

Fünf Fragen an Maciej Bernatt



Maciej Bernatt is an Associate Professor of Law at the University of Warsaw and the director of the Centre for Antitrust and Regulatory Studies (CARS). He worked for the Polish Supreme Court as well as the Constitutional Tribunal of Poland and in the Helsinki Foundation for Human Rights. His new book "Populism and Antitrust: The Illiberal Influence of Populist Government on the Competition Law System" is published by Cambridge University Press.

In your new book, "Populism and Antitrust", you look at how competition law enforcement falls prey to populist governments. Could you give an example?

The Hungarian watermelon cartel case offers a very good illustration. The competition agency was effectively forced to discontinue its investigation into a hard-core agreement of watermelon producers with evident negative price effects after the parliament passed an amendment limiting its powers in the agriculture sector. The law applied retroactively to pending investigations. Rather than offering a well-thought solution for the sector, it aimed at stopping the watermelon investigation which went against the economic interests of the ruling party's politician. This is a very direct example of what I call in my book a deconstruction scenario but we should be aware of less straightforward scenarios. For example an agency may strategically choose to self-restraint enforcement in relation to firms linked to the ruling government or offer a weak review of concentrations of firms controlled by the state. I also discuss that an agency may well go through an atrophy scenario and gradually lose much of its relevance.

How do you define populism in the realm of antitrust?

I associate populism with the practice of rule by populist governments and I see it as a driver of an illiberal shift insofar as it concerns democracy and the economy. I show that the practice of rule by populist governments undermines liberal democracy and economic liberalism, in particular the rule of law and checks and balances, as well as the commitment to market competition. This practice is justified by the ruling populists' claim that the will of ordinary people needs to be implemented without constraints. For me, central to populism is a rejection of pluralism and willingness to consolidate both political and economic power.

A recent ruling by the EU's General Court raises questions about the political influence on the

competition authority's decision-making in Poland. Do you agree that independence of competition authorities is an issue today?

One of my key findings relates to the agency's capability to maintain the actual independence: a challenging task if you consider the increasingly hostile environment within which the agency functions. This is likely to be true even for agencies where the independent status is safeguarded by law. I identify several processes which are problematic for the adequate institutional organization of a competition law system and which inform the agency's actual independence. They include non-expert character of appointment of agency's head and the members of agency's decision-making body, attrition of competent staff, as well as political pressure on courts exercising judicial review of agency's action. The GC judgment in the Sped Pro case confirms that there is a need for contextual analysis whether competition agencies and courts are independent.

The ECN+ Directive seemed to answer some of the concerns you raise. Does it live up to its promises?

I don't think so and I explain it in the book in detail. The ECN+ Directive provisions address two key problems: agency's independence and resources are general and incomplete. For example, the Directive does not preclude political, non-expert character of appointment and it is not concerned on how to safeguard an effective and impartial judicial review system. There is also some tension between the agency's power to prioritize cases and risks related to the agency's self-restraint attitude I discuss in my book. The Directive can be of some help for the agencies of the countries which would be about to face the rule of populist government but I don't think it will have a significant impact on the countries which already go through this experience.

What should those observe and do who try to keep a liberal idea of competition law and its enforcement? Any recommendations?

In my book I caution against naivety that a competition law system can be effectively protected when far reaching changes in political and economic systems take place. I therefore call for reforms so that the resilience of competition agencies and courts is greater. Among others, the improvements should involve the agency's independence, accountability, scope of competences, and judicial review. I argue that competition law enforcement should address peoples' economic concerns and fears which explain the success of populist politicians. Finally, I see the need for a (more) active role of EU institutions vis a vis competition law related challenges materializing at the Member States' level.

Die Fragen stellte Prof. Dr. Rupprecht Podszun, Heinrich-Heine-Universität Düsseldorf.