

Book Review

Do Today's Antitrust Institutions Accommodate Independent Expertise?

Maciej Bernatt

Populism and Antitrust

Cambridge Univ. Press 2021

Max Huffman

Maciej Bernatt, in *Populism and Antitrust: The Illiberal Influence of Populist Governance on the Competition Law System*, takes aim at populist governance and what he argues are its threats to antitrust systems.¹ Bernatt focuses on antitrust systems in Central Europe (with Hungary and Poland as his primary subjects), and to a lesser extent countries across the global south. In Bernatt's telling, populist governments use rhetorical appeals to “real people”—what a U.S. politician might call “main street”—to justify weakening antitrust enforcement.

Populism is much discussed in the popular press, with heightened interest since the ascendancy of Donald Trump in 2016.² Commentators have recently discussed populism in antitrust law as well, with particular focus on antitrust enforcement by the Department of Justice in the Trump presidential administration—DOJ typically considered the federal enforcer most subject to political influence due to the reporting line to the President³—and the direction of antitrust enforcement by the FTC and Congressional antitrust reform initiatives in the first 18 months of the Biden presidential administration.⁴ Barak Orbach proposes that, at least in the United States context, the term “populism” has become an epithet, poorly defined and wielded as a cudgel against ideological or political opponents. Thus, Orbach explains, Chicago School antitrusters have been called populist, as have Neo-Brandeisians.⁵

The definitional uncertainty and overuse of the term “populism” may diminish its utility in analyzing political activity and its interplay with economic policy and regulation. Fortunately, in *Populism*

■ **Max Huffman** is Vice Dean and Professor, McKinney School of Law; Senior Research Fellow, Loyola Univ.—Chicago Institute for Consumer Antitrust Studies. Marina Lao, Jack Parke, Maria José Schmidt-Kessen, and George Wright gave helpful ideas and criticism.

¹ Maciej Bernatt, *Populism and Antitrust: The Illiberal Influence of Populist Government on the Competition Law System* (2021).

² For example, a Google Trends search for “populism” both in the United States and worldwide, from 2004-present, shows a massive spike in December 2016, with post-2016 searches continuing higher than pre-2016 levels. See Google Trends U.S. (search conducted July 19, 2022), <https://trends.google.com/trends/explore?date=all&geo=US&q=populism>; Google Trends Worldwide (search conducted July 19, 2022), <https://trends.google.com/trends/explore?date=all&q=populism>.

³ E.g., Carl Shapiro, *Antitrust in a Time of Populism*, 61 Int'l J. Indus. Org. 714 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3058345.

⁴ E.g., Aurelien Portuese, *Biden Antitrust: The Paradox of the New Antitrust Populism*, George Mason L. Rev. (forthcoming 2022), <https://www2.itif.org/2022-biden-antitrust-paradox-populism.pdf>.

⁵ Orbach explains the odd circularity of opposing camps that deploy populist methods cross-identifying each other as populist. Barak Orbach, *Antitrust Populism*, 14 NYU J.L. & Bus. 3-4 (2017). Orbach traces the use of the term populism in antitrust to as early as 1963. *Id.* at 2 n.1 (citing Robert H. Bork & Ward S. Bowman Jr., *The Crisis in Antitrust*, FORTUNE (Dec. 1963)).

and *Antitrust*, Bernatt carefully breaks down the phenomenon to explain what populism is, how it is exercised in the context of antitrust, the implications for antitrust and for democracy more broadly, and what might be done to ameliorate them. These lessons make Bernatt's book a must-read for anybody with an interest in the future of antitrust law and its institutions. This review attempts to draw from the book's broader lessons, including for understanding the changes underway in U.S. antitrust.

Defining Populism

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After his introduction, in Chapter 2 Bernatt introduces the problem of populism across democracies and economies. He recognizes that populism is a “contested term,” quoting Case Mudde & Cristobal Rovira Kaltwasser's characterization of the word as “one of the main political buzzwords of the 21st century.”⁶

Bernatt's canvas of an extensive, primarily 21st-century, scholarly literature defines populism as the political method of dividing “real people” from others, with the other frequently characterized as a corrupt elite. Such a divide may cast governing institutions as elitist when they interfere with a populist's agenda. A U.S. reader may recognize shades of that antipathy to institutions both in Trumpist discourse, criticizing the “deep state” and the federal court system, and in today's Progressive discourse, raising claims of “systemic injustice.”⁷ As such, the core definitional feature of populism does prove applicable to otherwise wildly divergent political extremes. Bernatt brings that point home in *Populism and Antitrust* by drawing on examples from both right-wing populist governments in Hungary, Poland, and India (among others), and left-wing populist governments in Venezuela and South Africa.

Bernatt also confronts a second definitional problem of distinguishing populism from democracy. Too-casual use of “democracy” to define today's Western governments glosses over the importance of (small-r) republican institutions, frequently less democratic in day-to-day operation, that enable those democracies to function. Those institutions include a constitutional structure; judicial review with an independent judiciary; professional apolitical civil servants; independent regulatory agencies; an independent media; and other checks on majoritarian excess such as multi-party governments, NGOs, and independent universities. Those constraints mitigate tendencies of pure democracies both to repress political minorities and to produce swings in legal rules that undermine predictability. Bernatt employs the common “liberal” versus “illiberal” distinction to distinguish governments that undermine such constraints sufficiently to remove checks on excess (illiberal), from those that protect both pluralism and the rule of law (liberal).⁸

Many of the arguments in Part I of *Populism and Antitrust* will be familiar to a reader of recent political science literature. Bernatt provides a great service by bringing it together in a succinct framework, both to resolve the definitional problems and to categorize features of populism that

⁶ *Id.* at 24 (quoting Case Mudde & Cristobal Rovira Kaltwasser, *Populism: A Very Short Introduction* (2017) at 1).

⁷ E.g., Katie Reilly, *President Trump Escalates Attacks on ‘Obama Judges’ After Rare Rebuke From Chief Justice*, TIME (Nov. 21, 2018), <https://time.com/5461827/donald-trump-judiciary-chief-justice-john-roberts/>; Elizabeth Warren, *Democrats Can Avoid Disaster in November*, NY TIMES (Apr. 18, 2022), <https://www.nytimes.com/2022/04/18/opinion/elizabeth-warren-democrats-biden-midterms.html>.

⁸ *Id.* at 29-30. Notably, Hungarian Prime Minister Victor Orban, whose Fidesz government is one of Bernatt's two primary research subjects in this book, has adopted the phrase “illiberal democracy.” See Viktor Orban, *Full text of Viktor Orbán's speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014*, THE BUDAPEST BEACON (July 29, 2014), <https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>.

explain its impact on antitrust. He also provides a massive ten-page table of authorities providing substantial opportunity for further study.

The Impact on Antitrust

In Part II: Populist Influence on Competition Law Systems, *Populism and Antitrust* applies the broader lessons of populism in the political sphere to the realm of antitrust. This Part II is the heart of the book and represents Bernatt's primary contribution to the important political science questions raised.

In "Conceptualization," Bernatt outlines "variables" and "impact scenarios" for understanding the effect of populism on antitrust. One variable is the degree to which a government dismantles institutions that constrain populist excess leading to an undermining of the rule of law—in the absence of which antitrust may become a tool for economic control or suppression of political rivals rather than market oversight. The second variable is the degree of commitment to free markets, with lesser commitment leading to increased danger of the populist government's undermining the antitrust system. Taking these two variables, Bernatt describes four "impact scenarios," represented by quadrants on a two-dimensional chart. At the extreme, a lack of commitment to free markets and erosion of the rule of law together produce "deconstruction." At the other extreme, a populism that retains commitment to markets and respect for the rule of law has "limited impact." The two mixed outcomes—lack of commitment to markets but protection of the rule of law, and commitment to markets but erosion of the rule of law—produce "marginalization" and "atrophy," respectively.

This chapter is both the most original and—perhaps for that reason—the most challenging in the book. Bernatt's exercise in categorizing the variables does create a helpful model for understanding the observations related in the subsequent chapters. But as a practical matter the distinctions among Bernatt's outcomes seem blurred in a number of instances. Bernatt's categorization creates unnecessary grounds for quibbling about which quadrant is most descriptive in a particular case. Does appointing political cronies to positions previously held by subject experts reflect marginalization? Or deconstruction? The core point is that each of Bernatt's variables, when present in force, will weaken antitrust. Together, they will destroy it. Importantly, Bernatt brings that point home with a raft of examples relating to institutions and enforcement in subsequent chapters.

Bernatt's thesis raises a more fundamental question: is it important that the influences he studies derive from populism? Throughout the book Bernatt describes multiple examples of what one might call "bad government." Whether populism, corruption, or administrative incompetence is the cause, the outcome may be the same.

Agency Independence

Bernatt's 60-page chapter on "Institutions" is the lengthiest and the most important in the book. On its own this chapter makes *Populism and Antitrust* worth reading. Bernatt constructs the chapter around features that are core to a successful antitrust system, beginning with agency independence, which he describes as an essential check on populist excess. "[I]ndependence shields competition agencies from the pressure of politicians and private firms, and so enables them to function within their mandates prescribed by law."⁹ Although Bernatt expressly declines to engage the U.S. experience in depth in this book, he does highlight the government's review of the AT&T/

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⁹ *Populism and Antitrust* at 67.

Time Warner merger.¹⁰ Views differ as to whether the then-President's intemperate public statements about “want[ing] that deal blocked” led to the Justice Department's challenge of this primarily vertical merger involving a media company (CNN) that the then-President viewed as hostile.¹¹ But importantly, there are no prominent sources, even among those favoring the merger challenge, arguing that it would be acceptable if a president's wishes influenced an agency's decision to investigate or to prosecute.¹²

Bernatt sees independence as undermined by politically driven appointments, limited autonomy, negative perceptions of independence, legislative interventions, and agency self-restraint when brought about by political pressure. Politically driven appointments and limited autonomy are the key factors in this list, with the other three derivative. Bernatt uses examples from Poland and Hungary, including rapid dismissal of the head of the Polish Competition Agency (PCA) after a legislative change removed requirements of expert-driven and non-political appointment processes. Punctuating the decline in the PCA's independence, the new appointee described the agency's role as collaboration with other state institutions to achieve common results. Hungary's experience predated that of Poland by several years. The year 2010 saw the appointment of an agency president lacking significant prior experience, without prior questioning by the Hungarian Parliament. Bernatt identifies the example of Venezuela, where in 2000 Ignacio de León resigned and was replaced by a non-expert shortly after the Hugo Chavez ascendancy,¹³ as well as experiences in Greece in 2018 and the Czech Republic in 2021.

Structural features of antitrust institutions can also support or undermine independence. The structure of the Hungarian Competition Authority (HCA) was meant to insulate the case resolution procedures, in the hands of the Competition Council headed by a chair, from politics. Since the Fidesz party takeover of government in 2010, this political insulation has degraded through appointment of Competition Council leadership that sees itself as having a political role, leading to an inability or disinclination to protect council members from political pressure. Another specific degradation of independent expertise at HCA involved the resignation of the “agency's chief economist and his entire team”—with “entire team” not explained. Bernatt does not relate the specific cause for the resignations. Even if each departure was explainable as something other than agency decline, the large number of departures suggests, at a minimum, a lack of adequate incentives to retain excellent staff.

It is possible to see parallels with recent U.S. experience. If inter-agency collaboration in service of a whole-of-government approach threatens agency independence, what should one make of the 2021 Executive Order on competition, signed by the President with the FTC Chair standing in the background¹⁴ while serving on the White House Competition Council?¹⁵ Rewriting an agency's

¹⁰ *Id.* at 20 n.52; 107-08 nn. 517-22. Although Bernatt analyzes this as an example of the success of judicial review, it is equally valuable here as regards independence.

¹¹ See generally sources collected in Populism and Antitrust at 107 n.521.

¹² See, e.g., Spencer W. Waller & Jacob Morse, *The Political Misuse of Antitrust: Doing the Right Thing for the Wrong Reason*, COMPETITION POLICY INTERNATIONAL, ANTITRUST CHRONICLE (July 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3656501.

¹³ Bernatt does not identify the individual, but is referring here to Dr. Ignacio de León, the founding Chairman of Venezuela's antitrust enforcement agency, the Pro Competencia.

¹⁴ “Promoting Competition in the American Economy,” Exec. Order 14036 (July 9, 2021), 88 FR 369897 (July 14, 2021); see Yuval Rosenberg, *Biden Signs Sweeping Executive Order to Promote Competition, Lower Prices*, YAHOO FINANCE (July 9, 2021), <https://finance.yahoo.com/news/biden-signs-sweeping-executive-order-002545599.html>.

¹⁵ “White House Competition Council,” The White House, <https://www.whitehouse.gov/competition/> (listing members).

mission statement in ways that raise doubts about how it defines its core mission¹⁶ may raise concerns about its independence, as it may simultaneously disturb settled expectations of the agency's role and increase the likelihood of future changes in response to shifting political winds. Compounding that, a predominance of academic and political resumes over law practice experience might be expected to subordinate hum-drum investigation and law enforcement, the bread-and-butter of an agency's work, to broader policy pronouncements.¹⁷

At the same time, uniquely rich expertise in theoretical study and policy analysis might advance novel approaches. One example might be the FTC's joining with its sister agency in a renewed emphasis on labor markets.¹⁸ (Apart from the exemptions for labor unions, labor markets have always been subject to the antitrust laws but may be incorrectly seen as being in tension with consumer protection goals by causing firms to pass costs through to consumers. In reality, antitrust enforcement in labor markets serves consumer interests by increasing output to the extent it corrects for monopsony power.¹⁹) The countervailing danger, however, is that an emphasis on policy over enforcement can overreach and suffer from political capture. FTC leadership statements on price inflation, a macro-economic phenomenon outside the FTC's micro-economic market oversight role, and the nationwide baby food shortage, coming less than two weeks after the White House call for FTC action, raises the spectre of behind-the-scenes coordination on political narratives tied more to White House goals than to the agency's mission.²⁰ The FTC even has its own recent chief economist resignation, with Bureau of Economics Director Marta Wosińska resigning in February 2022 with no explanation or advance warning.²¹

In other respects, the lessons from Bernatt's case studies do not explain the U.S. experience. Bernatt notes that budget constraints and their particular impacts on both staff salaries and mission-critical work impede agency independence. In contrast, both U.S. antitrust enforcement agencies have been able to stand up once-in-a-generation enforcement efforts, including the FTC's *Facebook* matter under the leadership of then-Chair Joe Simons and DOJ's Google prosecution

¹⁶ The FTC website announces a "core mission" of protecting "consumers and competition" by "law enforcement, advocacy, and education, without unduly burdening legitimate business activity." Federal Trade Commission, Mission, <https://www.ftc.gov/about-ftc/mission>. A proposed rewrite of that mission deletes the protection for "legitimate business activity" and redefines the competition goal to be one of "policing unfair competition." Federal Trade Commission, DRAFT Strategic Plan for Fiscal Years 2022-2026 (Oct. 2021), <https://www.regulations.gov/document/FTC-2021-0061-0001>.

¹⁷ Three of the five current commissioners boast service as Chief Counsel to a U.S. Senator and a fourth as counsel to a House subcommittee. Of those, two worked as associates in law firms prior to their legislative experience. Two joined the FTC from their academic posts. Only one of five joined the Commission from private law practice. "Commissioners," Federal Trade Commission, <https://www.ftc.gov/about-ftc/commissioners-staff/commissioners> (providing biographies).

¹⁸ *E.g.* Federal Trade Commission & Dep't of Justice Antitrust Division, Making Competition Work: Promoting Competition in Labor Markets (Dec. 6-7, 2021), <https://www.ftc.gov/news-events/events/2021/12/making-competition-work-promoting-competition-labor-markets>.

¹⁹ See Mark Anderson & Max Huffman, *Labor Organization in Ride Sharing: Unionization or Cartelization?*, 23 *VAND. J. ENT. & TECH. L.* 715 (2020) (explaining labor and consumer market complementarity), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3680903.

²⁰ Letter from President Joseph R. Biden, Jr. to FTC Chair Lina Khan (Nov. 17, 2021), <https://int.nyt.com/data/documenttools/ftc-gas-prices/92d93dca9793b8b4/full.pdf>; White House Briefing Room, FACT SHEET: President Biden Announces Additional Steps to Address Infant Formula Shortage (March 12, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/12/fact-sheet-president-biden-announces-additional-steps-to-address-infant-formula-shortage/>. See also CNBC Transcript, Federal Trade Commission Chair Lina Khan Speaks Exclusively with Andrew Ross Sorkin and Kara Swisher Live from Washington, D.C. Today (Jan. 19, 2022), <https://www.cnbc.com/2022/01/19/cnbc-transcript-federal-trade-commission-chair-lina-khan-speaks-exclusively-with-andrew-ross-sorkin-and-kara-swisher-live-from-washington-dc-today.html>.

²¹ *FTC's Director Of The Bureau Of Economics Resigns*, COMPETITION POLICY INTERNATIONAL (Feb. 22, 2022), <https://www.competitionpolicyinternational.com/ftcs-chief-economist-resigns/>.

initiated at nearly the same time.²² (The Google example may be a double-edged sword, with an October 20, 2020 case filing date that seems suspiciously tied to the first Tuesday in November.²³ And not all agree that the two agencies' current cases are a best foot forward.²⁴) Federal enforcement agency staff salaries do lag far behind the private sector but have generally remained sufficient in combination with the prestige and psychological value of public service to attract top legal and economic talent.²⁵

Mission Creep

Bernatt cites statistics showing a preference for consumer protection cases over competition cases in both the PCA and the HCA and suggests that this indicates a shift away from competition policy toward consumer protection enforcement. He also recognizes the ambiguous implications of such statistics: consumer protection may involve smaller, less complex investigations and prosecutions, rendering case totals misleading. However, as agencies are tasked with responsibilities beyond consumer protection and competition, the impacts on capacity to serve antitrust outcomes may become extreme. As examples, the PCA undertook responsibility for a law targeting “contractual advantage” in agriculture and food products and another law sanctioning firms late in making payments to contractors, both marginally in the sphere of competition policy but distinct from typical antitrust oversight.

Here too we can identify parallels to the U.S. experience. The White House and some bills in Congress have sought to impose on the FTC mandates outside of the core of the agency's expertise, with some members of the Commission reportedly happy to expand or redirect the agency's role to more politically salient projects, such as technology regulation or broad ideas of equity.²⁶

Courts

The most frightening institutional study in *Populism and Antitrust* is Bernatt's analysis of judicial review in Poland, Hungary, Venezuela, and India. Steps to weaken judicial review in these countries include jurisdiction stripping (moving competition cases to tribunals perceived to be more pliable); court packing; politically influenced, non-expert, and nontransparent court appointments;

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²² Regarding *FTC v. Facebook*, see generally <https://www.ftc.gov/legal-library/browse/cases-proceedings/191-0134-facebook-inc-ftc-v>; regarding *United States v. Google*, see generally <https://www.justice.gov/atr/case/us-and-plaintiff-states-v-google-llc>. In 2019 when FTC Chair Joe Simons ordered the creation of a task force to investigate technology firms, the agency was able to pull together staff and move quickly to make the task force a permanent unit. Press Release, FTC, FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets, Feb. 26, 2019, <https://www.ftc.gov/news-events/news/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology-markets>.

²³ E.g., Franklin Foer, *The Irony of the Google Antitrust Suit*, THE ATLANTIC (Oct. 21, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/fight-tame-big-tech-has-finally-begun/616800/>.

²⁴ See Josh Kosman, *FTC faces shoestring budget in antitrust case against Facebook*, NY POST (Dec. 10, 2020), <https://nypost.com/2020/12/10/ftc-faces-shoestring-budget-in-antitrust-case-against-facebook/> (attributing to former FTC Chair William Kovacic statements about substantial cuts to the FTC budget as relevant to the agency's prospects in the litigation).

²⁵ See, e.g., Natalie Runyon, *The FTC's unique approach to legal talent*, REUTERS (July 9, 2021), <https://www.reuters.com/legal/legalindustry/ftcs-unique-approach-legal-talent-2021-07-09/>. Whether this reality will survive current FTC leadership is in question. See Cat Zakrewski, *Sinking FTC workplace rankings threaten Chair Lina Khan's agenda*, WASHINGTON POST (July 13, 2022), <https://www.msn.com/en-us/news/politics/sinking-ftc-workplace-rankings-threaten-chair-lina-khan-e2-80-99s-agenda/ar-AAZvL98>.

²⁶ E.g., Anna Edgerton, *FTC Chair Khan Tells Senators She Plans Tech-Focused Rulemaking*, BLOOMBERG (Dec. 17, 2021), <https://www.bloomberg.com/news/articles/2021-12-17/ftc-chair-khan-tells-senators-she-plans-tech-focused-rulemaking>; Lauren Feiner, *How FTC Commissioner Slaughter wants to make antitrust enforcement antiracist*, CNBC (Oct. 26, 2020), <https://www.cnbc.com/2020/09/26/ftc-commissioner-slaughter-on-making-antitrust-enforcement-antiracist.html>.

and new (or novel use of) disciplinary regimes for judges. Less independent courts might be more hostile to agency decisionmaking, further undermining agency independence. Bernatt also identifies decreased competition law expertise among judges in both Poland and Hungary.

These factors of concern are many, and whether they compound or contradict each other is ambiguous. If non-expert judges defer to expert agencies, that may support rather than undermine neutral enforcement. But deference to an agency undermines neutral enforcement if the agency lacks expertise, independence, and adequate resources. Perhaps the lesson is that somebody in the pipeline needs to be a politically independent expert. Bernatt's study of judicial review in his jurisdictions of concern suggests a perfect storm eroding both agency independence and competence and judicial independence—a chilling outcome.

It is not surprising that in a nation with a founding mythology constructed around individual entrepreneurs (the U.S.) a populist may claim to challenge consolidations of economic power, while in a nation with a history of state control of the economy (such as Hungary or Poland) a populist will be disinclined to challenge state-controlled consolidations.

Enforcement

Bernatt's 46-page study of antitrust enforcement, subdivided into characteristics—application to state-owned enterprises; exemptions; and competition advocacy—outlines predictable and disturbing effects of the previous chapter's institutional failures on market oversight. Broadly speaking, in the jurisdictions Bernatt studies, we see a tremendous reduction in enforcement, an effect particularly observed in the context of state-owned enterprises and export industries. Bernatt sees a substantial difference between his studied jurisdictions and the U.S. as regards enforcement trends, asserting that in the U.S. practices characterized as populist have in recent years tended to lead to greater enforcement, while in the studied jurisdictions practices tend to lead to lesser enforcement.

Initially, whether Bernatt's characterization of the U.S. experience with populism in antitrust is accurate may be subject to dispute. As Orbach demonstrated, the U.S. has experience with anti-enforcement populism as well as with pro-enforcement populism.²⁷ More generally, this distinction between anti-enforcement populism and pro-enforcement approaches seems to be superficial. Populist politics is inherently non-ideological and will target outcomes that purport to serve the "real people." It is not surprising that in a nation with a founding mythology constructed around individual entrepreneurs (the U.S.) a populist may claim to challenge consolidations of economic power, while in a nation with a history of state control of the economy (such as Hungary or Poland) a populist will be disinclined to challenge state-controlled consolidations.

Solutions

Populism and Antitrust moves to the impact of populist antitrust on regional competition law systems, highlighting in particular the EU but with implications for other multi-state regional systems across Asia and Africa. This Chapter 6, "A Regional System," identifies the ECN+ Directive as a possibility for improving the independence, capacity, and remedial authority of National Competition Authorities, such as the PCA and HCA. Bernatt concludes the Directive is insufficiently stringent, failing to clarify what the requirements for clear and transparent procedures for appointments and resource sufficiency mean in practice.²⁸ Bernatt also finds that relying on supranational frameworks to correct for the effects of populist governments on national competition systems has proved insufficient.

²⁷ See Orbach, *supra* n.5, at 9-11.

²⁸ The ECN+ Directive deploys the European Competition Network, formed in 2004 by the competition agencies of the EU member states, to enforce Articles 101 and 102 of the TFEU in parallel with the European Commission. Directive 2019/1 (Dec. 11, 2018), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L0001>.

Other approaches to resolving the populism and antitrust problem also rely on supranational intervention, including through voluntary organizations such as the ICN, OECD, and UNCTAD. Because of their non-binding nature, these are likely to be less effective than the ECN+ Directive in producing real and lasting solutions. I read Bernatt's argument to be that a meaningful corrective requires a regional enforcer, such as the European Commission, to take a meaningful enforcement role as a backstop.

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Bernatt's other solutions are internal to institutional structure and culture, with a core point being the need to create and maintain a political culture of agency independence. Yet it is unclear how that culture can be created and maintained. Merit-based and transparent appointment procedures, with expertise and experience a required basis for selection, constitute part of this. Another part is legal protection for tenure, with specific prohibitions against dismissals related to case selection and resolution. Bernatt also notes the value of internal firewalls separating agency decisionmakers from one another. But such rules imposed by legislation or norms developed through practice are not immutable, which undermines Bernatt's effort to treat them as reliable solutions. Other institutional features that Bernatt's research shows promise to improve outcomes include cultivating accountability, ensuring a carefully circumscribed mandate, ensuring operating capabilities, protecting due process rights and an appropriate pace of investigations and enforcement, and judicial review - all likewise subject to being undermined by governments that do not see their value.

In theory, it should be easier to secure agreement to and to enforce such structures against smaller jurisdictions, for which participation in a trade pact or regional agreement is important to political and economic outcomes. But if that were so, one would expect Poland, Hungary, Greece, and the Czech Republic to be constrained by EU oversight, and other jurisdictions to be constrained by the importance of trade pacts with the U.S. and the EU. Bernatt's study proves that such constraints are not sufficient to ensure insulation from populist excess. Bernatt does not discuss, and one wonders to what extent it would be possible to impose, some mechanism for external oversight on larger jurisdictions, like the U.S., to mitigate degradation of an agency swayed by populist impulses.

Such dour impressions do not undermine the value of Bernatt's well-researched and reasoned solutions. The necessary impression from *Populism and Antitrust* is that it is possible to design an institutional structure that will protect against populist interference. The challenge every jurisdiction faces is how to protect that design against interference as the incentives to interfere become overwhelming.

Concluding Observations

Attention in the U.S. and Europe to populism in governance reflects real and serious concerns, which nonetheless require careful study to distinguish generalized fears of one's political opposition from serious threats to liberal governance. An important part of this work will be to analyze intersections between populist political movements and government institutions—in the case of *Populism and Antitrust*, government's role in market oversight. Bernatt undertakes that analysis in careful, systematic, and comprehensive fashion, reporting on places where populist governments have attacked antitrust institutions in Hungary, Poland, and a handful of other countries, and identifying how institutions might be structured to mitigate this interference.

An American reader naturally looks for parallels in our own governance and antitrust system, and parallels are not lacking. The United States is experiencing a period of populist impulse to interfere in otherwise neutral market oversight and law enforcement. Both the Trump DOJ and the

Biden FTC have exhibited features that Bernatt demonstrates correlate to agency decline. At the same time, we are not (yet) experiencing in the U.S. the perfect storm of lack of agency independence, mission creep, resource constraints, and undermining of effective judicial review, which would threaten to produce the kinds of institutional degradation Bernatt studies. That gives ground for optimism, so long as the optimist maintains a sober-minded understanding of the dangers of populism and warning signs of decline. ●