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**Book Review — Published Version**

## [Rezension] Maciej Bernatt: Populism and Antitrust – The Illiberal Influence of Populist Government on the Competition Law System

IIC - International Review of Intellectual Property and Competition Law

**Provided in Cooperation with:**

Springer Nature

*Suggested Citation:* Beneke Avila, Francisco E. (2023) : [Rezension] Maciej Bernatt: Populism and Antitrust – The Illiberal Influence of Populist Government on the Competition Law System, IIC - International Review of Intellectual Property and Competition Law, ISSN 2195-0237, Springer, Berlin, Heidelberg, Vol. 54, Iss. 8, pp. 1304-1309, <https://doi.org/10.1007/s40319-023-01358-z>

This Version is available at:

<https://hdl.handle.net/10419/308708>

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## Maciej Bernatt: *Populism and Antitrust – The Illiberal Influence of Populist Government on the Competition Law System*

Cambridge University Press, 2022. 300 pp. ISBN: 9781108482837.  
£ 85.00

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Published online: 17 July 2023  
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*Populism and Antitrust – The Illiberal Influence of Populist Government on the Competition Law System* by Maciej Bernatt focuses on how competition law and its enforcement developed – or regressed – when populist governments came into power in Poland and Hungary, with references to developments in countries that have gone through similar situations such as Venezuela and the Czech Republic. As a starting point it is important to state how the author defines populism given that the phenomenon has different aspects and can be understood in different ways in academia and public commentary. The definition the author adopts is guided by what was observed in Hungary and Poland when the governments considered to be “populist” started in 2010 (with the Fidesz Party-dominated Parliament) in the former and in 2015 (with the formation of the Law and Justice government) in the latter. In short terms, the book describes how these two governments eroded liberal institutions in the political sphere – such as principles of the separation of powers and rule of law that underpin a democratic system – as well as in the economic sphere – backing away from a commitment to market competition and expanding the active role of the state.<sup>1</sup> Under this definition of populism, centralization of political and economic power is at the heart to the professed goal of furthering the will of the people. The book then presents how the competition law systems in Hungary and Poland evolved, providing an account of how competition law institutions were affected, including the functioning of agencies, relevant statutes

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<sup>1</sup> Bernatt (2022) *Populism and Antitrust – The Illiberal Influence of Populist Government on the Competition Law System*, pp. 22–23.

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Germany  
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and how they have been enforced.<sup>2</sup> The described approach makes the findings of the book useful beyond antitrust academia, since it deals in essence with how illiberal regimes shape political and economic institutions, using competition law as a case study.

Methodologically speaking, the book provides a normative analysis of developments in Hungary and Poland drawing from political science, sociology and legal literature. Its perspective is enriched by a collection of interviews with experts and practitioners in both countries. The book's main analytical tool to make sense of the events under consideration is a classification of scenarios according to two variables: (1) checks and balances and rule of law, on the one hand, and (2) the dismantling of the free market economic model, on the other. Depending on the deterioration of indicators of these two variables, the author presents four different impact scenarios to understand the influence that a populist government can have on competition law:<sup>3</sup>

1. **Deconstruction:** under this scenario, both rule of law and free market institutions have suffered significant setbacks. One could therefore expect that competition law institutions become largely eroded as reflected, for example, in the level of independence of enforcement agencies and reviewing courts. Competition law can also be instrumentalized to pursue the centralized economic agenda of illiberal governments.
2. **Marginalization:** when checks and balances and rule of law mechanisms are in place but the free market model is significantly reevaluated. Under this scenario the impact on competition law is more gradual and subtle in the beginning. The populist government is hindered from using competition law as a political tool by courts. On the other hand, there is an ever smaller role for competition law and policy in an economic system that departs from market-oriented principles.
3. **Atrophy:** this is the opposite of the marginalization scenario – rule of law is undermined but free market institutions remain. Under this situation, competition law is affected at the institutional level, for example, in the quality of the appointments to lead the authorities. It may also be steered away from the traditional tasks entrusted to competition agencies.
4. **Limited impact:** rule of law and free market institutions have been affected to a limited extent. The performance of the competition law regime will depend largely on the strengths and weaknesses it already possessed before the coming into power of the populist government.

The book can be described as going to the point as one turns its pages. However, it does provide an extensive account of areas of competition law that can be affected by populism. On the institutional side, the book examines how the independence of competition agencies, leadership and staff fluctuations, financial resources and their

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<sup>2</sup> This differentiates the book from other works describing populism in antitrust analysis, which focus on attitudes towards large corporations. See Shapiro (2018) Antitrust in a Time of Populism, *International Journal of Industrial Organization*, 61:714–748.

<sup>3</sup> Bernatt (2022), Ch. 3.B.

mandate were shaped by the Hungarian and Polish governments.<sup>4</sup> One illustrative instance of how the authority's independence was affected in Hungary was an enforcement action against a watermelon cartel. The companies involved, which were influential with the government, pushed back for immunity from competition law in the agricultural sector while the investigation was ongoing. The amendment with immunity passed before a decision in the case was reached. The Minister for Rural Development decreed that the watermelon cartel was covered by the exemption and the investigation was closed. The author recognizes that this amendment had a chilling effect on enforcement in agricultural markets.<sup>5</sup> The implications, however, can be interpreted more broadly. This instance signaled that competition law intervention in any industry with political influence could trigger a strong backlash against antitrust law institutions.<sup>6</sup> As the book points out, the Hungarian authority could still apply Art. 101 of the Treaty on the Functioning of the European Union (TFEU) to cartels in the agricultural sector despite the exemption. It, however, refrained from doing so because of political considerations.

Another development that exemplifies a denaturalization of normal competition tasks is the 2013 amendment in Hungary regarding public interest considerations in merger control introduced through Art. 24/A of the Competition Act. This provision allows the government to declare a transaction to be of strategic importance for the national interest to preserve jobs and the security of supply. The exercise of such powers is excluded from judicial review. According to the book, this article has been invoked at least 21 times between 2014 and 2017, which can be considered significant.

The author subsumes these instances into the deconstruction scenario and it is clear to see why. The antitrust immunity amendments do not conform to market-oriented principles, allowing the most egregious forms of anticompetitive behavior to remain unpunished, even when public contracts are affected. They also applied retroactively to ongoing investigations, which makes them contrary to settled rule of law principles. Public interest exemptions in merger control do not necessarily run counter to market-oriented principles since the economy may be affected in different ways through a merger transaction, such as environmental harm and job stability. It is a stretch to disregard such interests as non-economic. Public interest exemptions, on the other hand, can indeed be a threat to a market economy to the extent that they are invoked in an arbitrary manner. This depends, partly, on how they are drafted: in Hungary's case, the author argues that the limits of the exemption and how they are supervised are vague, and in the case at hand, the exemption is excluded from judicial review.

The lessons to be drawn from the cases analyzed in the book are relevant for antitrust authorities around the world. For the younger regimes, it may be advisable to go after the most harmful cartels and monopolies in the economy to gain political

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<sup>4</sup> *Id.*, Ch. 4.

<sup>5</sup> *Id.*, p. 153.

<sup>6</sup> This is shown by another example from the book in Hungary. An investigation into public contracts regarding waste management triggered a similar response from the government and parliament, which established an exemption in this market as well, with retroactive effects. Bernatt (2022), p. 157.

ground and relevance, which can be associated with how much support in the form of financial resources the antitrust authority receives from the central government. On the other hand, as the Hungarian experience shows, intervening in markets where firms are well connected to the ruling political party may cause a counter reaction that affects the competition regime, such as substantive law, how the head of the authority is appointed (giving more weight to political considerations rather than qualifications of the candidates), and financial resources assigned to fulfilling its tasks.<sup>7</sup>

The book also traces the effects of populist governments in enforcement activity. The story in Poland is quite telling, given that before the period characterized as “populist”, the competition regime had a good reputation and track record. After the coming into power of the Law and Justice government, the enforcement activity visibly declined as measured by the number of cases and the amounts of fines imposed by the authority. In 2018, the Warsaw office of the Polish Competition Authority, which is responsible for prosecuting nation-wide anticompetitive behavior, did not issue one single infringement decision.<sup>8</sup> This may be linked to other factors identified by the book such as the politically-driven appointments of the head of the competition authority and the expansion of its mandate to other areas apart from traditional competition law tasks (such as consumer protection) coupled with insufficient financial resources.<sup>9</sup>

The examples taken from the book give a good idea of the theme and analytical approach, but this account is far from exhaustive. The book analyzes developments regarding politically motivated enforcement, application of antitrust law to state-owned enterprises, and the decreasing activity regarding competition advocacy of the authority, among other areas.

The book also provides an analysis of the implications of these developments to competition law at the supranational level in the EU and what the role of regional authorities should be. To start with, the book concludes that the ECN+ Directive<sup>10</sup> does not address the pressures that competition regimes face under populist governments. The Directive is aimed at promoting that national competition authorities are independent, have sufficient resources and the necessary powers to effectively enforce Arts. 101 and 102 TFEU. The shortcomings it has in pursuing these objectives in the face of more extreme situations, such as that in Hungary and Poland, come from the fact that the Directive is a product of compromise due to various concerns of Member States, such as fears of losing autonomy and how to exactly regulate the independence of competition agencies. The Directive does not

<sup>7</sup> On the issue of balancing the development of an enforcement agenda and political opposition, see Kovacic and Lopez-Galdos (2016) “Lifecycles of Competition Systems: Explaining Variation in the Implementation of new Regimes”, *Law and Contemporary Problems* 79(4):85–122; and Aydin and Bütte (2016) “Competition Law & Policy in Developing Countries: Explaining Variations and Outcomes; Exploring Possibilities and Limits”, *Law and Contemporary Problems* 79(4):1–36.

<sup>8</sup> Bernatt (2022), pp. 130 and 131.

<sup>9</sup> *Id.*, pp. 69 and 97.

<sup>10</sup> Directive 2019/1 of December 11, 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11/3, January 14, 2019.

prescribe minimum selection criteria such as relevant experience of the heads of the authorities. In addition, it addresses enforcement problems through changes in the law regarding investigative and sanctioning powers, but the problems faced in Hungary and Poland come rather from more practical sources such as the lack of human resources.

Another aspect of EU law explored in the book as a counter-mechanism to pressures from populist governments is the use of supranational law by national competition authorities to act when constrained by national exemptions of antitrust law.<sup>11</sup> The book points to the limitations of this avenue referring again to the watermelon cartel in Hungary. The antitrust immunity in the agricultural sector only covered national competition law. It did not, and could not, apply to enforcement of Art. 101 TFEU by the Hungarian competition authority. The investigation was opened under both national and EU competition law. The authority, however, decided to close the investigation and not pursue liability under Art. 101 TFEU. Even if it was a possibility from a legal point of view, it is not difficult to understand why the national authority would refrain from intervening in a market where it already received a clear signal from the government to stay out.

The book also explains that intervention from EU authorities was also not enough to preserve the independence of courts reviewing antitrust law decisions by the Polish competition authority. In 2017, a new chamber of the Supreme Court was created (the Extraordinary Control and Public Affairs Chamber), which was entrusted with reviewing competition law and market regulation decisions, among other powers. Since the executive and legislative branch have more power on the appointments in this new chamber, the move was interpreted as aiming to curtail the independence of the Supreme Court in the matters assigned to the new chamber.<sup>12</sup> As described in the book, the Commission did investigate and helped in remedying other developments that affected judiciary independence of national courts in Poland and Hungary. The issue of the Extraordinary Control Chamber in Poland was not part of the Commission's intervention.<sup>13</sup>

Drawing from the lessons taken from the experiences of Hungary and Poland, the book proposes solutions along two themes:<sup>14</sup> (1) how to increase the resilience of competition regimes to intervention by populist governments, conceding that this is possible only for the less extreme cases of dismantling of rule of law and market economy institutions; and (2) how competition law can play a role in remedying the conditions that lead to the rise and popularity of populist regimes, conceding again that antitrust is not a panacea but can still do its part.<sup>15</sup> The book closes with a call

<sup>11</sup> Bernatt (2022), Ch. 6.

<sup>12</sup> *Id.*, pp. 108–111.

<sup>13</sup> *Id.*, pp. 190–193.

<sup>14</sup> *Id.*, Ch. 7.D.

<sup>15</sup> The debate on if and/or how competition law can be used to solve social problems is sometimes framed in terms of the limitations of traditional competition law analysis and tools to address harm other than that arising from market power (Priest (2013) "Competition law in developing nations: The absolutist view" In: Sokol D, Cheng T, Lianos I (eds) *Competition law and development*, Stanford University Press, Stanford, pp. 79–89). However, even within the limitations of traditional antitrust analysis, one can arguably make adjustments so that the policy plays a role in addressing social problems

for stronger EU intervention. Since the problems raised by populist governments can erode the trust in the decentralized system of application of EU competition law, the book proposes a stronger involvement of the Commission to fill the void left by the inaction of national competition authorities and the lack of independence of national reviewing courts.<sup>16</sup>

This review concludes that the book is a must read in the literature on the influence of politics in antitrust law and its enforcement. It is based on the methodical observation of the experiences in Hungary and Poland, drawing from extensive research on the laws, institutions and the enforcement activities, as well as the insights drawn from interviews with experts and practitioners that interact with these two competition regimes. As such, the book is a good source of lessons on the relationship between competition law and politics and ends with well-grounded and articulated recommendations beyond general best-practice prescriptions that can guide competition regimes around the world.

**Funding** Open Access funding enabled and organized by Projekt DEAL.

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Footnote 15 continued

that are connected to market power and lack of competition. For an analysis and proposals on how competition law can be used to open markets to advance the welfare of society at large in African countries, see Fox and Bakhoun (2020) Making markets work for Africa: Markets, development, and competition law in Sub-Saharan Africa, OUP, Oxford.

<sup>16</sup> *Id.*, p. 112.