusing on domestic markets

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<sup>8</sup> In pressured circumstances, Member State governments may feel the need to experiment with policies, try inelegant solutions adopted in haste, or to push the boundaries of the leeway they enjoy under EU law. This is particularly true when they act in retained competences, intervene in grey, developing areas of EU law, or claim to have acted in the discretion or autonomy available to them under EU law. The turbulence caused by the crisis may also lead to governments willing to address entrenched imbalances or asymmetries in the national economy, to increase State intervention and decrease competition, alter ownership and opportunities in strategic markets, ensure social protection through regulation, or to streamline the tax structure for competitiveness and growth and secure State revenues through unorthodox means. EU enforcement needs to act with utmost care when deciding to pursue such conducts under EU law.

<sup>9</sup> As required by the Copenhagen Criteria. See DOC/97/13, Commission Opinion on Hungary’s Application for Membership of the European Union.

<sup>10</sup> It was built on the gradual market-oriented reforms adopted from the end of the 1960s, Gjersem, Hemmings and Reindl, “Product market competition and economic performance in Hungary”, Economics Department Working Papers No. 381, Paris: OECD (2004).

<sup>11</sup> *ibid.*, and 2004 *OECD Economic Survey of Hungary*, Paris: OECD (2004).

<sup>12</sup> *ibid.*

<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.*

<sup>15</sup> *ibid.*, and 2014 *OECD Economic Survey of Hungary*, Paris: OECD (2014).

<sup>16</sup> Export-oriented growth-producing sectors received a considerable push from the government e.g., through a lowered taxes on wages, a competitive minimum wage, a competitive corporate taxation framework, foreign investment rebates and subsidies, the possibility of concluding ‘special agreements’ with the government, and

were subjected to significant restructuring, mainly to the benefit of certain domestic economic operators, or the State itself.<sup>17</sup> State intervention and State-ownership also increased leading to a reduction of competition, mainly in the public utilities sector,<sup>18</sup> and there is an evident reluctance from the government to further liberalize the public service markets kept in State-ownership.<sup>19</sup> With these changes, patriotism and the promotion of local interests became a hallmark of Hungarian economic policy,<sup>20</sup> which in certain circumstances involves the adoption of growth-promoting, market and competition friendly measures, and in others may lead to the calculated violation of EU law through – often sudden and radical – discriminatory or other restrictive practices.<sup>21</sup> The latter was particularly prevalent in certain, inward-looking sectors of the national economy where local interests initiated the closure of entire markets, or the far-reaching restructuring of competitive positions and market opportunities.<sup>22</sup>

The most controversial of these changes were carried out as rapidly and effectively as possible, often unexpectedly, to the surprise of economic operators, by relying on the very real political and legal power available to the Hungarian government. Effective and unrestrained political and policy leeway for the executive<sup>23</sup> to carry out extensive changes became the buzzword of the time, the impact of

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through the devaluation of the national currency. In contrast, the domestically focused service economy, including finance, energy, advertising and commercial retail, was burdened by sector-specific taxes and surtaxes to compensate the losses in public revenue caused by the above growth-enhancing policies, which diminished market opportunities in these sectors. See *2016 OECD Economic Survey of Hungary*, Paris: OECD (2016).

<sup>17</sup> Selectiveness, in terms of what sectors were affected and in which sectors EU obligations were readily overstepped, clearly characterized government intervention. This is a bit different from ‘the selective application of Community law’ noted by Snyder around the 1992 deadline for establishing the Single Market, but it raises the same issues in terms of Member State compliance and EU enforcement, see Snyder, “The effectiveness of European Community law”, 56 *MLR* (1993), 19-54, at p. 22.

<sup>18</sup> One of the potential political aims in these sectors is to reduce foreign ownership, and correct, thereby, the alleged political mistake of privatising these sectors in the 1990s.

<sup>19</sup> Such as postal services, and road and railway passenger transport services. The government is in the process of adopting secrecy laws to protect from publicity the contracts and other business information of State-owned companies in the broader public service market, see Bill T/8829 and Bill T/10536.

<sup>20</sup> See the economic policy plan entitled “Széll Kálmán Plan” adopted in 2010 and updated annually until 2014, <<http://http://2010-2014.kormany.hu/download/4/d1/20000/Sz%C3%A9ll%20K%C3%A1lm%C3%A1n%20Terv.pdf>> (last visited 20 Jun. 2016). The first indication perceptible in EU law of a ‘realist’ turn in Hungarian European politics was the launching of an infringement procedure against Slovakia (Case C-364/10, *Hungary v. Slovakia*, EU:C:2012:630). The symbolic triple infringement procedures initiated against Hungary in 2012 (IP-12-24) showed the realization at the EU level that Hungary is not afraid of moving away from its EU commitments if dictated by its interests.

<sup>21</sup> On the different directions of economic patriotism, see Rosamond, “Supranational governance as economic patriotism? The European Union, legitimacy and the reconstruction of state space”, 19 *JEPP* (2012), 324-341, 326-328.

<sup>22</sup> We have not been able to collect sufficient evidence regarding what is suspected to be a habitual distortion of the Hungarian public procurement market (see, however, the 2014 and 2016 OECD economic surveys, *supra* notes 15 and 16, and the Europe 2020 documents, *infra* notes 72 and 79) and what government practices of declaring public and private investment projects as ‘specifically relevant for the national economy’ under Act 2006:LIII may mean for the Single Market. Under Act 2006:LIII, the government in a decree can exempt the implementation of the affected investment project from obtaining certain of the necessary public authorizations and licenses. The decree appoints the authorities competent to proceed and sets a strict timetable for closing the procedures. The decree cannot be challenged in law.

<sup>23</sup> *Mozgástér* in the Hungarian political language.

which was felt most directly in economic regulation which became highly volatile and uncertain<sup>24</sup> and which experienced the rise of broadly framed discretionary clauses enabling nearly unrestrained choices for the government.<sup>25</sup> In such an environment, there is a heightened risk of arbitrary government intervention, the use of law and regulation in bad faith with an intended gap between the declared policy aims and their actual implementation, and of government resorting to practices in the private economic domain as a result of which economic operators and their consumers find themselves coerced to make the particular ‘choice’<sup>26</sup> offered to them in legislation. The restructuring of entire national markets may be prepared by using the same combination of controversial measures which, by inconveniencing the incumbent, predominantly foreign-owned economic operators and through the parallel favouring of their domestic competitors, ensure an unopposed implementation of government policy.<sup>27</sup> EU obligations and their enforcement will have very little relevance in the execution of such practices, and the time necessary to mount legal challenges either under national or under EU law may be interpreted as indicating the period within which the intended changes can in effect be carried out by government.<sup>28</sup>

#### *The restructuring of the tax-free remunerations voucher market*

The closure of the market for the provision of tax-free remunerations (non-salary allowances) by public and private employers in the form of paper and electronic vouchers, and the circumstances of opening a new market for electronic vouchers give a clear example of how market changes may be introduced in the non-exporting sectors of the Hungarian economy. The market was virtually erased in 2011, without offering a genuine transitional period for the foreign economic operators populating that market, by establishing a State monopoly for the paper voucher market and by means of imposing a 51 per cent tax on the market incumbents whilst reserving the tax-free status previously enjoyed by them for the new market entrant.<sup>29</sup> The new market created for electronic vouchers<sup>30</sup> (the SZÉP-card) was regulated in a manner which, in the words of the Commission, *de facto* reserved

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<sup>24</sup> The 2014 and 2016 OECD economic surveys, *supra* notes 15 and 16, and the Europe 2020 Council recommendations, *infra* notes 74–81.

<sup>25</sup> See the example of the treatment of mergers declared to serve the national interest, *infra* note 72, the powers available under Act 2006:LIII, *supra* note 22, or the powers made available in the planning process for commercial premises, *infra* note 48.

<sup>26</sup> See, for instance, the legislation adopted in the private pensions market which emphasized in their titles the choices made available to individuals (Act 2010:C on the freedom to choose private pension funds and Act 2010:CLIV on implementing the freedom to choose private pension funds), but which were implemented to coerce individuals into a particular decision.

<sup>27</sup> E.g., sudden increases in tax burdens, discriminatory taxation, regulation closing down markets without offering a transitional period or compensation to the affected individuals, preferential or discriminatory licensing and concessions, and administrative decision-making processes characterized by a low degree of transparency and an excessive degree of executive discretion.

<sup>28</sup> The intention of prioritising domestic interests over EU obligations was made particularly visible in the recent infringement case concerning the payment of excise duties for the production of ethyl alcohol (*pálinka*) by private individuals, Case C-115/13, *Commission v. Hungary*, EU:C:2014:253. The judgment and the explanations raised by Hungary both confirmed that the national measure, much liked by certain social groups, was adopted in the knowledge that its provisions violate the earlier implemented EU directive.

<sup>29</sup> Act 2011:CLV.

<sup>30</sup> Act 2011:CLVI, Act 1993:XCVI and Government Regulation 55/2011.

entry to the market to the three large banks domiciled in Hungary.<sup>31</sup> The conditions of market entry included, among others, primary establishment and a primary place of management in the country.

#### *The closure of the private pensions market*

The partial abolition of the Hungarian private-pensions market followed a similar pattern. In 2010, the Hungarian government, facing serious financial difficulties, used legal regulation to force economic operators to abandon the private tier of the mandatory pension system and to redirect its assets to the public tier of that system. The change took place without allowing a genuine transitional period for the individuals affected, and with the government resorting to discriminatory legal measures to coerce market participants and consumers to make the single ‘choice’ offered to them in law. The subsequent withdrawal of the discriminatory provisions in 2011 only aimed at preventing, just in time and just after the successful restructuring of the market, the bringing of legal challenges against government policy.<sup>32</sup>

The acts adopted towards the end of 2010<sup>33</sup> damaged the market by suspending for a year the payment obligations of the clients of pension insurers and by offering to them, in parallel, the possibility of abandoning their insurers and returning to the public tier. The ultimate push for consumers came in the form of the subsequently withdrawn<sup>34</sup> Act 2010:CLIV which threatened those that had decided to remain in what remained of the original market with the loss of their entitlements in the public tier of the mandatory pension system from 31 January 2011. Even though the legislative measures were framed so as to link market developments to the choices made by consumers, it is evident that the deterioration of market circumstances, which led to consumers anxious to protect their pension savings making the single reasonable choice of abandoning the market, was the consequence of the regulatory intervention by government.<sup>35</sup>

#### *The restructuring of the tobacco market*

The re-regulation of the retail and the wholesale segments of the Hungarian tobacco market took place with the aim of excluding incumbents to the benefit of their local competitors. In the retail market, the entry of new economic operators, some of which also had interests in the wholesale market, and the exclusion of incumbent economic operators were achieved, without granting a genuine transitional period, through the application of legal measures which not only opened the door for the arbitrary use of public powers, but also failed to ensure that the proprietary rights and legitimate expectations of the affected individuals were adequately protected.<sup>36</sup> As opposed to the Constitutional Court, which quite readily deferred to the government’s policy discretion in this

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<sup>31</sup> Action brought on 10 April 2014 in Case C-179/14, *Commission v. Hungary*, O.J. 2014, C 202/12.

<sup>32</sup> ECtHR, *E.B. (No. 2) v. Hungary*, Appl. No. 34929/11, judgment of 15 January 2013, which rejected the application but made the criticism that there was no choice involved for individuals as promised by legislation. See the applications rejected by the Hungarian Constitutional Court, infra note 93.

<sup>33</sup> Acts 2010:C and CI.

<sup>34</sup> Act 2011:CXCIV.

<sup>35</sup> On these measures in the context of the sovereign debt crisis, see Kilpatrick, “Constitutions, social rights and sovereign debt states in Europe: a challenging new area of constitutional inquiry”, EU Working Papers, Law 2015/34, at pp. 27-28.

<sup>36</sup> Act 2012:CXXIV.

matter,<sup>37</sup> the Court of Human Rights in Strasbourg found that the exclusion of incumbent economic operators from the tobacco market violated Convention rights.<sup>38</sup>

The legal preparation and the actual execution of the concession process, which enabled the entry into the wholesale market supported by exclusive rights of a new economic operator, raised doubts as to whether the selection of the concession holder and the parallel reduction of market opportunities for its competitors were based on objective, transparent, and, from the perspective of the operation of the tobacco market, relevant criteria.<sup>39</sup> The tobacco industry's special tax (healthcare contribution) introduced in parallel with these developments provided that customary fiscal instrument used by the government to burden incumbents when preparing markets for their subsequent restructuring.<sup>40</sup>

#### *The restructuring of the gambling market*

In the gambling market, the exclusion of incumbents from the slot machines market and the placing of that market under the control of select economic operators involved in the casino market commenced with the introduction of the fiscal instrument which, without providing a genuine transitional period, quintupled the tax on slot machines operated in amusement arcades, but not in casinos, and introduced a new flat-rate tax on that activity.<sup>41</sup> This was followed by the legal measure, which again without granting a transitional period and without offering compensation, prohibited the operation of slot machines outside of licensed casinos.<sup>42</sup> In parallel with these changes, the rules on granting gambling concessions affecting mainly the casino market were modified by the introduction of relaxed rules for so-called 'trustworthy gambling service providers' which expanded considerably the discretion enjoyed by the government in selecting the favoured casino concession holders.<sup>43</sup> This modification of the Act on gambling also liberalized the online gambling market<sup>44</sup> the scheduling of which provided the time necessary for the State monopoly gambling and betting organizer to enter that market.

#### *Regulatory interventions in the food retail market*

The domestic food retail sector experienced a number of regulatory interventions which evidently aimed at restructuring market opportunities to the benefit of domestic retail chains. The use of discriminatorily selective fiscal burdens, which give advantages to certain economic operators while disadvantaging their competitors, was again part of the strategy.<sup>45</sup> An extremely progressive food-

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<sup>37</sup> Decision 3194/2014 of the Constitutional Court.

<sup>38</sup> ECtHR, *Vékony v. Hungary*, Appl. No. 65681/13, judgment of 13 January 2015.

<sup>39</sup> Act 2014:XCV. The act introduced the notion of 'trustworthy' economic operators among the conditions of gaining a concession.

<sup>40</sup> Act 2014:XCVI.

<sup>41</sup> Act 2011:CXXV.

<sup>42</sup> Act 2012:CXLIV. The measure was upheld as constitutional by the Constitutional Court which decided to defer to the policy discretion enjoyed by government in this area, Decision IV/03576/2012 of the Constitutional Court.

<sup>43</sup> Act 2013:CLXXXV.

<sup>44</sup> Act 2013:CXXVI.

<sup>45</sup> See, from above, the tobacco industry healthcare contribution, the taxes imposed on operators of slot machines, and the 51 per cent tax in the vouchers market. The media market was affected by its own progressive tax (the provisions of Act 2014:LXXIV on the so-called advertisement tax).

chain supervision fee was imposed on the food retail sector in 2014.<sup>46</sup> Hungarian retail chains were given further support from the government when, during the radical restructuring of the tax-free remuneration vouchers market, the licensing of foreign-established retail chains to accept the new State vouchers as a legal tender took place much later than their domestic competitors.<sup>47</sup> Further, the Act on commerce was modified in parallel by Act 2014:CXII, and it now penalizes undertakings in the retail sector with an annual net income of 15 billion HUF with a compulsory suspension of their commercial activities if they fail to report profits in two successive years. In planning law, new stricter rules were introduced for the planning of commercial premises,<sup>48</sup> which were then applied under broad ministerial powers in procedures lacking transparency, predominantly to the benefit of local food retail chains.<sup>49</sup>

#### *The restructuring of public service markets*

Some of the domestic public service markets, in which Hungary had traditionally been reluctant to pursue a full liberalization agenda,<sup>50</sup> also experienced radical changes. The modifications, which saw the increase of State involvement and the parallel reduction of competition, were, in principle, supported by legitimate policy grounds, such as strengthening social cohesion or responding to a spiralling ‘cost of living crisis’<sup>51</sup> induced, in part, by the global financial and economic crisis.<sup>52</sup> The nationalization of certain public service providers, the replacing of market operators by State monopolies, and the increased relevance of direct price regulation by the State took place, however, in circumstances which raised the possibility of discriminatory exclusionism, selective favouritism, and the arbitrary use of regulatory and administrative powers. The operation of the new markets under State monopolies, which lack transparency and are likely to require State compensation, also poses considerable risks of violation of general EU economic law and of specific sectoral legislation.

The restructuring of energy markets<sup>53</sup> began with the introduction of compulsory regulated price reductions and freezes for end-users of electricity and natural gas.<sup>54</sup> The worsening market prospects caused by government intervention led to the incumbent, predominantly foreign-owned economic operators to hand back their licences before their expiry, and most of them were sold to the new State monopoly established in 2015 by Regulation 7/2015 of the Ministry for National Development

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<sup>46</sup> Act 2014:LXXIV. See also the retail surtax investigated in Case C-385/12, *Hervis*, EU:C:2014:47, where the ECJ interpreted the right of establishment as precluding the application of steeply progressive indirect taxes in case they result in indirect discrimination.

<sup>47</sup> <[http://nol.hu/gazdasag/erzsebet\\_utalvany\\_utan\\_szep\\_kartyat\\_is\\_elfogadhat\\_a\\_tesco-1315548](http://nol.hu/gazdasag/erzsebet_utalvany_utan_szep_kartyat_is_elfogadhat_a_tesco-1315548)> (last visited 25 Feb. 2016).

<sup>48</sup> Act 2012:CLVII.

<sup>49</sup> <<http://tldr.444.hu/2015/11/30/az-elelmiszerpiacot-akartak-atrendezni-a-plazastoppal>> (last visited 22 Feb. 2016). The decisions taken by the minister were only made public following a FOI request by investigative journalists.

<sup>50</sup> See 2004 OECD economic survey, *supra* note 11.

<sup>51</sup> *Rezsicsökkentés* in the colloquial Hungarian used in the political campaign leading up to the 2014 elections which secured another super-majority in Parliament for the incumbent government.

<sup>52</sup> The not-for-profit nature of public utilities became a general policy aim in Hungary. See Government Resolution 1465/2014.

<sup>53</sup> Some of the more general illegal practices of Hungary in the energy market are addressed in infringement no. 20142271 concerning obligations under the Third Energy Package.

<sup>54</sup> Arts. 104(4), 104(4a), 104(4b), 108/A and 109 of Act 2008:XL on natural gas supply, and Arts. 140(4) and 140(5) of Act 2007:LXXXVI on electricity.

under the name First National Public Utility Corporation.<sup>55</sup> As suggested by reports, the operation of the State monopoly at the end-user prices regulated in 2014, in part, to respond to the ‘cost of living crisis’, and, in part, to prepare the restructuring of the market is likely to raise the necessity of compensation from the State budget which in case of a State monopoly may be difficult to bring in line with EU State aid law.<sup>56</sup>

In the waste sector, the changes introduced coincided with the implementation of the Waste Directive,<sup>57</sup> which was transposed with much delay, possibly, with a view to ensuring that its implementation entrenches the newly restructured market.<sup>58</sup> In the waste collection market, the government expelled the incumbent, predominantly foreign-owned economic operators and renationalized the market by restricting the issuing of operating licenses to undertakings which are directly or indirectly controlled by the State or by local councils.<sup>59</sup> Making economic operators to reconsider their business plans through compulsory regulated price reduction was also used.<sup>60</sup> The waste management market was also restructured under the national Waste Management Agency<sup>61</sup> which was responsible for managing the system of public contracts concluded with economic operators for waste management services.<sup>62</sup> The tenders advertised have so far been won by a particular group of Hungarian undertakings which are now under investigation by the Hungarian Competition Authority under public procurement cartel charges.<sup>63</sup>

### **EU enforcement and national economic particularism**

The Member States implementing particularistic national economic policies, as a norm, find themselves confronted and restrained by the different EU enforcement mechanisms operated at both the European and the national level. Infringement procedures, procedures before national authorities and courts, EU level monitoring and reporting procedures, and the different procedures in place to enforce the values of the Union<sup>64</sup> should, in principle, ensure that the Member States intervening in national markets refrain from violating their EU obligations. The obligation for the Member States to observe EU law in their conduct follows foremost from the principle of loyalty and sincere cooperation regulated in Article 4(3) TEU which excludes, among others, national policies

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<sup>55</sup> <<http://www.enksz.hu>> (last visited 13 Jun. 2016).

<sup>56</sup> The 2016 OECD economic survey, *supra* note 16, and SWD(2016) 65 final, Country Report Hungary 2016.

<sup>57</sup> Directive 2008/98/EC on waste, O.J. 2008, L 312/3.

<sup>58</sup> The infringement procedure was closed on account of Hungary eventually implementing the directive, Order in Case C-310/12 *Commission v. Hungary*, EU:C:2013:556.

<sup>59</sup> Art. 81 of Act 2012:CLXXXV.

<sup>60</sup> See Act 2013:LIV.

<sup>61</sup> The autonomous agency was shut down by Government Decree 322/2014, and its functions were transferred to the National Environmental Authority. In April 2016, the National Waste Management Coordination and Asset Management Corporation was established to collect the fees, manage assets and debts, and to coordinate information on waste management public services provided by local government or by the State (Government Regulation 69/2016).

<sup>62</sup> Act 2012:CLXXXV. Characteristically for the Hungarian government, in 2014 Act 2011:LXXXV was supplemented by Art. 22/C which retrospectively excluded the application of the Hungarian competition act in regards anti-competitive conduct committed in the 2012-2013 tendering year.

<sup>63</sup> Vj/67/2014.

<sup>64</sup> Article 7 TEU, and COM(2014) 158 final, “A new EU Framework to strengthen the Rule of Law” and 16862/14 COR 1, Council Conclusions on ensuring respect for the rule of law.

which jeopardize the attainment of the Treaty objectives.<sup>65</sup> It prohibits, in particular, that the Member States knowingly and willingly contradict in pursuance of their own interests and to their own advantage their voluntarily undertaken commitments in the Union.<sup>66</sup> However, when strong-willed Member State governments act in pursuance of particularistic national policy considerations EU enforcement, despite its wealth of mechanisms and its principled basis, may not be able secure its expected outputs. As shown by the experiences with the recent Hungarian measures transforming national markets, EU law may not be able to achieve the reversal of changes introduced in national markets or the restitution of the original market conditions. Ultimately, it may fail to exclude national governments acting under real socio-economic pressure from realizing their illegitimate aims.

#### *Soft enforcement: Europe 2020 and Hungarian economic policy*

The changes implemented in Hungarian economic policy were noticed and reported in the newly established EU mechanisms for economic governance. The general and specific findings of the different documents issued in the European Semester framework recognized,<sup>67</sup> although with some delay, the risks posed by Hungarian developments for the European economy. The Europe 2020 country reports, which became more and more critical every year,<sup>68</sup> condemned at the level of general developments the highly unpredictable and volatile regulatory environment and the low transparency of the legislative process where measures were frequently adopted on a short notice and without providing an adequate transitional period for those affected.<sup>69</sup> There was also a long list of specific problems and hiatuses, including the increasing of entry barriers to individual markets,<sup>70</sup> the restrictive regulatory burdens imposed in the retail sector,<sup>71</sup> the low level of competition and transparency in public procurement, and the exemption of mergers declared to serve the national

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<sup>65</sup> Para. 21, Case 22/70, *Commission v. Council*, EU:C:1971:32. See also Opinion 1/03 EU:C:2006:81. The voluntary participation of the Member States in the EU does not mean that their obligations would be optional, see the discussion on the terms ‘voluntary’ and ‘optional’ in the context of EU membership by Dickson and Eleftheriadis, “Introduction: the puzzles of European Union law” in Dickson and Eleftheriadis (Eds.), *Philosophical Foundations of EU Law* (OUP, 2012), pp. 1-24, at 12, and para. 18, Case 106/77, *Simmenthal*, EU:C:1978:49, emphasising that Member State obligations are ‘unconditional’ and ‘irrevocable’.

<sup>66</sup> Case 6/64, *Costa* and paras. 17-18, Case 106/77, *Simmenthal*. The Member States cannot justify unilateral opt-outs from their obligations on the basis of the difficulties faced when complying with them, para. 10, Case 128/78, *Commission v. UK* and paras. 8-9, Case 141/78, *France v. United Kingdom*, EU:C:1979:225. The incomplete and selective application of EU law by the Member States is prohibited even when they have opposed the adoption of the EU measure in question or they consider it to be contrary to their ‘national interests’, para. 9, Case 128/78, *Commission v. UK*.

<sup>67</sup> They raised issues similar to those scrutinized in the parallel OECD reports, see, in particular, the 2014 and 2016 OECD economic surveys, *supra* notes 15 and 16.

<sup>68</sup> See, Country Report Hungary 2016, *supra* note 56; SWD(2015) 36 final/2, Country Report Hungary 2015; SWD(2014) 418 final, 2014 Assessment of the national reform programme and convergence programme for Hungary; SWD(2014) 376 final, 2013 Assessment of the national reform programme and convergence programme for Hungary; SWD(2012) 317 final, 2012 Assessment of the national reform programme and convergence programme for Hungary; SEC(2011) 725 final, 2011 Assessment of the national reform programme and convergence programme for Hungary.

<sup>69</sup> Other hiatuses include the lack of meaningful consultations with stakeholder and the lack of meaningful and publicized impact assessment of legislation.

<sup>70</sup> In sectors, such as tobacco retail, pharmacies, savings banks (cooperative banking), textbook publishing and distribution, waste management, mobile payments, and tax-free remuneration vouchers. It often also meant a decreasing of competition in previously open economic sectors.

<sup>71</sup> For example, the food-chain supervision fee, Sunday and night trading restrictions, the penalising of operation at loss, and the restrictive planning of commercial premises. These, as noted by the Commission, often affected certain economic operators disproportionately compared to their competitors.

interest from competition law.<sup>72</sup> The reports were particularly critical of the unfavourable regulatory changes in the energy sector, especially the introduction in regulation of reduced or frozen end-user gas and electricity prices, the reduction of competition by economic operators returning, as the consequence of price regulation, their licenses, and the setting up of a State monopoly household gas and electricity provider.<sup>73</sup>

The Council recommendations issued on Hungary noted the frequent changes in the regulatory framework,<sup>74</sup> the selective and distortive sector-specific taxes and surtaxes,<sup>75</sup> the new barriers of entry introduced and the old barriers maintained in the services sector, including retail,<sup>76</sup> the regulatory restrictions which ‘affect disproportionately foreign investors’,<sup>77</sup> the limitation of competition in an increasing number of sectors,<sup>78</sup> the corruption, the low level of competition and the lack of transparency in public procurement,<sup>79</sup> and the damages caused by end-user price regulation and other tax burdens to economic operators in the energy market.<sup>80</sup> The early, 2012 Council Recommendation put forward only the reserved criticism that there were ‘a number of controversial and unpredictable changes in the policy and fiscal environment and in the legal and institutional system’ which affected the business environment negatively.<sup>81</sup> It recommended in an equally reserved manner that Hungary preserves a ‘stable regulatory and business-friendly environment’ ‘for enterprises, including foreign direct investors’.<sup>82</sup>

Even though the European Semester framework enabled the regular monitoring and the open criticism of economic policy developments in Hungary, Hungarian reactions to the reports and the recommendations have been far from satisfactory. While some of the discriminatory and/or selective measures, which were also subject to parallel legal proceedings, were moderated by the government,<sup>83</sup> the far-reaching restructuring, even closure of national markets disadvantaging the predominantly foreign-owned incumbents were left unaddressed. The EU documents themselves

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<sup>72</sup> In public service markets, the rolling back of liberalization and the reserved efforts to foster competition in the postal sector were heavily criticized.

<sup>73</sup> The operation of the new State monopoly was also identified to hold risks under EU law as under the price regulatory scheme in force it will need to be permanently compensated by the State.

<sup>74</sup> 2014/C 217/10, Council Recommendation on the 2014 National Reform Programme of Hungary and delivering a Council Opinion on the Convergence Programme of Hungary 2014; 2013/C 247/15, Council Recommendation on the 2013 National Reform Programme of Hungary and delivering a Council Opinion on the Convergence Programme of Hungary 2012-2016.

<sup>75</sup> 2015/C 272/20, Council Recommendation on the 2015 National Reform Programme of Hungary and delivering a Council opinion on the 2015 Convergence Programme of Hungary; the 2014 and 2013 Council recommendations, *supra* note 74.

<sup>76</sup> The 2015 and 2014 Council recommendations, *supra* notes 74 and 75.

<sup>77</sup> The 2013 Council recommendation, *supra* note 74.

<sup>78</sup> The 2014 Council recommendation, *supra* note 74.

<sup>79</sup> The 2015, 2014 and 2013 Council recommendations, *supra* notes 74 and 75.

<sup>80</sup> The 2014 Council recommendation, *supra* note 74.

<sup>81</sup> 11257/12, Council Recommendation on the 2012 National Reform Programme of Hungary and delivering a Council opinion on the Convergence Programme of Hungary 2012-2015, recital 15.

<sup>82</sup> Point 5, *ibid*. It also mentioned that Hungary needs to ensure that ‘public procurement and the legislative process support market competition’, a stable, lawful and non-distortive framework is maintained for corporate taxation, and that unjustifiable restrictions affecting businesses, such as the new planning rules on large-scale retail premises are discontinued.

<sup>83</sup> The planning rules of new commercial premises were somewhat relaxed, and the radical progressive nature of the some of the sector-specific taxes and surtaxes were moderated. See *infra* notes 86, 109, 111 and 112.

noted that Hungary continued to fail to give effect to the Council recommendations.<sup>84</sup> Crucially, the EU economic governance mechanisms were unable to halt potentially irreversible and presumably unlawful changes as introduced rapidly in individual markets by the government. The reversal of changes in markets and the restitution of the original market conditions were evidently beyond their remit. It seems that the logic of ensuring compliance through soft mechanisms of monitoring and reporting Member State performance fails with governments determined to follow their own particular ways.

#### *Hard enforcement*

Infringement procedures and procedures before national authorities and courts – gradually and with some delay – also caught up with the suspected violations of EU law by Hungary in the economic domain.<sup>85</sup> The breach of EU law was established in due course in most of these procedures, and regulatory changes were or are planned to be introduced by the government so that it meets its EU obligations. It is, however, doubtful whether, even in these instances, real and effective compliance with EU rules, by way of the reversal of changes or the restitution of original circumstances, can in fact be achieved.<sup>86</sup> It is similarly doubtful whether EU enforcement has succeeded in excluding Hungary from realizing its particularistic policy objectives jeopardizing common policies.<sup>87</sup> The often sudden and radical changes in national markets were not prevented,<sup>88</sup> the time available before the infringement is established was used to carry out far-reaching and potentially irreversible modifications of competitive conditions and commercial opportunities, and the damages caused to markets and the competitive disadvantages suffered by economic operators were left unaddressed

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<sup>84</sup> E.g., point 4, the 2015 Council recommendation; point 3, the 2014, Council recommendation; point 3, the 2013 Council recommendation; explicitly, recital 13, the 2013 Council recommendation, *supra* notes 74 and 75, concerning the phasing out of distortive sector-specific surtaxes. The 2016 County Report, *supra* note 56, at p. 1, acknowledged that Hungary ‘has made some progress in addressing the 2015 country-specific recommendations’.

<sup>85</sup> The overall compliance record of the country, however, remained exemplary, Single Market Scoreboard 2014-2015 for Hungary, <[http://ec.europa.eu/internal\\_market/scoreboard/\\_docs/2015/09/member-states/2015-09-hungary\\_en.pdf](http://ec.europa.eu/internal_market/scoreboard/_docs/2015/09/member-states/2015-09-hungary_en.pdf)> (last visited 15 Jan. 2016).

<sup>86</sup> Another related issue is that the EU may not investigate, as a result of having limited access to information as to the eventual application of the impugned national measure, every aspect of the infringement. This was the case with the restrictive provisions on the planning of commercial premises under Act 2012:CLVII, where the Commission, after Hungary relaxed some of the restrictions, closed the infringement procedure initiated on this matter on 25 February 2016 (infringement no. 20132086). Because the relevant decisions of the responsible minister were – by design – not accessible publicly, only after an elongated period of freedom of information litigation did evidence as to the discriminatory use of the discretion available to the minister come to light, *supra* note 49.

<sup>87</sup> The closure of the private-tier of the compulsory pension system was never pursued by the Commission in law. Its position was weakened by the fact the according to the Hungarian government the closure of this market and the channelling of its assets to the public purse was necessitated by the Commission’s controversial decision earlier in 2010 to reject the request of Hungary and 8 other Member States to take into account the costs of pension system consolidation in calculating budget deficits under Article 128 TFEU. The subsequent withdrawal of the legally most controversial, openly discriminatory measure by Hungary, after having been in force for just enough time to convince consumers to leave the market, might also have played a role.

<sup>88</sup> The delay in initiating EU enforcement as regards national measures introduced with the purpose of securing advantages in competition – suddenly and on a short-term – for national economic operators over their foreign-owned competitors is clearly visible in the case concerning the 2014 modification of the Act on commerce which prohibited operation at a loss for retail sector undertakings. The letter requesting information was sent by the Commission in February 2016.

by the establishment in law of the infringement.<sup>89</sup> The effectiveness of EU law, as a matter of securing ‘implementation, enforcement, impact and compliance’ was clearly ‘in issue’.<sup>90</sup>

The remedies and procedures before national courts and authorities, which provide a direct and accessible defence, often through interim relief, against national measures contradicting EU obligations,<sup>91</sup> faced difficulties – particular to that period of policy-making – in the context of the economic policy developments in Hungary. The government was inclined to strengthen its position by weakening the legal protection available to individuals in national law and by lowering, as a result, the risk of legal challenges brought under national or EU law against government policy. While these changes may not have been introduced specifically with EU obligations in mind, they had severe consequences for the effectiveness of EU enforcement. The closure of the private limb of the compulsory pension system was preceded just a few weeks before by the strategic decision to suspend the review powers of the Constitutional Court in fiscal matters.<sup>92</sup> In consequence, the applications submitted by individuals challenging the controversial measures were declared inadmissible by the Constitutional Court on account of its lack of competence under the new jurisdictional rules.<sup>93</sup> The exclusion of judicial review against the regulations of the energy regulator was prompted by an unfavourable judgment for the government delivered in judicial review by the Budapest Metropolitan Court concerning an element of the flagship policy of addressing the supposed ‘cost of living crisis’ by direct price and cost regulation in the energy sector.<sup>94</sup> The change in the system of judicial protection was introduced as part of a rushed general overhaul of the powers and responsibilities of the regulator and the setting up of the new Hungarian Energy and Public Utilities Regulatory Authority.<sup>95</sup>

The hiatuses of EU enforcement, when faced with sudden and radical restructurings of national markets in pursuance of particularistic aims, are clearly indicated by the infringement case brought by the Commission<sup>96</sup> against Hungary concerning the changes introduced in the tax-free remunerations voucher market. The Grand Chamber judgment, which established that the rules governing entry to the new electronic vouchers market violated the Services Directive,<sup>97</sup> indicated an

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<sup>89</sup> See the EU’s delayed reaction to the restructuring of the entire Hungarian tobacco market which – together with the damages caused to competitors – may be impossible to reverse by the time the violation of EU rules is established in the procedure launched (IP-15-5375).

<sup>90</sup> Quoted from Snyder, op. cit. *supra* note 17, at p. 19, which touched upon some of these issues indirectly.

<sup>91</sup> Indeed, in some of the Hungarian cases legal redress was provided, even if belatedly, by the national courts identifying the violation of EU obligations by Hungarian measures, see *infra* notes 95, 105 and 109.

<sup>92</sup> Act 2010:CXIX. The modification is said to have been prompted by the decision of the Hungarian Constitutional Court which established the violation of constitutional provisions by the retroactive and disproportionate tax obligations introduced by the government, Decision 184/2010 of the Constitutional Court.

<sup>93</sup> Decisions 3291/2012, 3292/2012, 3293/2012, 3294/2012, 3295/2012, 3296/2012 and 3243/2012 of the Constitutional Court.

<sup>94</sup> Under the new rules, the Constitutional Court has jurisdiction to review the regulations issued by the new regulator.

<sup>95</sup> Act 2013:XXII. The controversial new arrangements are far from satisfactory considering that in the parallel *E.ON Földgáz Trade* case (Case C-510/13, *E.ON Földgáz Trade Zrt*, EU:C:2015:189) the ECJ expressed its discontent with how the right of access to judicial had been regulated in a genuine procedure for judicial review before the new institutional set up.

<sup>96</sup> Case C-179/14, *Commission v. Hungary*, EU:C:2016:108. There is an ongoing international investment arbitration case before the ICSID (ICSID Case No. ARB/13/35).

<sup>97</sup> Directive 2006/123/EC on services in the internal market, O.J. 2006, L 376/36.

obvious, very likely an intentional obstruction of EU obligations by Hungary.<sup>98</sup> As far as the potential justifications are concerned, the government was unable to support the breach of EU obligations by any rational and proportionate grounds based on evidence which would have had relevance from the perspective of market regulation, and it was also made evident that the violation was motivated by the intention of helping a group of favoured domestic undertakings to a lucrative segment of the larger financial services market.<sup>99</sup> The establishment of the infringement by the ECJ did not, however, address the future of the advantages secured for Hungarian economic operators not only in the narrower market for tax-free remuneration vouchers, but also in the financial services market. Even if entry to the market is subsequently ensured for EU economic operators, that possibility will not erase the advantages gained by their Hungarian competitors, and they are likely to enter a very different market in terms of market positions and competition than that at the time of its opening.

Furthermore, the condemnation by the ECJ of the setting up of the new State monopoly in the paper voucher market may have a negligible impact on the market situation established as intended by government policy. The judgment, which dismissed the claims that the State monopoly, which collects fees from the market, was not covered by the fundamental freedoms,<sup>100</sup> rejected all public interest grounds raised in justification, either, for being irrelevant in the context of State interventions in the market,<sup>101</sup> or, for not being supported by adequate evidence.<sup>102</sup> The prevention by EU law of erasing an entire market through the establishing of a State monopoly was not a matter to be covered by the ruling. In order to comply with the judgment, Hungary will have to bring the regulation of the State monopoly in line with EU law, which considering the failure of the case prepared by Hungary, especially that of the social policy grounds<sup>103</sup> may be difficult to achieve. It is a more uncertain issue, however, whether as a result of the judgment Hungary is expected to demolish the State monopoly and reinstate (the original) market conditions. The scope of the judgment covered only the changes introduced by bringing the market under a State monopoly, and it is far from clear that, without specific provisions to that effect, EU law would oblige the Member States to create or reinstate markets. Hungary may be required to compensate the economic operators affected, but it is unlikely, especially when the principle of neutrality under Article 345 TFEU is

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<sup>98</sup> The Advocate General's opinion, which examined the infringement mainly under the Treaty fundamental freedoms, seems to suggest that the government must have been aware of the risks under EU law of replacing incumbent market operators with a State monopoly, and of allowing the entry to the new market only of domestic economic operators preferred by the government, paras. 89-159 and 220-244, Opinion of Advocate General Bot in Case C-179/14, *Commission v. Hungary*, EU:C:2016:619.

<sup>99</sup> Paras. 46-47, 54-67, 69, 81-88, 89-90, 91, 92-94, 102-107, 116-116, Case C-179/14, *Commission v. Hungary*. E.g., the interest of sufficient integration into the local economy, the availability of sufficient experience and infrastructure, and the availability of sufficient guarantees to satisfy consumers and creditors.

<sup>100</sup> Paras. 147-164, *ibid.*

<sup>101</sup> Paras. 167-170, *ibid.*

<sup>102</sup> Paras. 171-173, *ibid.* The legal circumstances in which the Hungarian government repealed the incumbents from an entire market – in particular, the failure to grant a genuine transitional period, or the use of tax legislation to inconvenience market participants – were not assessed by the ECJ, para. 174, *ibid.*, but discrimination and *de facto* national favouritism were.

<sup>103</sup> See Act 2012:CIII. In particular, the interest of delivering social policy through State institutions and the redistribution (here, more like rechannelling) of incomes to finance social policy aims.

considered<sup>104</sup> that the closure of a market and its replacing by the State monopoly as intended by the government can be reversed.

Similar conclusions can be drawn from the eventual establishment of the violation of EU law in *Berlington* by the controversial restructuring of the Hungarian gambling market. The judgment found that the Hungarian measures amounted to an unlawful exclusion of amusement arcades from the slot machines market to the benefit of casinos,<sup>105</sup> and it formulated strong criticisms of the circumstances in which Hungary introduced the changes in the market. It held, with a cross-reference to the Strasbourg ruling condemning the re-regulation of the Hungarian tobacco market,<sup>106</sup> that the revocation of licences by Hungary violated the principles of legal certainty and the protection of legitimate expectations.<sup>107</sup> Again, there was no question of EU law preventing the swift changes brought about using very real powers by the government. In terms of future compliance, there is nothing in the judgment which would require Hungary to reverse the changes introduced or restore the original market conditions. Furthermore, the deference to the national court of the final assessment of the justifications submitted in defence of the restrictions might just ensure that the government is able to maintain the new market circumstances.<sup>108</sup> EU enforcement seems to have come too late to have a meaningful impact on market-level developments introduced in contravention with EU obligations.

Not all efforts of EU enforcements have, however, left particularistic, potentially illegal changes introduced in national markets unaddressed. As the example of the recent State aid procedures brought against Hungary shows, predominantly as a result of a much shorter procedural length, unlawful measures can be phased out from national legal systems before they are able to fully express their restrictive or discriminatory effects, or before they entrench a certain market situation.<sup>109</sup> The application of the progressive elements of the tobacco industry's special tax

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<sup>104</sup> It holds that decisions on private and public ownership, and, in this respect, decisions on liberalization and marketization, are within the remit of Member State autonomy, paras. 30-31, Joined Cases C-105/12 to C-107/12, *Essent*, EU:C:2013:677 and paras. 16-17, Case C-244/11, *Commission v. Greece*.

<sup>105</sup> The tax burdens imposed on operators of slot machines outside of casinos were held to violate the Treaties in case the national court establishes that their effect was to restrict the operation of slot machines to casinos, paras. 37-42, Case C-98/14, *Berlington*, EU:C:2015:386; the prohibition of operating slot machines outside of licensed casinos was in itself capable of violating EU law, paras. 50-63, *ibid*; the prohibition was also held to violate Directive 98/34/EC for being a technical specification which should have been notified to the Commission, paras. 93-100, *ibid*.

<sup>106</sup> *Vékony v. Hungary*, Appl. No. 65681/13.

<sup>107</sup> When the Member States revoke 'licences that allow their holders to exercise an economic activity, it must provide, for the benefit of those holders, a transitional period of sufficient length to enable them to adapt or a reasonable compensation system' and 'a trader who has made costly investments in order to comply with the scheme adopted previously by the legislature could see his interests considerably affected by the withdrawal of that scheme before the date announced, all the more so if that withdrawal takes place suddenly and unforeseeably, without leaving him enough time to adapt to the new legal situation', paras. 74-91, especially, paras. 85 and 87, Case C-98/14, *Berlington*.

<sup>108</sup> The judgment recognized that the regulatory interference may *prima facie* be legitimate, para. 56, *ibid*., and indicated that Hungarian policy may be consistent and systematic as required by the relevant EU jurisprudence paras. 64, 67-70, *ibid*. The critical issue is whether the parallel liberalization of the on-line gambling market will be assessed by the national court as undermining the consistency and the systematic nature of government interference with the market

<sup>109</sup> Compare with the amount of time it took in Case C-385/12, *Hervis*, to establish the unlawfulness of one of the earliest progressive taxes introduced in commercial retail. While Hungary was right to argue that progressive indirect taxes do not *per se* violate EU law, progressive elements which lead to direct or indirect

(healthcare contribution), which seemed to disfavour certain economic operators while favouring others, was suspended following the Commission decision initiating an investigation into the tax under State aid law.<sup>110</sup> The suspensory decision of the Commission investigating the food-chain supervision fee under State aid law<sup>111</sup> was implemented by Hungary moderating in legislation the progressive nature of the fee by repealing its 0 per cent rate favouring predominantly local retail chains.<sup>112</sup> The progressive advertisement tax imposed on the media market is now under investigation under State aid law.<sup>113</sup> EU State aid law has also proved to be effective in preventing potentially unlawful large-scale public infrastructure investment projects, such as the planned enlargement of the nuclear energy power station in *Paks*, the preparation of which lacked transparency, raised issues under public procurement law, and is now contested under EU State aid law as a matter of the legal and operational viability of electricity production under the agreement concluded with Russia.<sup>114</sup>

## Conclusions

The global financial and economic crisis put national governments, even within the European Union, under pressure to experiment with ‘patriotic’, or particularistic national policies favouring national industries. While many of these developments can be adequately addressed under the mechanisms available to police and enforce Member State compliance in the EU, in case of sudden and radical changes introduced in individual markets by strong-willed national governments using the political and legal power available to them, EU enforcement mechanisms may fail both the common policies and the individuals affected by Member State intervention. As the example of Hungary demonstrates, the far-reaching changes implemented in national markets with little regard to EU obligations may be impossible to prevent, and it is doubtful, even when the infringement of EU law is established, that the unlawful changes can be reversed, or the original market conditions can be restored. It is worrying for the future of the Single Market and the Union itself that national governments can get away with radical interferences with national markets in pursuance of particularistic national economic policies contradicting the rules of EU law.

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discrimination are in fact prohibited, paras. 37-41, *ibid*. See also, paras. 37-42, Case C-98/14, *Berlington*, concerning the tax introduced in the gambling market, and the investigation into the advertisement tax under freedom of establishment, *infra* note 113.

<sup>110</sup> SA.41187.

<sup>111</sup> SA.40018.

<sup>112</sup> Act 2015:XLVI.

<sup>113</sup> SA.39235. It is also investigated under the freedom of establishment (IP-15-4598). Its progressive elements were first modified in July 2015 following the criticisms of the Commission, 2016 County Report, *supra* note 56, at p. 38.

<sup>114</sup> SA.38454. See also infringement no. 20154231 concerning the public procurement implications of the project.