Book Review: Populism and Antitrust: The Illiberal Influence of Populist Government on the Competition Law System By Maciej Bernatt (CUP: 2022)

By:

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The evolution of competition law systems is a fascinating topic for all those interested in the interplay between law, history, economic policy, and socio-economic developments. What factors are most relevant in a given context? What trajectory can be identified? What challenges for institutional resilience or enforcement effectiveness? Studies venturing into this topic, especially if relying on direct empirical insights such as interviews with key stakeholders, are rare but all the more valuable.

The recent monograph by Maciej Bernatt is one such study. Published in 2022 by Cambridge University Press and totaling some 270 pages, *Populism and*

Antitrust: The Illiberal Influence of Populist Government on the Competition Law System 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. Bernatt is keen to address relevant challenges both at the competition authority level and at the level of the judiciary.

Maciej Bernatt is a well-known European antitrust scholar, in particular for his work on the judiciary and the rule of law crisis in the context of competition law. He is Associate Professor at the University of Warsaw, Poland, where he runs the Centre for Antitrust and Regulatory Studies (CARS). In addition, Bernatt acts as Editor-in-Chief of the Yearbook of Antitrust and Regulatory Studies (YARS), a leading competition law academic journal in Central and East Europe.

The book is structured in four parts.

In the first part (‘Background: Populism, Democracy, Economy’), Bernatt broadly identifies the implications populism has on democracy and the economy. He uses the somewhat elusive notion of populism to recognise it as a driver of illiberal change in the economy. 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. Furthermore, focusing on the detrimental effects of populism on democracy, Bernatt discusses the dismantling of checks and balances and the weakening of the rule of law in the context of competition law enforcement.

The second part of the book (‘Populist Influence on Competition Law Systems’) examines the influence of populist governments on competition law systems in Poland and in Hungary. Bernatt argues that the ‘reevaluation 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. 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. Bernatt contextualises those 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.

In the third part ('A Regional System') he discusses the reaction of the regional supranational economic system, ie the European Union, when faced with challenges brought about by populist governments in individual Member States. 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.

The book concludes with the fourth part ('Final Diagnosis and Prospects'), in which Bernatt offers his views on the interrelationship between populism, democracy, markets, and competition law as crucial for understanding the challenges he systematically examined in the previous chapters. In terms of solutions, for example vis-à-vis enhancing institutional resilience, 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. To counter populism-inducing sentiments, he proposes 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'.

Furthermore, Bernatt advocates prioritization of 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 equally wary of expanding the goals of competition law worried that this 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 role by the Commission, even if the developments only (nominally) concern national competition laws. 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 rich, well-structured and engaging monograph by an author who passionately yet systematically addresses the interrelationship between populism and competition law in the broader political and economic context. With this book, Bernatt provides his informed take on the ‘back-sliding’ experience in two European ‘illiberal democracies’. His discussion of the most pertinent challenges as well as his proposed solutions are most illuminating not only for readers interested in East Europe. This book is a perfect companion in our universal quest for discovering the important role of competition law in the development of democratic societies founded on the rule of law and the challenges we may encounter as we go along. Rather than merely informing us of the alarming back-and-forth quality of the competition system evolution, Bernatt sets us on the straight path of searching for solutions that ensure stability and resilience.

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