

Populism and Antitrust: The Illiberal Influence of Populist Government on the Competition Law System

Maciej Bernatt

*Reviewed by Nuno Castro Marques**

1. Introduction

Assuming that institutional and procedural organization of competition law systems dictate the real impact of competition law in a given country, the Book of Professor Maciej Bernatt, published in 2022 by Cambridge University Press, benefits from an empirical insight of legal changes in Poland and Hungary and puts them on the context of the political changes occurred in both countries. From there, the Book presents a comprehensive analysis of populism and its impact on the functioning of the institutions, discussing on how the rule of populist governments is challenging the foundations of competition law in unprecedented ways.

2. The Book

The Book is divided into four parts where it exposes clearly and with a pleasant and accessible writing the complex interplay of populism and antitrust. The theme is perfectly aligned with current fundamental concerns over the impact of populism on the EU integration and its political, economic and societal model.

Part I: Background: Populism, Democracy, Economy

The author starts by presenting the background that he considers to be composed by the interaction of populism with the democratic and economic aspects of the social organization. This Part is divided into two sections:

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1. Introduction and 2. Populism and its Relationship with Democracy and the Economy. In section 1, the context is set concerning the impact of populism over democracy, market structure and competition law and by reviewing actual debates. The approach of the Book, including the questions posed, methodology used and the countries included in the empirical analysis, closes this section. On section 2, the relevance of populism as a driver for illiberal changes either in democracy as in the economy is deeply analysed, as the author concludes that populism can really be considered as a driver of illiberal change, both in terms of democracy and the economy. More in detail, the illiberal change detected as resulting from populism movements is the dismantling of political, judicial and economic checks and balances, as well as the weakening of the rule of law alongside with the implementation of an economic patriotism discourse leading to a state hegemony in the country's economic strategy. The undermining of the judiciary independence is also a central consequence, from which also derives a reduction of (judicial) effective check on the actions of the executive, the administration, or the legislator (in the case of constitutional tribunals). Regulatory agencies once also deprived of their independence will probably stop or reduce neutral, expert-based assessments in the areas subject to their competences, including market regulation, aggravated by the fact that economic patriotism induces a growing role of state-owned enterprises and the favouring of (certain) national private businesses, shifting the normal economic and market rules to an economic system in which the state plays a central role. And the role of competition as a mechanism of market organization will necessarily be undermined.

Notwithstanding those potential and identified illiberal change, it is also concluded for the possibility of some of them never materializing or materializing only to some extent. This is a country-specific conclusion as the materialization of illiberal processes concerning democracy is linked *inter alia* to the resilience of democratic institutions, strength of civil society and media, and to the overall socio-political culture that are all specific to each country. As to illiberal processes concerning the economy, their materialization is considered to be sector-specific or be limited to foreign trade.

The author also concludes that processes of democratic backsliding and liberal market backsliding are by nature gradual, and their intensity may depend on a variety of factors that will increase or reduce its velocity. It is therefore defended that illiberal processes in countries ruled by populists

are indeed a possibility which may, but does not always have to, materialize. And the illiberal processes relevant for competition law may therefore be considered as variables, by means of which the impact of populist rule on the competition law system may be assessed.

Part II: Populist Influence on Competition Law Systems

Part II is composed of three chapters, one dedicated to the conceptualization of the impact of populism on competition law systems, another to the institutions and the last to enforcement.

Using an interesting method and reasoning, the Book offers a model to assess the referred impact, where the author includes two variables: (1) the dismantling of checks and balances as well as the rule of law and (2) the revaluation of the free market economic model, demonstrated in the embracing of a state-centred character of the economy and economic patriotism. By application of those variables, it is proposed a set of four hypothetical scenarios of populists' governments' impact on the competition law system: Deconstruction - when the safeguards related to checks and balances and rule of law are largely dismantled and when the reevaluation of the liberal market economic model is significant and in this scenario the competition law system is severely weakened, the enforcement of competition law becomes limited, represented by minor cases only, and the merger review system takes on a formal, rubber-stamp character; Marginalization - when the reevaluation 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, and despite the fact that there are sufficient safeguards in the system to protect the agency and the courts which review the competition agency's decisions from populist pressure, the populists' government's pressure gradually undermines the autonomous and expert character of the agency as a result of the appointments of nonexperts and staff attrition, with the perception of the competition agency as an independent, expert body beginning to diminish, affecting its overall reputation; Atrophy - 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), producing a state of gradual weakening, alongside with the attribution to the competition agency of new tasks, which push the agency away from its traditional role of protecting competition; and Limited Impact - when the 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, and so the competition agency continues to enforce the law with similar intensity as before, with Courts exercising judicial review with a similar stringency.

The chapter dedicated to the Institutions (competition agencies and Courts) brings us an in-depth study of Hungary and Poland where populists' governments have had an impact on competition agencies and courts, namely limiting the independence of competition authorities through several ways and even to the extent of the Hungarian situation where legislative pressure to discontinue politically sensitive cases pending before the agency was detected. Agency's operating capabilities may also be adversely affected through the reduction of staff quality, resulting in a decrease in the agency's expertise, and the author refers that in the Polish there was also the extension of the competition agency's competences to areas which are not related to its original competition protection mandate, jeopardizing the agency's focus and resources from its central activity. Lastly, there is also the risk of populists' governments to push forward reforms in order to curb the independence of the ordinary judiciary, undermining the legal safeguards of independent judicial review in competition law.

Applying that reasoning to the Hungarian and Polish cases, the author concludes that Hungary offers examples of direct political intrusion into the functioning and powers of the competition agency, and Poland shows an indirect intervention through the reorganization of the Polish Supreme Court and the relocation of competition law cases to a new chamber.

As to the last chapter – Enforcement –, the Book considers that populists' governments in Hungary and Poland had an impact on the enforcement of competition law by competition agencies in several ways, as the intensity of enforcement of competition law is low and in small cases, and merger review involving acquisitions by State-owned enterprises is lenient. Notably, there have been a stop of enforcement in some sectors, such as the adoption of legislation in Hungary limiting the application of competition law in the agriculture and waste management sectors.

Part III: A Regional System

Part III is dedicated to the analysis of the case of the European Union and the impact that could have the fact of having populists' governments in the member states of a regional economic organization such as the EU. On that aspect, the author rightly defends that the role of the central

authority responsible for the application of competition law is crucial for the regional system to work adequately. The example of the ECN+ Directive is presented as being an answer to the perceived weaknesses of certain NCAs, establishing minimum requirements. Nevertheless, as the challenges posed by national governments are not addressed to a sufficient extent by means of legislative initiatives and interventions by EU authorities, they may adversely affect the decentralized system of application of EU competition law. Overall, the actions taken by populists' governments undermine the mutual trust that all NCAs adhere to a common set of values, of which the rule of law is the most important in the competition law context. This lack of trust may affect exchanges of information and the allocation of cases within the ECN.

Despite that, it is defended that it can be argued that the European Commission is resistant and resilient from political pressure from member states and enjoys a significant level of independence, and thus it is considered that the actual situation does not seem to bring risks to the core of EU competition law and its enforcement by the Commission.

Part IV: Final Diagnosis and Prospects

At Part IV we find the conclusions and what are the Book proposals (way forward) to defend competition law and enforcement from the potential impact of populists' governments.

Firstly an enhancing resilience is proposed, namely through reinforcing several aspects of the institutional setting, such as (i) the independence of competition agencies, seen as a critical factor; (ii) the accountability of competition agencies, obtained with transparent rules governing the agency's actions, their judicial review, their comprehensive reporting and organization, promoting the agency's responsiveness to societal and economic challenges, while enjoying the characteristics of independence and expertise; (iii) the mandate of the competition agency, that should be properly delimited and with a clear connection with the agency's competition and consumer protection functions; (iv) the operating capabilities, with sufficient resources allocated and available to the competition agency; (v) the due process and timing, that not only respects the rights of the undertakings but also protects the competition agency from critics; (vi) the judicial review, that serves as the main accountability mechanism in the competition system; and (vii) the competition law system's surroundings, as the author rightly points out that a competition law system

is not an isolated island and the economic context shall be congruent and orientated to consumer and competition protection, and for that a strong role for advocacy is proposed. Secondly, the Book reserves to the regional system a crucial role, considering that EU and the EU competition law system have both a fundamental influence in setting the standard how the application of competition law shall be envisaged, monitoring and intervening whenever competition law or its enforcement in member states is endangered.

3. Conclusion

The book is well organised and provides an easy reading as it presents the themes in a logic sequence and with clarity. It is clearly not a practitioners Book but one for readers interested into fundamental values underlying competition systems and into a deontological approach to competition law, for whom it is indeed a mandatory reading.

Overall, the Book gives the audience an actual and in-depth discussion about populism's impact on competition law systems and for that it provides also a very complete analysis on the key factors and values needed for a modern, democratic and market driven competition system. Its findings are reinforced by the empirical work done over the impacts on the competition systems that can be seen in Hungary and Poland as a result of their populist's governments.

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