

B O O K R E V I E W

Maciej Bernatt,
*Populism and Antitrust: the Illiberal Influence
of Populist Government on the Competition Law System,*
Cambridge University Press, 2022, 253 p.

This monograph is published in Cambridge University Press' Global Competition Law and Economics Policy series. The book deals with the influence of populism on competition law. It focuses on Hungary and Poland and the legal changes which took place after May 9, 2010 (the formation of the Fidesz government) in Hungary, and after November 16, 2015 (the formation of the Law and Justice government) in Poland and the impact of those changes on the competition law systems of those two countries. The book analyses the interrelationship between populism and competition law in a broader political and economic context. In doing so the author inter alia explores the main characteristics of populism that are relevant in studying the influence of populism on a competition law system and how populist governments affect the institutional structure and the enforcement of competition law.

The monograph is composed of three parts and seven chapters. Part I, which consists of Chapter 1 and 2, sheds light on the relationship between populism, democracy, and the economy. Chapter 1 sets out the topic of the monograph. Since competition law is important for market economies, the author explains that the study of populism from a competition law perspective fits well with the studies of populism focused on both democracy and the economy. He points out the motivation behind the Sherman Act in the US which was enacted to curb the concentration of excessive economic power. Both US and European history has shown that a concentration of excessive economic power could translate into political power and endanger democracy. Hence, competition laws' limits on the concentration and the use of economic power not only facilitate the functioning of markets but also safeguard democracy. After a brief outline of the existing debates about populism the monograph sets out the scope and research questions and explains its methodology. It also provides background information on Hungary and Poland – the two central case studies in this book. Lastly, the chapter explains the meaning of the key concepts used in this book.

Chapter 2 discusses the meaning of populism in the political science, legal and economic literature. The author explains that out of the two characteristics of populism, namely anti-elitism and anti-pluralism on the one hand, and illiberalism on the other hand, the latter is better suited for analysis from a legal perspective. According to the author illiberal change in democracy materializes itself in legal

actions taken by institutions controlled by ruling populist parties which are directed at dismantling checks and balances and the rule of law. This process is known as ‘democratic backsliding’. Illiberal change in the economy is characterised by a departure from the ideas of economic liberalism, since they undermine the principal role of market competition, the dominant role of private ownership in the economy, market openness across borders, and the principle of competitive neutrality. This ‘liberal market backsliding’ as suggested by the author is a parallel process. The case studies of Hungary and Poland expound the principal characteristics of illiberalism in democracy and the economy.

Part II of the monograph is composed of Chapters 3–5. It examines and analyses the influence on the competition law systems of a number of countries that had populist governments.

Chapter 3 builds on the findings of Chapter 2 that populists’ rule may work as a driver of democratic and liberal market backsliding. It identifies two variables by means of which the scenarios concerning the impact populist governments may have on competition law system can be determined. The first variable concerns the weakening of checks and balances as well as the rule of law. A lack of an independent judicial review is more likely to produce lower quality and instability of administrative decision-making and provides no safeguards against abuse of power by a competition authority. The second variable is related to the state-centred character of an economy and economic patriotism. These two processes indicate a departure from the idea that competition and open markets are vital for a well-functioning economy. They also involve an increasing role of the state as the owner of formerly private enterprises. Those two variables give rise to four possible scenarios of populist governments’ influence on a competition law system: (1) deconstruction, which “materializes when the safeguards related to checks and balances and rule of law are largely dismantled and when the re-evaluation of the liberal market economic model is significant”; (2) marginalization, which “materializes when the re-evaluation of the liberal market economic model is significant, but when safeguards related to checks and balances and the rule of law have not been dismantled to a significant extent”; (3) atrophy, which “materializes when the safeguards related to checks and balances and the rule of law have been dismantled (first variable) and the extent of re-evaluation of the liberal market economic model is limited (second variable)”; and (4) limited impact (of populist government on a competition law system), which “materializes when the extent of re-evaluation of the liberal market economic model is limited and when the safeguards related to checks and balances and the rule of law have not been dismantled to a significant extent.”

The actual manifestations of the influence of populist governments on competition law systems are discussed in Chapters 4–5. Mainly based on empirical findings from Hungary and Poland, but also some examples from other jurisdictions with populist governments, those manifestations are linked to the four scenarios proposed in Chapter 3. Chapter 4 analyses the influence of populism on competition authorities and courts. It examines the competition authority’s independence, operating capabilities, mandate, and judicial review of the authority’s actions by courts. According to the author the following aspects adversely impact competition law enforcement. First,

the independence of competition authorities is limited by means of politically driven appointment processes, more limited autonomy of decision-makers within the authority's structure, and in the Hungarian case by legislative pressure to discontinue politically sensitive cases pending before the authority. Second, an authority's operating capabilities may be impaired due to the attrition of expert senior staff and/or high fluctuation among the lower staff, which results in a decrease in the authority's expertise. Third, in the case of Poland the competition agency's competences have been extended to areas which are not related to its original competition protection mandate. Finally, populist governments advocate reforms to restrict the independence of ordinary courts. Such reforms weaken the legal safeguards of independent judicial review in competition law.

Chapter 5 examines the manifestations of the influence of populist governments on the practice of competition authorities in countries ruled by populist governments. The chapter is based on in-depth analyses of the Hungarian and Polish experiences, while also providing the reader with relevant examples of developments in other countries ruled by populist governments. The chapter shows that the practice of competition authorities is negatively affected in the following way. First, the intensity of enforcement of competition law is low and the authorities focus on small cases, such as local bid-rigging agreements, which stems from the authorities' approach of self-restraint and their limited operating capabilities. Final decisions in high-profile cases are limited to cases which are in accordance with the political agenda of the ruling party. Second, hardly any abuse of dominance cases are brought against SOEs and mergers in which SOEs are involved are reviewed leniently. Third, the populist ruling majority goes so far as to object to enforcement in some industries. And fourth, the competition authorities have a limited record in opposing anticompetitive legislative measures.

The monograph's third part is made up of Chapter 6 and examines the functioning of a regional competition law system during a time of populism. This chapter serves as a case study of the EU regional competition law system. It explains the relevance of the challenges posed mostly by competition law enforcement in Hungary and Poland for the EU competition law system and draws lessons from those experiences. The author's first finding is that the ECN+ Directive, which was implemented to improve the enforcement of EU competition law in the EU Member States, is unlikely to remedy the deficits regarding the independence and operating capabilities of the NCAs in countries ruled by populist governments. The ECN+ Directive is a minimum harmonisation tool and therefore not specifically equipped to address the challenges faced by competition authorities and courts in countries ruled by populist governments. Second, interventions by the European Commission as the guardian of the EU Treaties (e.g. using the infringement procedure under Article 258 TFEU) have mitigated or slowed down the degradation of competition law enforcement in the countries ruled by populist governments. Yet, the tactics employed by the populist governments is likely to allow them to achieve most of their pursued goals. Third, the populist governments' actions undermine the mutual trust that all NCAs adhere to a common set of values, and therefore adversely affect the decentralized system of

application of EU competition law. Lastly, the central EU competition law system is sufficiently independent to closely monitor the challenges posted at the national level by the rise of populist governments, and when necessary to take action to address them. Chapter 7 concludes this monograph, presenting the main findings and solutions to improve the resilience of competition agencies and courts to the challenges posed by the rule of populists' governments.

Populism in contemporary Europe is a topical issue and this book makes a highly valuable contribution to the current political and economic debates on this issue. It is the first monograph that has been written on the influence of populism on competition law and policy. As the author correctly points out, populism has been a point of contention in US antitrust law. On the other side of the Atlantic, populism in competition law is associated with 'an anti-bigness attitude' – a fear of large corporations and their enormous market power and sympathy for small businesses. This debate in the US has increased in more recent years with the rise of digital platforms and the emergence of the Neo-Brandeis movement.¹ In particular, populism has not been studied in the competition law scholarship in the institutional context. This work is therefore of importance to understand how populism affects the institutional characteristics and the practices of competition authorities and courts. The author provides invaluable insights about the impact of populist governments on the competition law systems of Hungary and Poland (the author's native country) but also other countries such as Greece, India, South Africa and Venezuela. The case studies on Hungary and Poland are very detailed and thorough. The author conducted 27 semi-structured interviews with current and former members of competition authorities, judges, and leading antitrust experts mainly from those two countries. Besides the impact on competition law systems this book is of relevance to the wider debates on democratic and liberal market backsliding. Moreover, the book contributes to the debate about the EU law crisis by discussing how the challenges posed by populists' governments affect the EU competition law system. In summary, this book is an indispensable resource for anyone who is interested in modern populism and its consequences for democracy and the economy.

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¹ See e.g. Sandeep Vaheesan, 'The Evolving Populisms of Antitrust' (2013) 93 *Nebraska Law Review* 371; Barak Orbach, 'Antitrust Populism' (2017) 15 *New York University Journal of Law and Business* 101; Carl Shapiro, 'Antitrust in a Time of Populism' (2018) 61 *International Journal of Industrial Organization* 714; D Daniel Sokol, 'Antitrust, Industrial Policy, and Economic Populism' in Damien Gerard and Ioannis Lianos (eds), *Competition Policy: between Equity and Efficiency* (Cambridge University Press 2019), p. 281; Joshua Wright and Aurelien Portuese, 'Antitrust Populism: Towards a Taxonomy' (2020) 13 *Stanford Journal of Law, Business & Finance* 131.