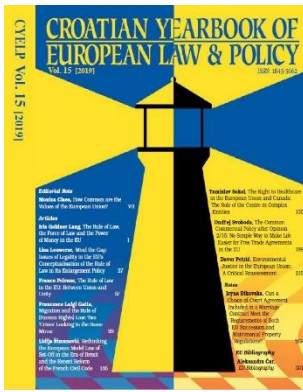




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### Book Review: *Populism and Antitrust: The Illiberal Influence of Populist Government on the Competition Law System*, Maciej Bernatt (Cambridge University Press 2022)

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**Book Review:**  
***Populism and Antitrust: The Illiberal Influence of  
Populist Government on the Competition Law System,***  
**Maciej Bernatt (Cambridge University Press 2022, ISBN:  
9781108482837) 300 pp, £85,00.**

Antitrust scholars have always wondered what makes competition law systems succeed and what makes them fail, or falter. Particularly interesting, and somewhat rare, are studies where insights are gained empirically, usually from interviews with key stakeholders. Maciej Bernatt's book, *Populism and Antitrust: The Illiberal Influence of Populist Government on the Competition Law System*, is one of the most recent contributions to the field of institutional antitrust, building on such empirical insights. One of the most prominent scholars of competition law in Central and Eastern Europe (CEE), Bernatt is Associate Professor at the University of Warsaw, and Director of the Centre for Antitrust and Regulatory Studies (CARS). He is also Editor-in-Chief of the Yearbook of Antitrust and Regulatory Studies (YARS), the leading CEE academic journal focused on competition law issues.

In the book, Bernatt uses empirical findings from Poland and Hungary to propose a new theoretical framework aimed at better measuring and understanding the illiberal influence of populism on competition law systems, addressing both challenges at the competition authority level and at the level of the judiciary. The book was published in 2022 by Cambridge University Press in their series on global competition law and economics policy, edited by Ioannis Lianos (University College London), Thomas Cheng (The University of Hong Kong), Simon Roberts (University of Johannesburg), Maarten Pieter Schinkel (Universiteit van Amsterdam), and Maurice Stucke (University of Tennessee).

The book, totalling some 270 pages, is structured in four parts. In the first, titled 'Background: populism, democracy, economy', Bernatt sets the scene by discussing the broader context and showing the implications populism has on democracy and the economy. The heart of the book is the second part, titled 'Populist influence on competition law systems', where he examines the influence of populism on competition law systems both by systematically discussing his empirical findings and by laying out his original theoretical framework. The third part, 'A regional system', is crucial for Bernatt's analysis of the actual (and potential) EU response to populist-related challenges to competition law development in Hungary and Poland. The fourth part gives the final diagnosis and prospects.

In the following paragraphs, I summarise and discuss the main insights and contributions, following closely the structure mentioned above.

In Part I, Bernatt is honest about acknowledging 'disagreement' over what constitutes populism. Establishing a link between populism and competition enforcement, he utilises this somewhat elusive notion to recognise it as a driver of illiberal change in the economy. However, unlike Rodrik for example,<sup>1</sup> Bernatt disagrees that economic and political populism should be considered as separate phenomena.

Developing his contextual narrative around the notion of economic patriotism, Bernatt describes the process of leaving behind the free market paradigm of the 1990s and 2000s for Poland and Hungary, the so-called 'privatisation reversal', and the advent of a more prominent role of the State in the economy. His discussion on economic patriotism and the idea of strengthening national champions is richly illustrated by instances of foreign firms being targeted by state policies leading to departures from Hungarian and Polish markets.

Equally, showing the detrimental effects of populism on democracy, Bernatt discusses the dismantling of checks and balances and the weakening of the rule of law. In particular, as regards Hungary, he unveils the critical repercussions of economic policies aimed at protecting national economic interests, such as limitations of procedural safeguards for private firms, the erosion of constitutionality review, and the rapid law-making process.

Bernatt's point of departure is the experience of Poland and Hungary in enforcing competition law in the 1990s and 2000s. The discussion does not address the pre-1990s influences or any enduring legacy of the planned economy and socialism on the economy and democracy.

In Part II, Bernatt examines the influence of populist governments on competition law systems at the national level. Relying on interviews with Hungarian and Polish stakeholders, he systematically describes the backsliding process and its repercussions. Bernatt argues that the 're-evaluation of economic principles' brought forward by economic patriotism, ie departure from the free market economic model, resulted in the weakening of the competition law system and in the capture of competition authority. He tells the story of populist governments' push to weaken the institutional resilience of competition authorities and bend competition rules to suit their economic agenda.

Against the backdrop of his empirical, country-specific insights, Bernatt proposes an original theoretical model to identify the 'manifestations' of populist competition law systems, postulating four hypothetical scenarios: deconstruction (competition system severely weakened), marginalisation (competition authority adopting an attitude of self-restraint), atrophy (gradual weakening), and limited impact. In his model, he uses two variables: first, the extent of the dismantling of checks and balances and the rule of law, and second, the extent of re-evaluation of the free

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<sup>1</sup> Dani Rodrik, 'Populism and the Economics of Globalization' (2018) 1 *Journal of International Business Policy* 12.

market economic model. Bernatt's insights work finely to refine the line of research started by Kovacic and Lopez Galdos on competition system trajectories,<sup>2</sup> and Büthe and Aydin's research on the main factors influencing the development of those systems.<sup>3</sup>

Thereafter, in a most interesting and lively manner, Bernatt contextualises the abovementioned scenarios in light of actual developments in Hungary and Poland, discussing topics such as the independence of competition authorities, their operating capabilities, judicial review, and competition law enforcement. Among a host of insightful observations, I note here that Bernatt is wary of blurring the authority's mandate by expanding its competences, arguing that it runs the risk that its leaders may lack the incentives to prioritise the protection of competition. He also argues that legal reforms during populist rule weakened the independence of the courts adjudicating in competition law cases, resulting in a decrease in expertise. As regards the enforcement track record, Bernatt describes the enforcement slump in Hungary and Poland after the advent of populist governments. However, he stops short of claiming that enforcement in those two countries can be described as politically motivated, despite identifying cases that suggest either political motives behind enforcement or the competition authority's willingness to act in line with the ruling populists' political agenda.

His discussion of enforcement against state-owned enterprises (SOEs) in the context of populist governments, as well as of statutory exemptions and limitations of enforcement powers illustrated by the Hungarian Watermelon case, is captivating. Bernatt claims that the authority's ability to enforce competition rules against SOEs can be considered a litmus test for establishing whether it is able to perform its role as an independent watchdog. Alarming is his reminiscing regarding Hungary, on the return to the pre-second world war approach of using cartelisation as a 'platform to regulate industries in line with national needs'.

In Part III, Bernatt brings a broader EU law context into play to analyse the reaction of the regional supranational economic system when faced with challenges brought about by populist governments in EU Member States. He is clearly concerned about the impact of the rule of populist governments on the system of competition law enforcement in the EU which is based on mutual trust, and advocates a direct reaction by the EU institutions rather than adopting new legislation. In particular, Bernatt is sceptical about the potential of the ECN+ Directive of bringing about real change in practice, as it, as he *inter alia* notes, fails to address the issue of the political character of the selection and appointment pro-

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<sup>2</sup> William E Kovacic and Marianela Lopez-Galdos, 'Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes' (2016) 79 *Law and Contemporary Problems* 85.

<sup>3</sup> Umut Aydin and Tim Büthe, 'Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits' (2016) 79 *Law and Contemporary Problems* 1.

cess of the members of the authority's decision-making body, while also omitting to set precise guidelines related to the authority's resources and staff numbers. Interestingly, Bernatt warns that the directive's insistence on allowing competition authorities to reject complaints if they do not consider such complaints to be an enforcement priority may backfire in a country ruled by a populist government as it may serve as a convenient excuse for not opening politically sensitive cases, promoting, in fact, an authority's attitude of self-restraint.

Using the Hungarian Watermelons case to illustrate the (potential) role of EU law and EU institutions in addressing concerns related to the weakening of competition enforcement in 'illiberal democracies', as well as the limits of top-down intervention, he does not stop at criticising the Commission's narrow reaction only as regards this particular case.<sup>4</sup> More generally, Bernatt warns that the lack of intervention by the Commission to defend the independence of the judiciary responsible for competition law may have unwanted consequences, with the national courts being less eager to refer preliminary questions concerning the interpretation of competition law, both national and EU.

Last but not least, I found the section providing a systematic analysis of the consequences of the rule of populist governments on the decentralised enforcement of EU competition law very insightful. The discussion found there, I think, is not only crucial from the point of view of illiberal democracies, but also as a point of reference for other CEE countries and the challenges they encounter when enforcing competition rules. It is also vital from the point of view of a possible reform of Regulation 1/2003. For example, Bernatt discusses the controversial (lack of) use of the effect on trade criterion by the CEE competition authorities. He warns that this potentially enables the use of national law to put forward populist policies which would not fit under EU competition law. Moreover, he cautions about the weaknesses in the notification system prescribed in Article 11(4) of Regulation 1/2003, ie the fact that competition authorities in Member States are not obliged to notify closure decisions. Arguing that this limits oversight by the Commission in cases where proceedings have been opened under Articles 101 and/or 102 TFEU, Bernatt rightly calls for reform of the notification system.<sup>5</sup>

In the final part of the book, in his diagnosis, Bernatt reverts to the issue of the interrelationship between populism, democracy, markets, and competition law as crucial for understanding the challenges he systematically examined in the previous pages. The logical loop he

<sup>4</sup> For recent criticism over the Commission's stance in relation to limited rule of law in Hungary, see Kati Cseres, 'The Commission's Missed Opportunity to Reclaim Competition Law for the Rechtsstaat' (*Verfassungsblog*, 2022) <<https://verfassungsblog.de/the-commissions-missed-opportunity-to-reclaim-competition-law-for-the-rechtsstaat/>> accessed 19 December 2022.

<sup>5</sup> For a detailed discussion, see Alexandr Svetlicinii, Maciej Bernatt and Marco Botta, 'The Dark Matter in EU Competition Law: Non-Infringement Decisions in the New EU Member States Before and After Tele2 Polska' (2018) 43 *European Law Review* 424.

hypothesises is the backbone of the book and a direct outcome of the foundational experiential study that helped inform his insights.

In short, Bernatt explains that populism affects democracy by bringing challenges related to the separation of powers, checks and balances, the rule of law, minority rights, media pluralism, etc. By weakening the rule of law and dismantling the system of checks and balances, populism weakens the competition law system. Furthermore, populism affects free markets by increasing the role of the state in the economy and by spurring economic patriotism, which signals that the perceived role of competition law may be changing. This affects the competition law system, eg competition authority may self-restrain its enforcement, offer only a lenient review of mergers, not play a significant advocacy role, etc. Markets may become excessively concentrated, the rent-seeking of private powerful groups becomes possible, markets can be monopolised as a result of anticompetitive regulations, and potentially anticompetitive actions of SOEs are not subject to competition authority scrutiny. As a result, markets may become less competitive and consumers may be harmed. This may further reinforce the rule of populist governments at the expense of individual economic freedoms.

In terms of solutions, Bernatt does not shy away from offering a number of suggestions. In terms of enhancing resilience, he argues that independence is critical for competition authorities' proper functioning. In this regard, he recommends a transparent merit-based appointment of authority leaders, requiring significant experience; clear rules against undue dismissals of authority heads to be laid down in the law; internal walls within the authority ensuring the protection of experienced and expert staff from the political context; and safeguarding budgetary autonomy. Not without controversy, Bernatt also proposes that the duration of the term of the authority's head and the members of the decision-making body should be limited in time and not subject to automatic renewal and that no more than two terms in office should be allowed. Moreover, to counter populism-inducing sentiments, he advances a proposal to implement a 'democratization of competition proceedings', including giving the right to comment to NGOs, research institutes, academia, and relevant state institutions, as well as to those believed to be directly affected by the alleged anticompetitive practice or notified concentration, or 'by the free market economy'. In addition, Bernatt notes the need for transparent and publicly available information on the cases 'not opened' by the competition authority. Overall, he argues, a culture needs to be built within which independent expert institutions, including market-regulatory ones, are respected.

Enforcement-wise, Bernatt suggests prioritising cases that involve harm to broader segments of society, in particular those in relative poverty and the lower middle class. He is keen on seeing competition law enforcement addressing inequality and economic insecurity that fuels populism but is, on the other hand, wary of expanding the goals of com-

petition law as this, he opines, can be used by populist governments to force the authority to sacrifice competition as a value worthy of protection and to clear transactions that raise significant competition concerns.

As regards the role of the EU and the EU competition law system, Bernatt argues for a more active reaction by the Commission, even if the developments only (nominally) concern national competition laws. He suggests that while cooperation between the competition authorities in the Member States and the Commission is relatively well developed in the field of practices restricting competition, building adequate channels of information exchange and monitoring vis-à-vis the control of concentrations at the national level is a must. In order to counter the attitude of self-restraint by competition authorities, the Commission should, he argues, open its own investigations in relation to anti-competitive practices materialising principally on the whole territory of the Member State.

This is a well-researched, thoughtful, and impassioned monograph analysing the interrelationship between populism and competition law in the broader political and economic context. While enriching the general literature on the evolution of competition law systems, it is a most welcome contribution to discussion on the role of competition institutions and competition policy in CEE. Anyone interested in learning about 'illiberal' influences impacting the performance of a competition law system, be it at the level of the competition authority or at the level of the judiciary, should be familiar with its main findings. May it inspire further (empirical) cross-country or country-specific studies so we can deepen our understanding of the ever-changing world.

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