

# Populism and Antitrust

The Illiberal Influence of Populist Government  
on the Competition Law System

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Presentation based on the  
research findings presented in my  
new book:

MACIEJ BERNATT Populism and  
Antitrust: The Illiberal Influence of  
Populist Government on the  
Competition Law (Cambridge  
University Press 2022).

- 1) Intro
- 2) Populism
- 3) Framework
- 4) Institutions
- 5) Enforcement
- 6) EU Law System

# POPULISTS IN POWER – COMPETITION LAW

- Populists rule(d) in several countries in the world and they influence existing political, legal and socio-economic order
- All of these countries have competition laws
- What's an impact of rule of populist governments on competition law system? (1) Institutions (agencies + courts), (2) Enforcement, (3) Regional system of competition law (EU)
- Broader Debate: *Markets and Democracy*

# APPROACH

- Research on selected post-transformation countries: in Europe (Czech Republic, Greece, Hungary, Poland), in Latin America (Venezuela), in Africa (South Africa) and in Asia (India)
- Focus: manifestations of populist impact on competition law systems (rather than country case-studies)
- Desk research (law on the books, case-law, agency reports etc) and empirical research (in-depth, unstructured interviews with antitrust experts)

# POPULISM AND DEMOCRACY (CH. 2)

- **The practice of populism in power is a challenge to the main institutions and values of *liberal* democracy, most notably pluralism, separation of powers, checks and balances, rule of law, minority rights (illiberalism)**
- Democratic backsliding and concentration of power as a result of rule of populist governments; rule of law crisis

# PRACTICE

- Capture of constitutional courts
- Dismantling of professional civil service
- Early retirement age of judges + disciplinary measures
- Courts and media capture
- Narrow legalism
- Evasion of constitution and supranational legal norms

The existence and the intensity of these (and other) processes may vary, time matters

# POPULISM AND ECONOMY (CH. 2)

- Departure from liberal, market-oriented vision of economy → growing role of state in the economy + state as an owner + economic patriotism
- Concentration of political and economic power

# PRACTICE: MARKETS

- nationalisation and monopolisation of sectors of economy (school books, cigarettes)
- consolidation in the bank, media and energy sectors involving SOEs (departure of foreign companies), pro-incumbent policies (energy market)
- loopholes in procedural protection

The existence and the intensity of these (and other) processes may vary, time matters

# POPULISM – TWO ILLIBERAL ASPECTS

Departure (to an extent) from

1. Liberal democracy
2. Free market economy

→ these two phenomena inform variables by means of which impact of ruling populists on competition law system may be assessed (Conceptual framework: Ch. 3)



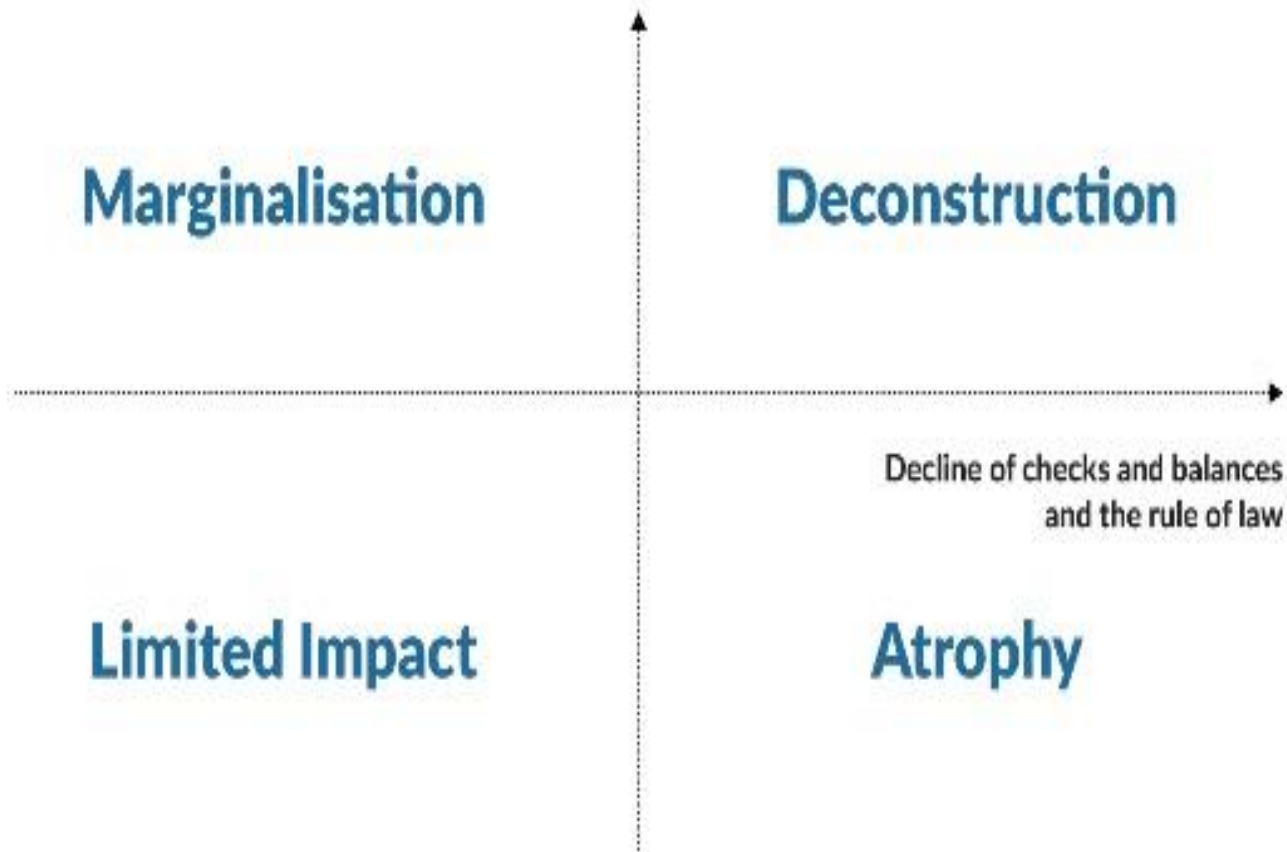
# VARIABLES + IMPACT SCENARIOS (CH. 3)

1) The extent of decline of checks and balances and the rule of law

2) The extent of re-evaluation of the free market economic model (→ state-centred, patriotic model)

→ Impact Scenarios (concern aspects of functioning of the system and not particular countries)

Re-evaluation of the free market economic model



# INSTITUTIONS (CH. 4)

## **Independence of competition agencies:**

- Politically-Driven Appointment Process
- Limited Autonomy of Decision-Makers within the Agency Structure
- Negative Perception of Agency's Independence

## **Operating capabilities:**

- Change of leaders and weak replacements
- Attrition of senior staff and staff with special knowledge
- High staff fluctuation
- Insufficient financial resources

# INSTITUTIONS (CH. 4)

## **Judicial review:**

- Dismantling of safeguards of independent judicial review
- Adverse effects on the expert character of judicial review
- Dysfunctional constitutional review

## **Mandate of competition agencies:**

- Competition and consumer mandate
- Incoherent additional tasks

# ENFORCEMENT AND ADVOCACY (CH. 5)

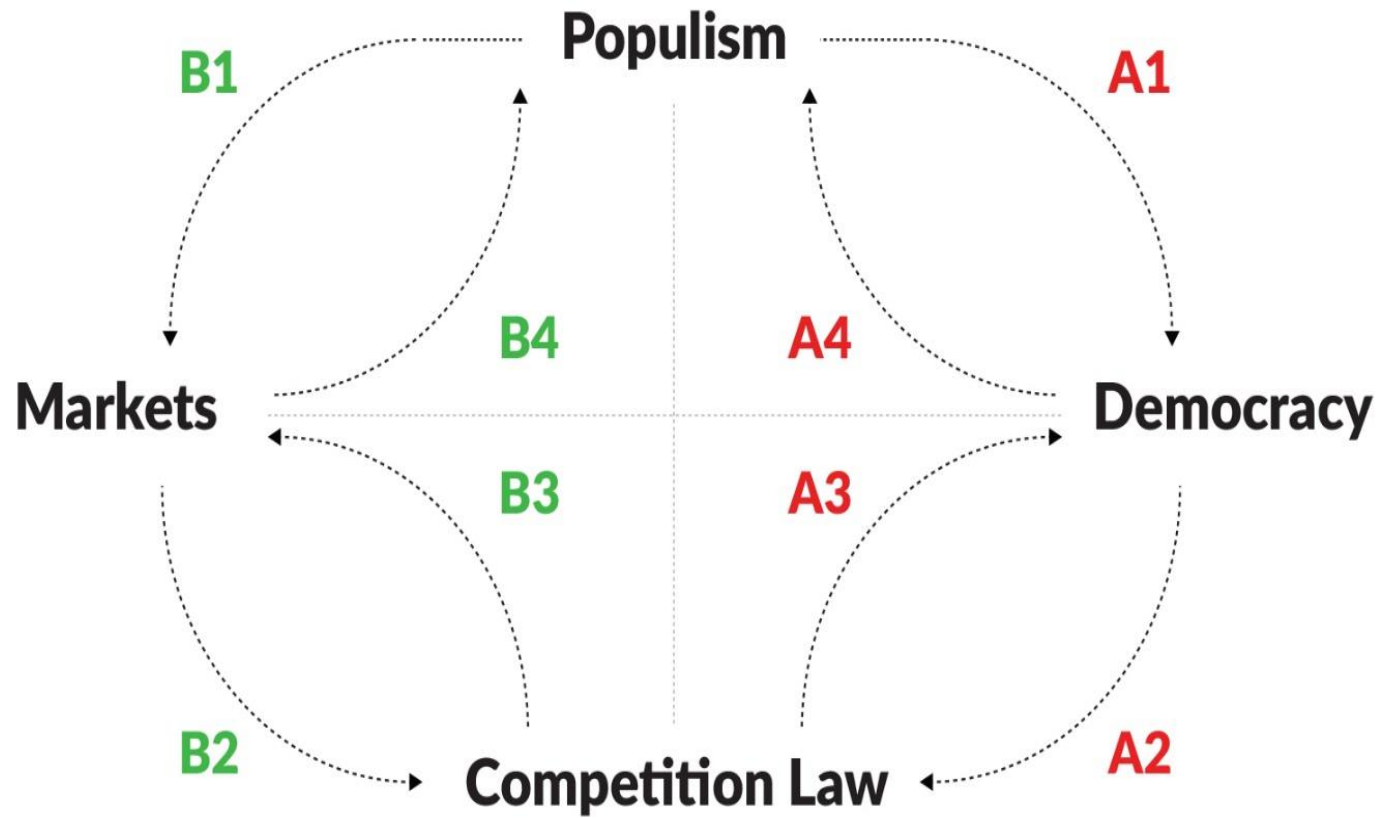
- Examples of politically motivated enforcement/merger review (energy and media sector)
- Self-restraint (for example in relation to SOEs and politically strategic mergers)
- Overall limited enforcement (small cases)
- Exemptions limiting the reach of competition law and interrupting investigations
- Advocacy: Limited activity of agency, lack of respect to agency comments

# REGIONAL SYSTEM: THE EU (CH. 6)

- Risks for functioning of decentralized system of EU competition law enforcement (lack of trust), GC's *Sped Pro* ruling of Feb 2022 as an example
- Not fully sufficient role/capability of EU institutions (interventions and legislative proposals like ECN+ Directive) but this is a challenge (gradual and subtle character of changes, narrow legalism)
- Strength of central level (independence of DG Competition, public debate, epistemological community, transparency)

# CONCLUSIONS (CH. 7)

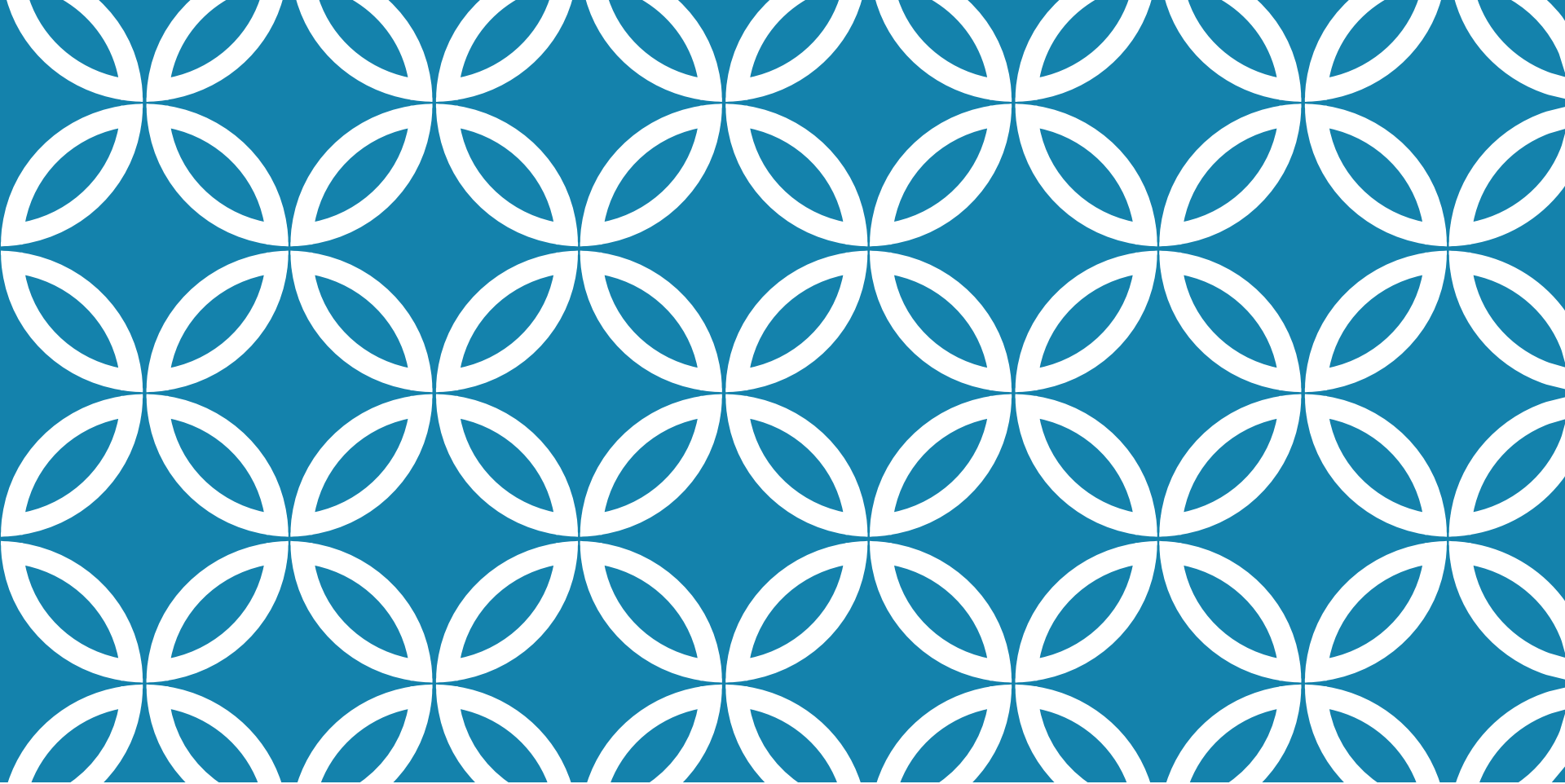
- These manifestations inform different scenarios, cumulation in case of **deconstruction scenario**
- Some specific characteristics for **marginalisation** (self-restraint) and **atrophy** (new competences unrelated to agency's competition mandate)
- Some of the characteristics which existed earlier continue to exist during the time of rule of populist governments (limited impact)
- Such processes may happen anywhere but some countries are likely to be more resilient, role of independent judicial review (think of AT&T/Time Warner merger in the U.S.)





# THE WAY FORWARD (CH. 7)

- Antitrust community should seriously address challenges posed by populist governments to competition law system (populism will stay)
- Two ways to proceed: Enhancing resilience and addressing the reasons
- **Enhancing resilience:** independence, accountability, due process and timing, judicial review, democratic surrounding, allies
- **Responding:** directions of enforcement (practices harming society at large, inequalities, entry barriers), addressing concentration, advocacy re state activity, broadening of goals of competition law?



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**THANK YOU !**