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**Maciej Bernatt, *Populism and Antitrust: the Illiberal Influence of Populist Government on the Competition Law System*, Cambridge University Press, Cambridge: 2022, pp. 258**

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*And those people should not be listened to who keep saying the voice of the people is the voice of God, since the riotousness of the crowd is always very close to madness. – Alcuin, 798 A.D.*

Over the years much has been said about rational law-making. It is idealistically assumed that lawmakers are prudent and rational and that the shape of legal frameworks results from careful consideration of the pros and cons, all driven by an overarching obligation to pursue a general public benefit. The importance of a rational, science-based approach is especially seen in the sphere of competition rules, due to their inherent reliance on economic knowledge. In this sense, competition law allows rational lawmakers to rely on objective, verifiable science in order to safeguard the competitive process and ensure consumer welfare. But what if the lawmakers do not subscribe to this vision?

In a perfect world the author of this book, Maciej Bernatt, would have no reason to write *Populism and Antitrust: the Illiberal Influence of Populist Government on the Competition Law System*. The real world, however, is not perfect. In face of the rising tide of populism, the question of how ideas – largely built on fear and on short term emotionally-based public relations gains at the expense of long term planning and a science-based approach can impact the competition law is indeed a “hot topic”.

The book is comprised of 7 chapters, divided into 4 parts. In the first part – which aims to build the theoretical foundation upon which the subsequent analysis is based – the author presents the concept of populism and analyses the factors

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responsible for the appearance of illiberal tendencies, which often amount to what Erich Fromm has described as “Escape from Freedom”.<sup>1</sup> The factors presented – such as economic insecurity or cultural anxieties – are not country-specific, and their combination and interplay varies across countries and regions. However, they do provide valuable insights into why populism has gained traction in recent years, making the conclusions presented relevant in a non-country specific context.

Maciej Bernatt further analyses the mechanisms by which populist governments can affect markets, where changes in competition rules either directly pursue a populist agenda, or at least remove barriers impeding populist policies. These considerations represent the main building blocks of the book and provide a conceptual backdrop for the subsequent analyses. The research perspective is determined by the following questions:

What characteristics of populism are relevant in analysis of the influence of populism on a competition law system? In what ways does the rule of populists’ governments affect the institutional structure and the enforcement of competition law? How relevant are the challenges related to the rule of populists’ governments to the regional system of competition law, and what should the regional reaction to these challenges look like? (pp. 13-14).

The substantive discussion is then presented in the subsequent parts. The second part seeks to map the pathways of populists’ influence on competition law systems. The author presents a set of possible scenarios, ranging from the minimalization of competition authorities’ roles through atrophy, where *verba legis* becomes a dead letter to the complete deconstruction. Bernatt convincingly elucidates how seemingly innocuous factors may have wider knock-on effects in competition law. For example, he shows how relatively small changes in the rules governing appointments, dismissals and reporting procedures in competition and regulatory agencies may chip away at these agencies’ independence. Generally, the system of checks and balances can become dismantled or rendered ineffective. These analyses make for a sad read when seen in the light of contemporary developments (the silver lining here is that this goes to show the accuracy of Maciej Bernatt’s conclusions). The analysis in the third part moves to the supranational level. It focuses on how the national populist tendencies can undermine the European competition law and further on how the EU can respond and defend its *acquis*. The final, fourth part provides a summary and offers conclusions as well as recommendations.

Throughout the book, the author frames the populist influences on the competition law system as a gradual departure from the decades-long adherence to a liberal economy. Even if a “pure” Nozick’s liberalist approach is now rejected, even

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<sup>1</sup> E. Fromm, *Escape from Freedom*, Farrar & Rinehart, New York: 1941.

in the European ordoliberal-inspired “social market economy” the very idea of a market economy and the role of competition as process was never questioned.<sup>2</sup> Conversely, as the author points out populist rhetoric often revolves around a strategic rejection of the free market economic consensus of the preceding period. In this context Maciej Bernatt points out the process of re-nationalisation, whereby the State is no longer seen as the guarantor of a free market, but rather is replacing markets in providing outcomes that would have been otherwise achieved by market forces. In this context we can see the growth of state-owned enterprises and their increased scope of operation. In addition, Bernatt argues that the redefinition of the role of the State manifests itself through the increased acquiescence towards subsidising (or otherwise supporting) sectors which evoke public sympathy, regardless of whether they have been negatively verified by market mechanisms and regardless of the broader economic implications.

Such an approach is often portrayed by populist discourse as “Economic Patriotism”. This overused notion is, to paraphrase Uwe Pörsken, a “plastic word” – a good sounding hollow shell devoid of meaning and substance<sup>3</sup>. Bernatt pays attention to this policy angle and acutely observe that behind the lofty rhetoric, the (economically dubious) strategy of promoting State-owned “national champions” helps to build and maintain the political elite’s power base, creating places which can be filled by political appointments and providing a vehicle for various pork barrel contracts. The populist slogan of ‘economic patriotism’ in reality translates into favouritism, whereby preferential treatment or privileges are given to certain individuals or groups based on personal relationships or other non-meritorious factors, rather than on objective criteria such as qualifications or performance. This process can take many forms, ranging from nepotism through to cronyism and political patronage.

The situation is further exacerbated by the systemic dismantling of checks and balances. This is the crux of the analysis presented in the book. The gradual but observable increase in the role of the state in the economy is not populist *per se*. For example, the recent trend of re-municipalization of certain public services stems from the economically defensible assumption that the marketized model has led to various inequalities and labour violations. All in all, there are many valid, economically defensible reasons for governments to intervene in markets. Even Friedrich von Hayek himself famously wrote that “probably nothing has done so much harm to the liberal cause as a ‘wooden insistence’ on laissez-faire”.<sup>4</sup> Nationalization and

<sup>2</sup> Cf. R. Nozick, *Anarchy, State and Utopia*, Basic Books, New York: 1974, pp. 153-156 with W. Röpke, *Jenseits von Angebot und Nachfrage*, Eugen-Rentsch-Verlag, Erlenbach-Zürich-Stuttgart: 1958.

<sup>3</sup> Cf. U. Pörsken, *Plastic Words: The Tyranny of a Modular Language*, Penn State University Press: 1995.

<sup>4</sup> F. von Hayek, *The Constitution of Liberty*, University of Chicago Press, Chicago: 1960, p. 205.

increased stateization is not a problem in and by itself. It turns into a problem when populist policies escape the control normally exercised by independent competition/regulatory agencies and by impartial courts.

The author highlights the two main factors responsible for the process whereby competition law systems become either permeated by populist ideas, or at least vulnerable to populist-driven initiatives: politically-driven appointment processes in seemingly independent agencies; and limited autonomy of non-political decision makers. The replacement of a recognized expert in the field who is chairperson of a competition authority with a political nominee with no prior experience in the field usually heralds this process. This will typically have the knock-on effect of attrition of “Old Guard” – i.e. highly experienced and largely irreplaceable personnel. Further Bernatt focuses his attention on legislative interference into the agencies’ decision-making processes. This presents an almost textbook example of indirect influence (so much discussed in the context of Art. 6 ECHR), whereby for instance by simplifying a chairperson’s dismissal procedures an organisation can be rendered “toothless” without any actual changes to its competences. This process usually results in the refocusing of enforcement priorities from protecting the competitive process – i.e. scrutiny of dominant State-run undertakings and cooperative relations between public enterprises – towards relatively small consumer-focused cases. At the same time, grassroots consumer advocacy groups are routinely ignored.

The next segment is devoted to the question of undermining the impartiality of the judicial protection system. Bernatt elucidates the role of due process as a safety net against, on the one hand, questionable government policies, and on the other against abuses of powers by otherwise unaccountable agencies. He well illustrates the synergy between the institutional framework of competition law enforcement and an independent, fair and impartial judiciary. Populist steps taken by governments – either directly or through vassalized competition authorities – can only succeed when effective judicial recourse is not available to affected individuals and/or institutions. Although in this context it must be noted that even in the European Union competition law, where neither the impartiality of the Commission nor the Court is in question, there is a salient issue of how meaningful such a judicial oversight really is if the Court’s assessment is limited to questions of law and in principle cannot reject the Commission’s economic analyses, even though they may be methodologically questionable.

In the final part of the book the author analyses how a regional system – in this case the European Union – can and should respond to a threat to its competition law system from within. Painting in broad strokes, the general thrust of the argument is to replace populist-poisoned domestic mechanisms with those where decisions are taken at the supranational level; for example by monitoring concentrations below

the so-called community thresholds as well as engaging in a search for “a friendly, dialogue-based resolution” (p. 238). In the latter context however, the author is rightly sceptical. A dialogue-based conciliatory approach may not be effective in reining in populist governments. If certain regimes systemically reject European values, one can reasonably expect such governments to keep “an open line of communication” in order to maintain the facade of openness and dialogue without actually reversing their policy courses. It can be said that we are observing a new iteration of a decades-old error made by Western Europe in its contacts with the Soviet Union, wherein all conciliatory approaches were based on the false premise that both parties were equally devoted to the principle of dialogue. Instead, as history has demonstrated, the Soviet side instrumentally exploited the existing goodwill to pursue their own agenda while viewing concessions as a sign of weakness.<sup>5</sup> The picture painted by Maciej Bernatt of how populist governments can maneuver in the international environment also lamentably bears a strong resemblance to challenges associating with treating people with a “criminal personality” where their need for control and power over others can and will cause them to misuse just about anything for their own purposes, including therapy, for example in order to build a false self-image.<sup>6</sup>

The author’s conclusions provide therefore food for thought with regards to what to do with such governments. He questions whether there really exists a systemic approach to the protection of European values when a Member State equally systematically rejects them and yet the “offender” enjoys a democratic mandate. The inadequacy of a dead-letter Art. 7 TEU has become apparent in recent years. The infringement procedure, mixed with the rule of law conditionality regulation, has proven somewhat more successful, although far from completely. In light of all this, maybe what Alcuin quoted early was wrong? Maybe *vox populi* is indeed *vox dei*? That is a scary thought, but if the observable wave toward populism does not subside, we may wind up not focusing on countering populist tendencies, but rather on how the competition law system can be dismantled and replaced with a command economy. This presents a yet-unwritten scenario and would be a continuation of Maciej Bernatt’s book.

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<sup>5</sup> P. Hassner, *Western European Perceptions of the USSR*, 108(1) *Daedalus* 113 (1979).

<sup>6</sup> S. Yochelson, S. Samenow, *The Criminal Personality: A Profile for Change*, Rowman & Littlefield Publishers, Lanham, Boulder, New York, Toronto, Oxford: 2004.