

Introduction

A CONTEXT: POPULISM, DEMOCRACY, MARKETS, AND COMPETITION LAW

In January 2020 wildfires were ravaging Australia, an established democracy with a robust free market economy and a very high gross domestic product (GDP) per capita. The authorities did not manage to control the situation and thousands of people had to flee their homes. The environmental damage was unprecedented. The smell of smoke was everywhere, and the sun was hardly visible. Tourists had to change their routes and ended up in places they'd never thought of visiting. The common experience connected them to the locals, and tourists and locals began exchanging views, asking themselves why these things were happening and what should be done. During one such exchange, the author of this book, a national of a Central European democracy, asked a local Australian, a well-dressed man in his fifties, what should be changed in Australia. My interlocutor answered in a way that echoed the voices I heard increasingly often in Europe. He stated that Australia 'needs to be shaken', and expressed strong doubts about whether this was possible in the Australian democratic system. He said he would prefer a strongman who would destroy the 'ivory tower' which rules Australia today. He argued eloquently that politicians in Australia are reelected because of the support they receive from big Australian businesses, which in turn influences the way in which these politicians govern the country. The result is that Australia is driven by the self-interest of the rich class and is not capable of facing the then current economic, environmental, and societal challenges. He hoped that the strongman, if left unconstrained, could change this course of events.

This conversation aptly encompasses the concerns underlying this book. Today's world faces a number of challenges, which are the subject of intense public debate. They include climate change, digitalization of the economy, the growing inequalities of wealth, migrations, and the crisis of values in modern societies.

These challenges inform, at least to some extent, the rise of populist politicians, who build their programs on the opposition between elites and the ordinary people who feel both disoriented and endangered by the aforementioned challenges. These populist politicians often argue that the concentration of political power is necessary for them to deliver on the promises they make to the ordinary people. In last ten years, populist parties, headed by charismatic and divisive leaders, have won democratic elections, formed governments, and often stayed in power for more than one term. They emerged in Europe (Greece, Hungary, Poland, and the Czech Republic) and in Asia (India). In other countries populist politicians have won presidential elections (Brazil, the United States) and reshaped the political and economic scene in their countries. In several other countries, such as Austria, France, Germany, Italy, and the UK, populist politicians and populist parties have gained strength, and although they have not attained full power, they have become important players on the political scene. Since the challenges mentioned above are not likely to disappear, populism can be seen as a phenomenon which is likely to remain present for many years to come.¹ Thus it makes sense to discuss the already-existing examples of the rule by populists (rule of populists' governments), and by doing so to build a better understanding of what the future may bring.

Populism is a phenomenon that can be studied from the point of view of the impact it has on democracy. Indeed, the number of such studies has been growing in recent years. At the same time, populism is a phenomenon which is related to the economy. There are economic reasons underlying the success of populist politicians. The study of populism through the lens of competition law fits well within the studies of populism focused on both democracy and the economy. This is because competition law is an element of a certain type of economic order: one in which the free market plays a fundamental role. Competition law is aimed at ensuring that, competition – which is a central mechanism underlying the functioning of a free market – is protected. In particular, the actions of private actors may undermine competition and in doing so harm consumers and societies at large. Competition law aims to ensure that such actions are eliminated. At the same time, ever since the first competition act was adopted in the USA in the late nineteenth century, competition laws have been considered as an important element of a democratic order.² This is because both US and European history has shown that

¹ Roger Eatwell and Matthew Goodwin, *National Populism: The Revolt against Liberal Democracy* (Penguin 2018), p 269.

² Pitofsky argues that the US Congress, when enacting antitrust laws, 'exhibited a clear concern that an economic order dominated by a few corporate giants could, during a time of domestic stress or disorder, facilitate the overthrow of democratic institutions and the installation of a totalitarian regime'. According to him, 'that concern about economic power and the desire that it be dispersed complements the general American governmental preference for a system of checks and balances and distribution of authority to prevent abusive actions by the state'. See Robert Pitofsky, 'Political Content of Antitrust' (1979) 127 *University of Pennsylvania Law Review* 1051, p 1054.

a concentration of excessive economic power is related to a concentration of excessive political power, and that both of them – seen jointly – endanger democracy.³ Thus, since competition law, by prohibiting the exclusion of rivals using anticompetitive means and by screening potentially anticompetitive mergers, imposes limits on the concentration and the use of economic power, it is conducive not only to the adequate functioning of markets but also to democracy.⁴

Such a perception has traditionally been present in both the USA and Europe, where it has been promoted in the latter instance by, among others, German ordoliberals.⁵ They considered economic freedom as a necessary element for the exercise of political rights by individuals in a democracy, and considered competition law as a rule of law for markets – one which aims to protect this economic freedom and hence promotes a free society.⁶ Therefore the preservation of a free society is considered an ultimate goal of ordoliberal competition policy.⁷ While the influence of ordoliberal thought has been limited in recent years due to a focus on the neoliberal economic efficiency paradigm,⁸ today it still inspires the study of competition law as an element of the broader political-economic system. Indeed, such reflections are on the rise. For example, Eleanor Fox argues that liberal markets ‘produce the tight and virtuous fit between safeguarding civil liberties and

³ See Frank Maier-Rigaud, ‘On the Normative Foundations of Competition Law – Efficiency, Political Freedom and the Freedom to Compete’ in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar 2012), p 166. For a discussion in the USA during New Deal times, see Henry Simons, *A Positive Program for Laissez Faire: Some Proposals for a Liberal Economic Policy* (University of Chicago Press 1934), p 4.

⁴ This is not to say that the goal of competition law is to safeguard a market structure which promotes small inefficient firms at the expense of more efficient large firms. It should be noted that competition law and policy are seen as conducive to democracy also by those who consider consumer welfare and efficiency as the goals of competition law, James Langenfeld and Marsha W Blitzer, ‘Is Competition Policy the Last Thing Central and Eastern Europe Need?’ (1991) 6 *American University Journal of International Law and Policy* 347, pp 354–355.

⁵ Josef Drexel, ‘Competition Law in Media Markets and Its Contribution to Democracy: A Global Perspective’ (2015) 38 *World Competition* 367, p 368. Franz Böhm argued that ‘the establishment and the use of economic power affect the constitution of the democratic state and the constitutionally balanced relationship between the private and the public sphere’, Franz Böhm, ‘Democracy and Economic Power’ in Daniel A Crane and Herbert Hovenkamp (eds), *The Making of Competition Policy: Legal and Economic Sources* (Oxford University Press 2013), p 279.

⁶ For a comprehensive presentation of the ordoliberal school and criticism of misunderstandings of ordoliberal thought in the English-speaking world, see Peter Behrens, ‘The Ordoliberal Concept of ‘Abuse’ of a Dominant Position and Its Impact on Article 102 TFEU’ (2015) <<http://ssrn.com/abstract=2658045>> accessed January 19, 2021.

⁷ Maier-Rigaud (n 3), p 168.

⁸ Ibid. It should be noted that the ordoliberal school is sometimes associated with the protection of a market structure consisting of small firms. It has been argued, however, that such a perception is simplistic, and it does not take into account the evolution in the ordoliberal school, which provided a space for efficiency-related arguments. See Behrens (n 6).

economic liberties', and thus serve democracy.⁹ On the other hand, democracy includes 'a major negative goal likewise symbiotic with markets: it is against autocratic power and privilege and control by the few for the few'.¹⁰ Applying Fox's approach, we can argue that in a democratic country competition law serves both markets and democracy: it helps markets to play their utilitarian role of meeting people's needs, and at the same time helps markets reinforce the civil and economic rights which are inherent in free democratic societies.¹¹ In this context, it is not coincidental that the EU legal order, which was founded to integrate markets and by doing so to foster peace in Europe, has ever since its inception contained competition law in its rule book. Similarly, the transformation of the post-Soviet Central European countries in the 1990s involved not only the embracement of democracy as a political system but also the adoption of competition laws as an element of promoting a new, free market-oriented economic order.

As this book will further explore, the rise of populism, and in particular the actual rule by populist politicians, may be seen as a process that influences both liberal democracy and the free market economy. If the rule by populists also has an impact on the competition law system, its functional role for markets and democracy is affected. This is exactly what this book is about: the impact of populists' rule on competition law systems in the context of the broader political (liberal democracy) and economic (liberal markets) aspects. It explores the links between populism, competition law, democracy, and markets.

B EXISTING DEBATES AND THE TOPIC OF THE BOOK

The research presented in this book thus speaks to the broader debates which have been present in the public law and competition law literature for some time, as well as those which have been on the rise more recently.

Starting with the general topics, the book is of relevance for the debate on how to understand modern populism, particularly insofar as its actual consequences for democracy and the economy are concerned.¹² Populism is certainly a contested term, but increasing numbers of scholars have observed that populism translates into changes for both democracy and the economy. This links the topic of populism with the debates concerning the rise of illiberalism and the slide toward authoritarianism in countries which were once considered democracies, i.e. the process of so-called

⁹ Eleanor M Fox, 'The Symbiosis of Democracy and Markets' (2018) <www.oecd.org/competition/globalforum/democracy-and-competition.htm> accessed January 19, 2021, p. 2.

¹⁰ *Ibid.*

¹¹ On the other hand, in the nondemocratic countries that have opted for liberal markets (such as communist countries which abandoned the command-control economy) competition law helps markets to play their utilitarian role of meeting people's needs and building the economic standing of these countries in the world. It does not play pro-democratic functions.

¹² See, *infra*, Chapter 2.

democratic backsliding. This book contributes to this debate by offering – in the context of the competition law system – evidence regarding the influence of the rule of populists on the democratic and economic order. In other words, while this research is primarily focused on the competition law system, it is of significant relevance to the broader debates concerning democracy and the economy. In particular, the book can be helpful in bridging the gap between political and economic studies on populism. This is necessary because political scientists and constitutionalists generally tend to focus on right-wing populism and the possible threats it poses for liberal democracy, while they show limited interest in the economic aspects of populism. Economists, on the other hand, often focus on left-wing populism due to its easily observable anti-market discourse. While I believe that distinguishing between right-wing and left-wing populism is not very useful in the contemporary world,¹³ the study offered in this book can be helpful in building an understanding that whatever the version (right wing or left wing), populism can still affect both the constitutional legal order (liberal democracy) and legal-economic order (liberal economy). The extent to which it affects these two orders is arguably related to the variables which are described in Chapter 3 rather than to the label (right wing or left wing) attached to a given populists' government.

This book also offers insights into the debate on the rule of law crisis, which is especially visible in the context of EU law. In recent years EU law scholars have attached a growing importance to the principle of the rule of law declared in Article 2 of the Treaty on European Union (TEU),¹⁴ and have closely followed the European Commission's and European Parliament's initiatives criticizing certain EU member states for their alleged violations of the basic principles of the rule of law and separation of powers.¹⁵ In the rulings of the Court of Justice of the European Union effective judicial protection (Art. 19 TEU) and the independence of a member state's judiciary have been subjected to close scrutiny.¹⁶ This book will complement this debate by discussing in detail how the threats to the rule of law posed by populists' governments affect concrete areas of EU economic law, focusing on the crucial area of competition rules.

¹³ It can be argued that populists, once in power, mix the narratives and tools they apply: some of them normally associated with right-wing parties (the importance of nation or religion, etc.), while others normally associated with left-wing parties (rich social redistribution programs, criticism of globalization, etc.).

¹⁴ The Treaty on European Union, OJ C 326, October 26, 2012, pp 13–390.

¹⁵ See, e.g., Dimitry Kochenov and Laurent Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 *European Constitutional Law Review* 512; and Laurent Pech and Kim Lane Scheppele, 'Illiberalism within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

¹⁶ See, e.g., Michał Krajewski and Michał Ziolkowski, 'Judicial Independence Decentralized: A.K.' (2020) 57 *Common Market Law Review* 1107.

This book is also of relevance to the debate in administrative law about the regulatory state and the crucial role played today by regulatory agencies. While administrative law scholars have opened a debate on how populism affects the administrative state, the works on this topic¹⁷ do not discuss in detail the possible ramifications for competition agencies and the courts reviewing their decisions. This book aims to fill this gap. Of particular importance is the book's analysis concerning the independence of competition agencies and the judicial review of their actions. This analysis is helpful for understanding how resilient the administrative state is in younger democracies.

This research concerns institutions which are sometimes called 'chapter IX institutions' by constitutionalists (after the South African Constitution), or 'State Institutions Supporting Constitutional Democracy'. They support democracy by playing an oversight role within the democratic state. Their role is complementary to functions usually associated with separation of powers in a democratic legal order.¹⁸ In other words, such institutions can be considered to make up part of a broadly conceived system of checks and balances within the state. Their independence from the executive and legislative branches and their constitutional status reinforce such a role. Indeed, such institutions are sometimes dubbed as the 'fourth branch of government' since they discharge some of the executive, legislative, and judicial responsibilities associated with the traditional three branches of government.¹⁹ While competition agencies are not a classic example of chapter IX institutions, they can be considered to be such. Very often they enjoy an independent status and operate within the sphere of competences which are laid out in national constitutions. One of their roles is to provide a check on state activities so as to limit anticompetitive acts of state (which covers not only anticompetitive legislative measures but also the activity of states in the private sphere, e.g. by means of state-owned enterprises or SOEs). In addition, the activities of chapter IX institutions which are focused on the protection of market competition can be conducive to democracy. While the literature on chapter IX institutions is vast, the research in this

¹⁷ See, e.g., Gillian E Metzger, 'Foreword – 1930s Redux: The Administrative State under Siege' (2017) 131 *Harvard Law Review* 1 and Barry Sullivan and Christine Kexel Chabot, 'The Science of Administrative Change' (2020) 52 *Connecticut Law Review* 1. Waller and Morse believe that after 2016 in the USA 'there is real reason to be concerned that the enforcement agencies are consciously or unconsciously beginning to tailor aspects of their decision-making to the stated, or perceived, political needs of the White House', Spencer Weber Waller and Jacob Morse, 'The Political Misuse of Antitrust: Doing the Right Thing for the Wrong Reason', *Competition Policy International* (2020) <www.competitionpolicyinternational.com/the-political-misuse-of-antitrust-doing-the-right-thing-for-the-wrong-reason/> accessed November 6, 2020.

¹⁸ Charles Fombad, 'The Diffusion of South African-Style Institutions? A Study in Comparative Constitutionalism' in Rosalind Dixon and Theunis Roux (eds), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (Cambridge University Press 2018), pp 359–360.

¹⁹ *Ibid.*, p 362.

book can be helpful in understanding how they operate in a country ruled by populists. Thus the focus on competition agencies may also enrich the literature on chapter IX institutions, which is usually focused on other institutions, such as electoral commissions.

Finally, as already indicated, the book speaks to the literature concerning the relationship between democracy, markets, and competition law systems. It needs to be emphasized that most of the competition law scholarship in the last two decades has been focused on the economic aspects of competition law. Both in the USA, where the efficiency-focused paradigm in antitrust law has prevailed, and in the EU, where the so-called more economic approach in competition law has become more prominent, the focus has often been on how to make enforcement more flexible so that the actually measured anticompetitive effects and procompetitive efficiencies resulting from firms' actions are taken into account. While the relevance of these dynamics remains valid today, and are indeed issues the enforcers may struggle with when dealing with digital platforms, it seems imperative to remind ourselves about the political face of competition law and the role it plays in enhancing democracy and markets. This book engages in an extensive analysis of this aspect. In particular, the study on the condition of competition law systems in increasingly illiberal political and economic surroundings is of relevance in this regard.

Moving our attention now to competition law issues per se, it should be stressed that the topic of populism is underdeveloped in the competition law literature. In particular, no monograph has been written addressing the influence of populism on competition law and policy. It is true that populism has been the subject of debate in US antitrust law, but in a way understood differently from that which is presented in this book – i.e. in a way associated with a fear of large corporations and their vast market power and sympathy for small businesses.²⁰ In particular, populism has not been analyzed in the competition law literature in the institutional context, i.e. as a process which may affect the institutional characteristics and the practices of competition agencies and courts. Against this backdrop, this book is of importance for the debates about the institutional structure of competition agencies. It should be noted that two monographs have searched for an optimal institutional model of competition law enforcement.²¹ However, both books are based on the experience of competition law enforcement in liberal democracies based on rule of law, and they indirectly presume that this is the surrounding environment in which competition laws function. The study presented in this book provides insights into how those factors which are fundamental to building an adequate institutional structure – in

²⁰ See, *infra*, note 170 and the accompanying text.

²¹ Annetje Ottow, *Market and Competition Authorities: Good Agency Principles* (Oxford University Press 2015) and Daniel A Crane, *The Institutional Structure of Antitrust Enforcement* (Oxford University Press 2011). See also Eleanor M Fox and Michael J Trebilcock (eds), *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press 2012).

particular an agency's independence, expertise, and resources – are actually implemented in practice in populist surroundings, which may be hostile to independent, merit-based competition agencies. For example, one of the key issues concerns the actual independence of agencies as opposed to their formal independence. Such an approach is in line with the suggestions pointing out that the institutional structure of an agency, i.e. its internal organization and the context in which it functions (institutional embeddedness), condition the substantive outcome of a competition agency's actions.²² The study presented in the book also sheds light on the debate about the adequate allocation of competences to competition agencies, and in particular the question whether the mandate of competition agencies should be narrow (limited to the protection of competition) or broad (covering other areas such as consumer protection, public procurement surveillance, and unfair trading practices).²³

The research presented also speaks to the vast antitrust literature on developments of competition law regimes, which discusses, inter alia, the factors which inform the successes of some competition law regimes and the upheavals faced by others.²⁴ As regards the discussion in this book, it is also of relevance that antitrust scholars have offered insightful reflections on how to safeguard the system of antitrust law to ensure that it is democratic in its nature.²⁵ However, the existing literature does not analyze in detail how the overall state of liberal democracy and its institutions affect competition law systems. This is not to say that this relationship has never been addressed in the antitrust literature at all. In fact, it has been subjected to analysis in the context of the establishment of new competition law regimes in developing countries.²⁶ However, the existing literature does not discuss the situation of countries with more experienced and advanced competition law regimes (with at least fifteen years of experience) when faced with the appearance of populists' governments. It could logically be presumed that with the passage of time

²² David J Gerber, 'Competition Law and the Institutional Embeddedness of Economics' in Josef Drexler, Laurent Idot, and Joel Moneger (eds), *Economic Theory and Competition Law* (Edward Elgar 2009).

²³ See Michael J Trebilcock and Edward M Iacobucci, 'Designing Competition Law Institutions' (2002) 25 *World Competition* 361, pp 364–365 and Katalin J Cseres, 'Integrate or Separate – Institutional Design for the Enforcement of Competition Law and Consumer Law' (2013) 3 *Amsterdam Law School Research Paper*.

²⁴ Usually, the works of William Kovacic and Eleanor Fox serve as a point of reference. See the specific literature invoked, *infra*, in Chapter 4.

²⁵ See, in particular, Harry First and Spencer Weber Waller, 'Antitrust's Democracy Deficit' (2013) 81 *Fordham Law Review* 2543; Spencer Weber Waller, 'Antitrust and Democracy' (2019) 45 *Florida State University Law Review* 807.

²⁶ See, in particular, Umut Aydin and Tim Büthe, 'Competition Law and Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits' (2016) 79 *Law and Contemporary Problems* 1, p 13.

the functioning of competition law will in most cases improve, not deteriorate.²⁷ But the appearance of populists' governments may interrupt such a continuing improvement.²⁸ It is worth exploring the competition law system from this perspective.

The discussion offered in this book aims to fill another gap in the competition law literature, which normally takes the independence of courts reviewing the decisions of competition authorities for granted²⁹ and focuses on the institutional and procedural organization of competition agencies. Since in this predominant model competition agencies are administrative authorities (rather than courts), it is necessary to provide effective judicial review of their actions by independent courts. However, the academic attention is usually limited to questions concerning the scope and the intensity of the judicial review of competition authorities' decisions. In cases of populists' rule, one has to take a broader view and also address the question of whether the national courts responsible for competition law are indeed independent.

Leaving aside the institutional aspects of the competition law system, we need to underscore the importance of antitrust literature discussing the relationship between the state and competition, including, among other issues, the application of competition laws to SOEs.³⁰ Today this is one of the key issues for competition law, particularly if we take into account the rise of Asian economies (such as China) where the state and SOEs play a vital role and where the border between the activity of firms in the private business sphere and acts of state is blurred.³¹ This issue can be

²⁷ See in this respect the United Nations Conference on Trade and Development (UNCTAD) lifecycles methodology, 'Prioritization and Resource Allocation as a Tool for Agency Effectiveness' (2013) <https://unctad.org/system/files/official-document/ciclpd20_en.pdf> pp 15–16.

²⁸ With respect to the concept of lifecycles in the competition law literature, see William E Kovacic and Marianela Lopez-Galdos, 'Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes' (2016) 79 *Law and Contemporary Problems* 85.

²⁹ The independence of the judiciary is sometimes discussed in the context of developing countries establishing their competition law regimes. See Aydin and Büthe (n 26) and Mel Marquis, 'Competition Law in the Philippines: Economic, Legal, and Institutional Context' (2018) 6 *Journal of Antitrust Enforcement* 79, pp 98–100.

³⁰ In most countries SOEs, when acting in the private sphere, are not exempted from antitrust rules; see Eleanor M Fox and Deborah Healey, 'When the State Harms Competition – The Role for Competition Law' (2014) 79 *Antitrust Law Journal* 769. The anticompetitive features of SOEs, such as the creation of entry barriers or predatory pricing practices, have been discussed. See David EM Sappington and J Gregory Sidak, 'Competition Law for State-Owned Enterprises' (2003) 71 *Antitrust Law Journal* 479.

³¹ See, e.g., Angela Huyue Zhang, 'The Single Entity Theory: An Antitrust Time-Bomb for Chinese State-Owned Enterprises?' (2012) 8 *Journal of Competition Law and Economics* 805, Nicolas Petit, 'Chinese State Capitalism and Western Antitrust Policy' (2016) 4 *Concurrences* 69, and Alexandr Svetlicinii, *Chinese State Owned Enterprises and EU Merger Control* (Routledge 2020).

framed within the issues of protectionism and competitive neutrality.³² For example, one of the issues – whether merger control can be used as a protectionist tool aimed at preventing acquisitions by foreign firms – has been analyzed in the literature.³³ The insights offered by this book will be helpful, however, in understanding how the centralization of power within the state, which can be considered characteristic of populists' governments,³⁴ as well as the growing role of SOEs in the economy,³⁵ change the dynamics of enforcement by competition agencies. One of the challenges is whether they continue to apply competition law with no bias (e.g. without providing more favorable treatment to SOEs) in line with a competitive neutrality principle.

The book is also of relevance vis-à-vis the debate over how competition law and competition agencies should respond to the challenges posed by digital markets, in particular the rise of digital platforms such as Amazon, Facebook, or Google. A disagreement in this respect clearly exists in the literature. While some continue to believe in the hands-off approach to firms which built their success on innovation, and thus favor limited enforcement against the dominant digital platforms, others see their market power as very problematic and call for more vigorous antitrust enforcement under a broader set of competition law goals.³⁶ This book may provide insights into this debate. At the outset, one has to bear in mind that the rise of populists' governments could have been facilitated by social network platforms such as Facebook or Twitter, which make it possible to segment society, to deliver an appropriate targeted message to potential voters, and overall to benefit from growing social polarization.³⁷ What's more, the rise of populists is arguably linked also to

³² See, in particular, Antonio Capobianco and Hans Christiansen, 'Competitive Neutrality and State-Owned Enterprises. Challenges and Policy Options' (2011) 1 OECD Corporate Governance Working Papers 1. See also Deborah Healey, 'Competitive Neutrality and the Role of Competition Authorities: A Glance at Experiences in Europe and Asia-Pacific' in Paulo Burnier Da Silveira and William E Kovacic (eds), *Global Competition Enforcement: New Players, New Challenges* (Wolters Kluwer 2019), pp 189–190.

³³ Empirical studies have revealed that this is not necessarily true for the European Commission merger review system; see Anu Bradford, Robert J Jackson, and Jonathon Zytnick, 'Is EU Merger Control Used for Protectionism? An Empirical Analysis' (2018) 15 *Journal of Empirical Legal Studies* 165.

³⁴ See, *infra*, Populism as a Driver of Illiberal Change in the Economy (ch. 2).

³⁵ See, *infra*, Populism as a Driver of Illiberal Change in the Economy (ch. 2).

³⁶ For the pro-enforcement views, see Lina Khan and Sandeep Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents' (2017) 11 *Harvard Law & Policy Review* 235. See also Joseph E Stiglitz, 'Towards a Broader View of Competition Policy' (2017) <<https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Broader-View-of-Competition-Policy-201703.pdf>>. For the opposite view, see Elyse Dorsey, Jan M Rybníček, and Joshua D Wright, 'Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent-Seeking' (2018) 18–20 *George Mason Law & Economics Research Paper*.

³⁷ Josef Drexler, 'Economic Efficiency versus Democracy: On the Potential Role of Competition Policy in Regulating Digital Markets in Times of Post-Truth Politics' (2016) 16 *Max Planck Institute for Innovation and Competition Research Paper Series* 1, pp 3–9.

labor insecurity, which the rise of digital platforms may create (or at least give such an impression). Finally, populism is associated in the antitrust literature with intense enforcement, in particular against the digital platforms. The analysis provided in this book verifies whether the enforcement in countries ruled by populists is indeed intense. In a similar vein, the study of enforcement of competition law in countries ruled by populists is helpful in understanding whether the experiences of these countries offer examples of the intense enforcement of competition law focused on the interests of the ordinary people the populists claim to represent. The analysis in this respect will be helpful for the discussion on the role of competition law in combating inequalities.³⁸

Finally, this book is of relevance to the debate concerning the EU competition law system. There are several topics which nurture this debate today. They include the functioning of the European Competition Network; the institutional challenges the national competition authorities (NCAs) face; the application of Articles 101–102 of the Treaty on the Functioning of the European Union (the TFEU)³⁹ by NCAs; the convergence – substantive, institutional, and procedural – of EU and national competition laws; and the role of the European Commission in the system of enforcement of EU competition law. This book will be helpful in understanding how broader political and economic changes within the EU member states affect the functioning of the EU competition law system. The analysis will also fit squarely into the debate about the reforms of the EU competition law system and the role the European Commission (and in particular the Commission’s autonomous Directorate General (DG) Competition) is to play vis-à-vis member states promoting the interests of selected enterprises or national champions.

C APPROACH

Principal Questions

This book analyses the interrelationships between populism and competition law in a broader political and economic context. Specifically, the research questions addressed are:

1. What characteristics of populism are relevant in analysis of the influence of populism on a competition law system?

³⁸ See, among others: Michal S Gal, ‘The Social Contract at the Basis of Competition Law: Should We Recalibrate Competition Law to Limit Inequality?’ in Damien Gerard and Ioannis Lianos (eds), *Competition Policy: Between Equity and Efficiency* (Cambridge University Press 2019); and Ioannis Lianos, ‘The Poverty of Competition Law: The Long Story’ (2018) 1 Centre for Law, Economics & Society Research Paper Series, sec. VI B. For the discussion of inequality in the US antitrust literature, see Jonathan B Baker and Steven C Salop, ‘Antitrust, Competition Policy, and Inequality’ (2015) 104 *Georgetown Law Journal Online* 1.

³⁹ The Treaty on the Functioning of the European Union, OJ C 326, October 26, 2012, pp 47–390.

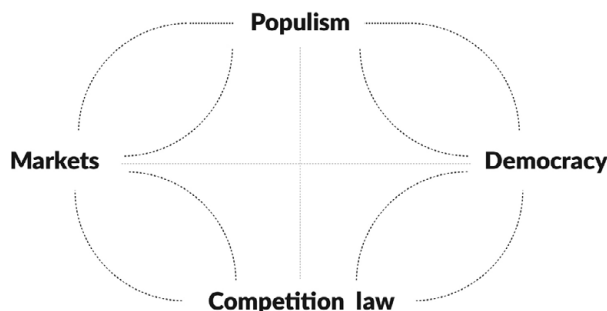


FIGURE 1.1. Relation between populism, democracy, competition law, and markets

2. In what ways does the rule of populists' governments affect the institutional structure and the enforcement of competition law?
3. 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?

As shown in the Figure 1.1, the answers to the first two questions will make it possible to assess whether the processes prompted by populism reinforce the idea that liberal democracy and the competition law system are interrelated; namely whether the impact of populists' rule on the liberal democratic order influences the institutional structure and enforcement of competition law. Moreover, the answers to these questions will make it possible to assess whether the populists' impact on a liberal market economy influences the institutional structure and enforcement of competition law. Finally, in the event the impact of populists' rule on the competition law system is confirmed, the answers to these questions will be of relevance in the debate over how the application of competition law during a time of populism may affect free markets and democracy, and so possibly further reinforce populists' rule. In other words, the answers to these questions will be helpful in better understanding the relationship between populism, liberal democracy, liberal markets, and competition law. The analysis related to the third question above will complement this reflection by examining how a regional system of competition law, which is built on the premise that its members adhere to certain set of common values – including among others the rule of law – interacts with the populist dynamics materializing on a national level.

In order to answer the first question (1), the analysis offered in the Chapter 2 identifies the principal characteristics of populism, particularly in light of the actual experiences of countries ruled by populists such as Hungary and Poland. The impact of populists' rule on both liberal democracy and the liberal economy is taken into account. Next, in light of the Chapter 2 findings, Chapter 3 proposes variables by means of which various scenarios of populists' impact on competition law systems can be identified.

In order to answer the second question (2), Chapters 4 and 5 examine the manifestations of populists' impact on the competition law system with respect to its institutional structure and the enforcement of competition law. The experiences of Hungary and Poland are specifically studied in this respect. Insofar as the institutional structure of competition law is concerned, these manifestations are examined with respect to the independence of the competition authorities, their operating capabilities, their mandate, and judicial review of their actions. As regards the enforcement of competition law, these manifestations are examined with respect to the character and the intensity of the enforcement and application of competition law to SOEs, the application of exemptions and other limitations on competition law, as well as the agencies' advocacy activity. This identification of the manifestations of populists' impact on competition law elaborates on and gives concrete meaning to the scenarios put forward in Chapter 3. By doing so, the existing examples of populists' influence on competition law systems are used to build an understanding of the ways in which populism may affect the competition law system of a liberal democratic country that is subject to populists' rule.

In order to answer the third question (3), Chapter 6 discusses how the challenges related to populists' rule identified at the national level interact within a regional system of competition law, in this work being that of the EU. In this respect the relevant EU legislative initiatives, as well as the reactions of the EU central institution responsible for competition law (i.e. the European Commission) to the developments in member states, are critically assessed. In addition, the challenges related to mutual trust and respect for the rule of law are analyzed. The chapter also looks at the populist-related dynamics concerning the functioning of the central level of the regional (EU) competition law system.

Structure

The book consists of three parts.

The first part explains the relationship between populism, democracy, and economy. It consists of Chapters 1 and 2.

The present chapter introduces the reader to the book's topic and the existing debates which the book addresses. It also frames the book's scope and research questions, and explains the methodology and the selection of specific countries. The meaning of the principal concepts is explained.

Chapter 2 discusses the notion of populism as approached in the political science, legal, and economic literature. It explains in detail how populism is understood in the book; what actions it is associated with; what its principal characteristics are; and what are the possible reasons behind the success of populist politicians. It analyzes the difficult relations between populism and liberal democracy and liberal markets. In particular, by studying the experiences of Hungary and Poland, the chapter provides the reader with two case studies which can be used in an analysis of how

a populists' government's rule specifically affects liberal democracy and market economy. This discussion provides the reader with a concrete context within which the influence of populism on competition law systems can be studied. The chapter concludes with a finding that populism may work as a driver of illiberal change in democracy and the economy.

The second part of the book (Chapters 3–5) examines and analyzes the influence of the rule of populists' governments on particular competition law systems.

Chapter 3 builds on the findings of Chapter 2, i.e. that populists' rule may work as a driver of illiberal change in democracy and the economy. It identifies two variables by means of which the scenarios concerning the impact populists' government may have on competition law system can be determined. The first variable is related to the dismantling of checks and balances as well as the rule of law, both of which are inherent to a liberal democracy. The second variable is related to the state-centered character of an economy and economic patriotism. These two variables give rise to four possible scenarios of populists' government's influence on a competition law system: the deconstruction scenario, marginalization scenario, atrophy scenario, and limited impact scenario.

Chapters 4–5 discuss in detail the actual manifestations of the influence of populists' governments on competition law systems. At the end of each subchapter these identified manifestations are linked to the scenarios proposed in Chapter 3. In this way Chapters 4–5 develop and contextualize – based on empirical findings from Hungary and Poland – these scenarios in light of actually existing developments. At the same time, the study is complemented by the inclusion of relevant examples from other jurisdictions which have experienced the rule of populists' governments.

Chapter 4 focuses on an analysis of the influence populists' rule has on two institutions: competition agencies and courts. It examines the competition agency's independence, operating capabilities, mandate, and judicial review of the agency's actions. In each of these areas the exact manifestations of the influence of populists' governments on the institutional organization of competition law systems are scrutinized. The discussed manifestations include: a politically driven appointment process; the limited autonomy of decision-makers; leadership changes; staff fluctuation and decrease in expertise; scarce resources; prioritization of consumer protection; the scope of the agency's mandate; and weakening of the independent and expert character of judicial review.

Chapter 5 examines the practice of the application of competition law by competition agencies, and identifies the major characteristics of agencies' practice in countries ruled by populists' governments. In doing this it examines the manifestations of the influence of populists' governments on the enforcement of competition law. The chapter examines the nature of enforcement, the application of competition law to SOEs, and the influence of exemptions to the application of competition law on its enforcement. In addition, the competition agencies' advocacy efforts vis-à-vis anticompetitive legislative measures is subjected to scrutiny. The discussed

manifestations include limited enforcement, politically motivated enforcement, limited enforcement of the prohibition of abuse of dominance and lenient review of mergers in relation to SOEs, the introduction of exemptions limiting the reach of competition laws, and agency's limited advocacy role.

The third part of the book, Chapter 6, discusses the functioning of a regional system of competition law during a time of populism. This chapter is focused on the EU regional competition law system, with lessons drawn from the experiences therewith of the two countries selected for an in-depth study. Being EU member states, Hungary and Poland are part of the competition law system of the EU. This chapter explains the relevance of the challenges identified at the national level (i.e. mostly in Hungary and Poland) for the EU competition law system. Four topics are addressed. The first is the EU legislative initiative, which aims to empower NCAs, i.e. the European Competition Network (ECN)+ Directive.⁴⁰ It is argued that this directive is not likely to resolve the problems faced by national competition law regimes subject to populists' government's pressure. Second, the chapter analyses the reaction of the EU regional competition law system to developments at the national level brought about by populists' governments. Both the reactions of the EU institutions (the European Commission and the Court of Justice) and national institutions (NCAs and national courts) are analyzed. The insufficiency of these reactions is examined and explained. Third, the chapter outlines and examines the deficit of trust in the decentralized system of enforcement of EU competition law, and shows how the rise of populism can have consequences for the EU competition law system, including the functioning of the ECN. Fourth, the functioning of the central level of EU competition law system is examined.

The book closes with conclusions which present the principal findings of the book. Moreover, reflections on how to address the challenges related to populists' influence on competition law systems are presented.

Methodology

The book involves a critical analysis of the challenges for competition law resulting from the rule of populists. This critical analysis is based on, inter alia, legal and social science theory, jurisprudence, real-world case studies, and empirical evidence. In addition, when developing the analysis of populists' governments' influence on competition law systems one of the foresight methods, i.e. the scenario method, is applied.⁴¹ The sources consulted include legislation, case law, peer-

⁴⁰ See Directive 2019/1 of December 11, 2018 of the European Parliament and of the Council to Empower the Competition Authorities of the Member States to Be More Effective Enforcers and to Ensure the Proper Functioning of the Internal Market, OJ L 11/3, January 14, 2019.

⁴¹ Foresight is used for projecting the future/anticipating future options on the basis of empirical findings concerning present and past experiences. Scenarios are not about *predicting* the future. They are rather simulations of some possible future developments and they are helpful

reviewed articles, conference papers, international organizations' and governmental reports, the statistical data of competition agencies, as well as existing surveys and empirical data. Press materials, including interviews with competition agencies' heads, are also presented. In addition, the research is based on a series of twenty-seven individual in-depth interviews, which were carried out in accordance with the qualitative research methodology and the relevant ethical rules.⁴² The interviews involved current and former members of competition authorities, judges, and leading antitrust experts from the selected jurisdictions, i.e. mainly from Hungary and Poland.⁴³ They had significant (usually more than ten years') experience in the application of or research into competition and economic laws. The interviews were of a semi-structured character: they consisted of open-ended questions, which guaranteed that the structure of the interviews was planned in advance while offering the interviewee the flexibility to address issues which arose during the interviews from another perspective, and/or to add some additional information/comments. Thus, the interviews made it possible to explore issues already identified by means of desk research, as well as develop new ones. The interviews were especially helpful in understanding the context of populists' influence on competition law systems. In particular, the interviews were of importance in understanding what affects the levels of independence of competition authorities and the judiciary, as well as their operating capabilities. They also enabled the contextualization of competition authorities' enforcement efforts, including in some cases their inaction.

While the book builds principally upon the experiences of Hungary and Poland,⁴⁴ it should not be viewed as a collection of country reports, nor as a multi-perspective in-depth study of the competition law regime of a given country.⁴⁵ Rather, the research aims at identifying and describing – in the context of the experiences of the selected countries – the interrelationships between populism and competition law systems.

in revealing the choices available and their potential consequences. For more, see: 'Scenario Method.European Foresight Platform' <www.foresight-platform.eu/community/forlearn/how-to-do-foresight/methods/scenario/> accessed November 17, 2020.

⁴² In particular, interviewees received information about the research as well as a consent form specifying the nature of the interview and their rights. Among other things, due to the sensitive nature of some of the topics discussed the interviewees were informed that their anonymity would be safeguarded so that they will not be identified by name on the any of the files or data produced by the author's project. For this reason, the references to interviews are general and they do not offer any specific characteristics of the respondents which would enable their identification. The gathered data were stored on two password-protected devices. It was accessible only to this project investigator, i.e. the author of this book.

⁴³ Most of the interviews were face to face. A few of them were conducted remotely.

⁴⁴ See, *infra*, Selection of Countries (ch. 1).

⁴⁵ For such a study concerning pre-2016 Poland, see Marek Martyniszyn and Maciej Bernatt, 'Implementing a Competition Law System – Three Decades of Polish Experience' (2020) 8 *Journal of Antitrust Enforcement* 165.

The majority of the research materials collected for this book were finalized at the end of 2019. Therefore, the book focuses on the relevant developments that took place up to that time.

Selection of Countries

This book is based on the experiences of two countries ruled by populists' governments, both of which have had competition law regimes in force for more than twenty-five years. It is focused on the experiences of Hungary and Poland, two examples of populist rule in European democratic countries with mature competition law regimes. The experiences of Hungary after 2010, i.e. the formation of a government by Viktor Orbán's Fidesz party, and those of Poland after 2015 (i.e. the formation of a government by Jarosław Kaczyński's Law and Justice party) are taken into account. In parallel, the book examines the EU regional competition law system, considering it as an example of the most developed regional competition law system in the world; one which often works as a point of reference for other, younger, regional competition law frameworks.

To complement the research on Hungary and Poland, the book also takes into account selected examples from other countries ruled by populists in which competition law operated before the formation of populists' governments. The following countries are taken into account: Czech Republic,⁴⁶ Greece,⁴⁷ India,⁴⁸ South Africa,⁴⁹ and Venezuela.⁵⁰ These countries share with Hungary and Poland not only the experience of being ruled by populists' governments but also some similarities in the pre- and post-transition patterns of their economic and political history.⁵¹ These similarities make it possible to complement the in-depth research on Hungary and Poland with relevant examples from these countries. By contrast, due to a lack

⁴⁶ The Czech Republic's post-2017 experiences are relevant, i.e. the experiences since the formation of ANO party's government headed by Andrej Babiš.

⁴⁷ Greece's 2015–2019 experiences are relevant, i.e. the experiences concerning the period of the SYRIZA government headed by Aleksis Tsipras.

⁴⁸ India's post-2015 experiences are relevant, i.e. the experiences since the formation in 2015 of the Bharatiya Janata party's government headed by Narendra Modi.

⁴⁹ South Africa's post-2009 experiences are relevant, i.e. the experiences since the beginning of the Jacob Zuma presidency.

⁵⁰ Venezuela's post-1999 experiences are relevant, i.e. the experiences since the beginning of Hugo Chavez presidency.

⁵¹ These similar patterns include: the significant role of the state in the economy before the 1990s; the experience of privatization process in the 1990s, followed by a slowdown of the privatization processes and a growing role of the state and SOEs in the economy; the existence of semi-authoritarian political systems before the 1990s; the weakening of checks and balances in the 2000s and 2010s; the similar context in terms of adoption of competition laws – they were adopted as part of the market liberalization processes, and they have been in force for at least fifteen years.

of such similarities, the book does not in principle take into account the 2016–2019 experiences in the USA.⁵²

The book does not take into account countries that have adopted competition law regimes in recent years, even though some of them are ruled by populist politicians.⁵³ This is because in the cases of these countries it is difficult to assess – due to the limited time competition law has been in force – in what ways populism may affect the competition law system. Moreover, the book does not study those countries which are authoritarian, i.e. those which do not offer periodical free and fair elections. While some of these authoritarian countries (such as Russia) have competition laws in place, their experience is not relevant to answer this book's research questions posed in this chapter. The focus of this book is on countries which have been democratic and continue to be democratic, in at least the narrow sense (i.e. they carry out fair, periodical elections), even if they may be in the process of backsliding insofar as the liberal aspects of democracy are concerned. In particular, this book studies the influence of populism vis-à-vis the weakening of checks and balances – a principle which is lacking in authoritarian countries.

D BACKGROUND INFORMATION ON HUNGARY AND POLAND

Since the research set out in this book is based primarily on the experiences of Hungary and Poland, it may be useful to offer to the reader a short summary of the political economies of these two countries, as well as offer a background for further analysis, which is focused on the developments after 2010 and 2015, respectively.

Hungary and Poland are important economies of Central-Eastern Europe. Their joint GDP is 743,545 million USD.⁵⁴ They have forty-eight million inhabitants. What these countries share is not just a close geographical location but also a common modern history. After the Second World War, from 1945 until 1990 they made up part of the Soviet bloc of satellite states. Their economies were designed, in line with the Soviet model, as centrally planned economies with little space for private economic initiative. The central role of the state was a defining characteristic. In particular, in most of the sectors the state was responsible for the production, distribution, and sale of goods. State enterprises, grouped within specific industries, played a crucial role. Within such a model there was almost no space for market competition, hence unsurprisingly there were also no meaningful legal rules aimed at the protection of competition. The first experiments with competition laws began

⁵² See, however, a reference to the AT&T/Time Warner merger to introduce the topic of the importance of independent judicial review as a check against the politically driven enforcement of competition law. See, *infra*, notes 517–522 and the accompanying text.

⁵³ See, e.g., the case of the Philippines; studied by Marquis (n 29).

⁵⁴ 585,663 million USD for Poland, and 157,882 million USD for Hungary. World Bank data for 2018, 'GDP (Current US\$) – European Union | Data' <<https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=EU>> accessed January 15, 2021.

in the 1980s – Hungary adopted its first competition law in 1984, and Poland in 1987. They were part of the economic reforms that aimed to address the shortcomings of centrally planned economies. Among other things, they aimed to address the economic harm caused by state enterprises. The ultimate change in the economic model came about in 1989 with the end of communism, and Hungary and Poland embarked on political and economic reforms. A system of liberal democracy and a free market economy were introduced in each country. Among other actions, new competition law acts were adopted in 1990 in Hungary and Poland and NCAs were established. Part of the post-1989 economic reforms included the process of demopolization of the economy. For example, the Polish competition agency was empowered to divide or dissolve state enterprises. In addition, the Hungarian and Polish competition agencies enforced prohibitions of anticompetitive agreements and anticompetitive unilateral conduct against the incumbents: SOEs and the legal successors of state enterprises. The other process that characterized the 1990s in Hungary and Poland was privatization, which continued with various degrees of intensity until the 2000s. Many SOEs were privatized and often ended up in the hands of foreign investors.

From the early 1990s onward, both Hungary and Poland opted for economic integration with the EU, and both countries signed Association Agreements with the European Communities. These agreements required, *inter alia*, the building of an effective free market economy and the approximation of laws to the EU legal framework. Thus, among other things, changes in Hungarian and Polish competition laws were introduced.⁵⁵ The EU accession process was finalized in 2004, when both Hungary and Poland joined the EU and thus became integral parts of the EU internal market, making Hungarian and Polish competition agencies competent to apply EU competition rules (Arts. 101–102 TFEU).

After 2004 both countries continued to function as free market economies, and their respective GDPs were growing significantly.⁵⁶ At the same time, however, the increases in average wages were far less impressive.⁵⁷ Moreover, both countries had

⁵⁵ In 1997 Hungary's current competition act – the Act LVII of 1996 on the Prohibition of Unfair Market Practices and the Restriction of Competition – entered into force. In Poland a new competition act – the Act on Competition and Consumer Protection of December 15, 2000 – entered into force in 2001. Its substantive provisions were not changed significantly when the Act on Competition and Consumers Protection of February 16, 2007, which is currently in force, was adopted.

⁵⁶ The GDP per capita rose between 2004 and 2010 by 23.2 percent in the case of Hungary, and by 36 percent in the case of Poland; estimation based on: 'GDP and Spending – Gross Domestic Product (GDP) – OECD Data' <<https://data.oecd.org/gdp/gross-domestic-product-gdp.htm>>.

⁵⁷ The average wages rose between 2004 and 2010 by 1.82 percent in the case of Hungary, and by 10.71 percent in the case of Poland; estimation based on: 'Earnings and Wages – Average Wages – OECD Data' <<https://data.oecd.org/earnwage/average-wages.htm>>.

high unemployment rates,⁵⁸ and the level of development differed widely between different regions. Indeed, some of the regions, including the industrial ones, were hit hard by the transformation process. As a result, the entrance to the EU led to widescale emigration of young people to the 'old' EU member states, in particular (though not only) to the UK and Ireland. On the political side, throughout the 1990s and 2000s there was generally a political consensus in both countries that liberal democracy was the right political model.⁵⁹ The checks and balances inherent for liberal democracies were respected. In particular, the need for and role of an independent judiciary was not fundamentally questioned. Moreover, both countries had powerful constitutional tribunals which often invalidated the laws passed by their respective parliaments due to their unconstitutionality. Media freedom, freedom of assembly, and freedom of association were also generally safeguarded. At the same time, the level of public trust in public authorities was low, and courts were known for lengthiness of proceedings and excessive formalism.

The reorientation of the political and economic model started at the end of first decade of the 2000s and in the first instance concerned Hungary, where a populists' government was formed in 2010, and then Poland, where a similar process took place in 2015.⁶⁰ The parliamentary elections brought to power parties headed by strong leaders who in their public statements questioned the safeguards of the liberal democratic order. The judiciary was particularly singled out for criticism. In addition, in Hungary media freedom came under growing pressure. The changes were complemented with new widespread and generous social distribution programs, as well as nation-centered patriotic rhetoric and anti-immigration attitudes.

E TERMINOLOGY

In this book several terms are used, the meanings of which can be subject to different interpretations. Thus it seems useful at the outset to explain how these terms are understood in this book.

First, *populism* is associated with the practice of rule by populists' governments and is seen as a driver of an illiberal shift insofar as democracy and the economy are

⁵⁸ For example, in 2005 the unemployment rate in Poland was 17.93 percent and 7.17 percent in Hungary. In 2010 the relevant numbers were 9.68 percent for Poland and 11.17 percent for Hungary. See 'Unemployment – Unemployment Rate – OECD Data' <<https://data.oecd.org/unemp/unemployment-rate.htm>> accessed January 4, 2021. However, unemployment among young people was much higher. In 2005 it amounted to 35.77 percent in Poland and 19.63 percent in Hungary. In 2010 the relevant numbers were 22.41 percent for Poland and 27.84 percent for Hungary. See 'Unemployment – Youth Unemployment Rate – OECD Data' <<https://data.oecd.org/unemp/youth-unemployment-rate.htm#indicator-chart>> accessed January 4, 2021.

⁵⁹ It should be noted, however, that during the 2007–2008 first Law and Justice government some processes materialized which were to characterize Poland after 2015.

⁶⁰ For more details, see more, *infra*, Chapter 2.

concerned.⁶¹ This practice is justified by the ruling populists' claim that the will of ordinary people needs to be implemented without constraints. Central to populism is a rejection of pluralism and a willingness to consolidate power. It should be noted that such an understanding of populism is different from the one present in the US antitrust literature, where populism is often associated with a fear of large corporations and sympathy for small businesses.

Second, *illiberalism* is associated with actions which undermine liberal democracy and economic liberalism, in particular the rule of law and checks and balances, as well as the commitment to market competition and the limited role of the state in the economy.⁶²

Third, *checks and balances* refer to safeguards protecting against the encroachment of one branch of power upon the competences of others, as well as the control of one branch of power over the functioning of another one.⁶³ In this book the term 'checks and balances' refers not only to the three traditional branches of power (i.e. legislative, executive, and judiciary) but also to independent regulatory agencies.

Fourth, *rule of law* is understood as an opposition to and a safeguard against the arbitrary exercise of power, and is linked to a certain set of requirements that: (1) laws be prospective rather than retroactive; (2) compliance with such laws be possible; (3) laws be promulgated in advance; (4) the meaning of laws be clear; (5) laws be consistent with one another; (6) laws be sufficiently stable; (7) laws be general; and (8) officials adjudicating legal matters do so within the meaning of the laws and the laws governing their activities.⁶⁴ In addition, *rule of law* is also about the availability of legal remedies and procedures which guarantee that the rule of law is ensured. In particular, effective judicial protection is a concrete expression of the rule of law. In turn, effective judicial protection requires that the courts are independent.

Fifth, *competition law system* is associated with competition law statutes (the law on the books), institutions responsible for the application of competition law (competition agencies and courts), and the application of competition laws by these institutions (competition law in practice).

Sixth, the term *enforcement of competition law* is understood broadly and covers different situations in which competition agencies and courts apply competition law in practice. This includes, in particular, the application of the prohibition of collusion between firms (prohibition of anticompetitive agreements), the prohibition of anticompetitive unilateral actions (prohibition of abuse of dominant position), merger review by competition agencies (control of concentrations), as well as a competition agency's public activity against anticompetitive legislation by parliament or other state institutions (its advocacy role).

⁶¹ See more Chapter 2.

⁶² See more Chapter 2.

⁶³ See, *infra*, note 87 and the literature invoked there.

⁶⁴ See, *infra*, note 82 and the literature invoked there.