ANTITRUST AND INEQUALITY – TIME FOR A PARADIGM CHANGE

BY DAMJAN KUKOVEC [1]

I. INTRODUCTION

The divergence in wealth distribution is occurring on a national and global scale. There is growing inequality in the world and, particularly in the United States, there is a resentment about the concentration of income and economic power in the hands of the one-percent.[2] While the median U.S. income and wealth both declined in real terms between 2010 and 2013,[3] the real income of the top one percent grew by 31.4 percent.[4] With similar developments elsewhere, it should not come as a surprise that inequality is high on the agenda of economists, lawyers, politicians and the population at large across the world.

As the purpose of antitrust law is also to counter the concentration of power and wealth in society,[5] several authors have called on antitrust policy to play its role in the combat of inequality in the world. Joseph Stiglitz has called for "stronger and more effectively enforced competition laws" to help address inequality.[6] Luigi Zingales has argued that "the most powerful argument for antitrust law" is that "it reduces the political power of firms."[7] Paul Krugman[8] and Anthony Atkinson[9] have also claimed that monopoly and anticompetitive market conditions are among the root causes of wealth inequality. Sandeep Vanessan has argued that consumer-oriented antitrust enforcement can promote more progressive wealth distribution[10] and

1 S.J.D. (Harvard), Senior Lecturer, Middlesex School of Law, London.

2 See J.M.F. & A.C.M., *The Purse of The One Percent,* Economist: Daily Chart (Oct. 14, 2014 3:55 PM), http://www.economist.com/blogs/graphicdetail/2014/10/daily-chart-8.

3 Baker & Salop, *Antitrust, Competition Policy and Inequality,* 104 Geo. L.J. 1, 1 (2015).

4 Id.

5 See Whish & Bailey, Competition Law 21 (2008).

6 Stiglitz, The Price of Inequality: How Today's Divided Society Endangers Our Future 338 (2012).

7 Zingales, A Capitalism for the People: Recapturing the Lost Genius of American Prosperity 38 (2012).

8 See Krugman, *Robber Baron Recessions*, N.Y. Times (Apr. 18, 2016), http://www.nytimes.com/2016/04/18/opinion/robber-baron-recessions.html.

9 Atkinson, Inequality: What can be done? 126-27 (2015).

10 Vanesaan, *The Evolving Populisms of Antitrust*, 93 Neb. L. Rev. 370, 413 (2014).

that the lack of competition in many sectors of the U.S. economy is a powerful driver of economic disparity.[11]

The debate about antitrust and inequality however reveals that increased antitrust enforcement and equality are not necessarily connected. It further reveals that there is a lack of empirical evidence on antitrust enforcement's impact on society, including on its ability to increase the pie for the world as a whole. Antitrust law is thus ripe for a paradigm shift if it is to play a serious role in combating abuse of power and the reproduction of concentration of wealth in the twenty-first century.

II. ANTITRUST AS A TOOL FOR COMBATING INEQUALITY

In his recent book Inequality: What Can Be Done?, British economist Atkinson argues, that the United States has erred in shifting away from the Sherman Act's original focus on wealth inequality towards a pure consumer welfare orientation for antitrust law.[12] Krugman argues that "increasing business concentration could be an important factor in stagnating demand for labor, as corporations use their growing monopoly power to raise prices without passing the gains on to their employees."[13]

Baker & Salop argue that while it is not possible to identify with precision the relative magnitudes of various factors contributing to growing inequality, market power likely has an effect. Relying on Piketty's analysis, they argue that because the exercise of market power tends to raise the return to capital, it can contribute to the development and perpetuation of inequality. As market power grows more common and visible, argue Baker & Salop, an increasing public concern with inequality might be expected to call for a competition policy response.[14]

A more forceful approach to antitrust implementation, may perform a corrective function, assuming market power affects inequality. Furthermore, antitrust regulatory agencies may prioritize lowering the consequences of inequality when advancing their programs.[15] In their vision, improving the distribution of income and wealth by reducing the impact of market power would happen especially if the agencies fully embrace the consumer welfare standard because this standard does not permit conduct that would harm consumers while benefiting shareholders. In contrast, they argue, the aggregate welfare standard, that takes into account the benefits to producers, can contribute to inequality by permitting market behavior that leads to the creation and exercise of market power. When cost savings or other efficiencies associated with the conduct are not shared with consumers, the benefits accrue primarily to shareholders and top executives, who typically are wealthier than the consumers of the products.[16]

Growing concern about inequality, according to Baker & Salop, that leads to the recognition of additional harms from market power, in turn would justify reconsideration of that direction in favor of adopting more interventionist antitrust rules that would recognize greater harm from market power than had previously been identified.[17]

In this analysis, resistance to inequality translates into almost indiscriminate resistance to "market power," without an account as to how and why precisely accumulation of capital, wealth and power occurs and who gains from it. Furthermore, reliance on protectionist considerations and equality in general does not assure change for the benefit of those who find

11 Khan & Vaheesan, *How America Became Uncompetitive and Unequal*, Wash. Post (June 13, 2014), https://www.washingtonpost.com/opinions/how-america-became-uncompetitive-and-unequal/2014/06/13/a690ad94-ec00-11e3-b98c-72cef4a00499_story.html?utm_term=.05359a47eb46.

12 Atkinson, supra note 9, at 126-27.

13 Krugman, *Robots and Robber Barons*, N.Y. Times (Dec. 9, 2012), http://www.nytimes.com/2012/12/10/opinion/krugman-robots-and-robber-barons.html?_r=0.

14 Baker & Salop, supra note 3 at 13.

15 Id. at 14.

16 Id. at 16-18. They do argue that application of a consumer welfare standard in principle could increase inequality in matters where consumers tend to be wealthy and the sellers are small firms owned by middle class entrepreneurs, such as hypothetical cartels among worker-owned manufacturers of luxury goods, such as fine crystal products or yachts. However, they expect those situations are rare. Id. at 17.

17 Id. at 21.

themselves in structurally unprivileged positions in society.[18] Finding a systemic legal regime that will favor the weaker party, such as the class of consumers, is fraught with analytical difficulties. Postulating an abstraction of a "weaker party" as the underlying reality of the world and aiming to help this presumably preexisting category can lead to reproduction of several hierarchical structures.[19] The danger of challenging market power in the abstract, as in Baker & Salop's proposal, without adequately addressing the complexity of the hierarchical structure of society and without developing a clearer analytical picture of concentration and reproduction of power in society leads to a discussion at a purely conceptual level without ever raising the necessary appreciation of the economic, social and ethical issues, which the work of lawyers should engage in the pursuit of advocacy for the most vulnerable. Consequently, such reasoning may well contribute to the reproduction of the existing distribution of material and spiritual values in the world.[20]

The analytical weakness of Baker & Salop's proposal is confirmed by Daniel Crane's distributional analysis. He argues that it is far from certain that antitrust violations (including cartels, anticompetitive mergers and abuses of dominance) systematically redirect wealth from the poor to the rich.[21] In order to sustain a showing that they do, one would have to have information about a large number of factors, including the relative wealth of producers and consumers, overcharge pass-on rates, the effects of market power on employees of the firm, the distribution of rents as between managers and shareholders and the distribution of rents among classes of managers.

The assumption underlying the progressive claim of antitrust enforcement is that senior managers and wealthy shareholders of large companies capture the majority of the rents attributable to anticompetitive conduct, and hence outpacing the typical consumer in the accumulation of wealth. In this picture, relatively poorer consumers bear the brunt of monopoly overcharges.[22] But it is far from certain that CEOs and rich shareholders are "in fact capturing the lions' share of monopoly profits."[23] Monopoly rents are not captured uniformly by the owners of capital (i.e. shareholders), but are distributed in various complex ways throughout the firm, including its workers.[24] According to Crane, drawing any firm conclusions regarding the net effect on wealth distribution of market power exercises and antitrust enforcement is a task that could not likely be done with anything approaching statistical rigor.[25]

A conclusion that an increase in market power of a particular company by monopolization or by another anticompetitive act does not have positive consequences beyond management and shareholders thus cannot simply be drawn. Nor can a simple conclusion be drawn that combating abstract market power with existing tools of antitrust law will lead to reductions of inequality.

18 See Damjan Kukovec, Taking Change Seriously; The Discourse of Justice and the Reproduction of the Status Quo in EUROPE'S JUSTICE DEFICIT? (Kochenov, de Bùrca and Williams eds.) at 324-30.

19 Id. at 329-30.

20 Id. at 329-30. Justice is often understood within a particular framework of interpretation, which contributes to reaffirmation of existing perceptions of social injury rather than challenging them.

21 Crane, *Antitrust and Wealth Inequality*, 101 Cornell L. Rev. 1171, 1174 (2016). Despite some the merits of Crane's distributional analysis, it should not be accepted at face value. For example, Crane's analysis and conclusion as to the progressive effects of monopoly overcharges in government procurement contracts regime is inaccurate. He assumes that wealthier consumers pay more for monopoly overcharges because they pay higher taxes due to progressive taxation. Thus, he concludes, anticompetitive behavior has progressive effects. He does not, however, take into consideration the fact that poorer consumers and citizens may often be the larger recipients of budget transfers and thus carry the cost of monopoly overcharges by the fact that less services, goods, or funds are available to them due to the higher prices of goods and services paid by public authorities because of monopoly overcharges.

22 Id. at 1184.

23 Id. at 1187.

24 Id. at 1192 (citing Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. Pa L. Rev. 2063, 2068 (2001)).

25 Id. at 1208.

III. ANTITRUST AS A FIELD OF COMPETITION BUT NOT DISTRIBUTION

Does this pose a problem for antitrust law? While Crane concludes that there are so many unknowables in antitrust enforcement that antitrust law is not suitable for addressing wealth inequality,[26] he claims that the antitrust system is reasonably competent at generating consumer welfare and economic efficiency, at creating a larger pie.[27] According to Crane, antitrust causes essentially two economic effects. First, it eliminates deadweight losses that arise from monopoly pricing and hence grows the social welfare pie.[28] Second, antitrust enforcement prevents redistribution of wealth from consumers to producers. Thus, Crane concludes that antitrust law works best as a set of objective principles regarding "measurable economic effects" in commercial markets.[29]

It remains unclear, however, what these measurable economic effects are, especially if the effects of antitrust policy are so difficult to predict, as Crane's analysis suggests.[30] If "the net effect on wealth distribution from general increases or decreases in overall antitrust enforcement is virtually impossible to tell,"[31] how can a conclusion be drawn that existing antitrust law based on existing assumptions maximizes consumer welfare and generates a larger pie than its alternative construction?

If the detailed investigation of the actual results could not likely be done with anything approaching statistical rigor, then "measurable economic effects," consumer welfare or total welfare, are just as uncertain as the distribution of wealth. In other words, calculation of the sum of individual welfare runs into the same difficulty and uncertainty as calculation of wealth distribution as Crane portrays. The effects of antitrust enforcement seem coherent and visible when its goal is framed in terms of aiming at "consumer welfare" or at elimination of the deadweight loss. Fulfilling the requirements of formulas and ideological abstractions such as consumer welfare, however, has little to do with the reality of distribution, with actual results and with effects of antitrust enforcement on the daily life of citizens.

The debate on antitrust and inequality thus reveals that consequences of antitrust enforcement remain profoundly unclear. The problem of existing thinking about antitrust enforcement goes far beyond the problem of its inability to address inequality. Just as methodological naivety can lead us to a conclusion that increased antitrust enforcement can actually lead to greater equality, methodological naivety can bring us to substituting tautological conclusions about achieving consumer welfare with actual effects of antitrust enforcement. Both a claim that antitrust law, as currently conceived, produces competition and maximizes welfare, and the claim that it produces social equality rest on uncertain and incoherent assumptions.

IV. PREFERENCE FOR TAX AND TRANSFER?

Is there any role for antitrust law to play in addressing inequality? Some would argue that the antitrust system is far inferior to other branches of law and governmental authority in addressing wealth equality and that therefore distribution should only be addressed through tax and transfer.[32] An assumption that distribution should be left to tax and transfer, bring us to the same conclusion as Piketty's analysis of fighting inequality – to a conclusion of combating inequality through taxation without an analysis of how this redistribution should occur.

26 Crane, supra note 21.

27 Id. at 1177 n.13.

28 Crane, supra note 21.

29 Id. at 1228.

30 Id.

31 Id. at 1174.

32 Crane, supra note 21.

Social processes, including competition and the process of concentration of capital and wealth cannot be adequately depicted or addressed by economic theories or formulas.[33] For example, Piketty's conclusion that a rate of return on capital (r) is greater than economic growth (g), (r > g), is an *ex-post facto* rationalization of the phenomenon of accumulation of capital. While the private rate of return on capital can be significantly higher for long periods of time than the rate of growth of income and output,[34] this finding does not articulate the reasons for this. It does not give us an analytical perspective of what accumulation of capital we would want to resist and what accumulation of capital we would want to honor. Thinking in terms of distribution through taxation misses the essential point and added value of legal analysis – identification of specific injuries that could explain the phenomenon of accumulation of capital or of the concentration of wealth. This identification is fundamental to targeting inequality.

V. ANTITRUST LAW BETWEEN ECONOMICS AND FAIRNESS

The debate on the right balance between economic models and fairness-based models of antitrust also fails to properly address inequality as well as fails to expand the range of understanding of injury and thus the range of social options that antitrust law could help to articulate. Modern antitrust analysis reflects the dominance of the economic model of analyzing antitrust policy. Both in the United States and in the European Union, legal models have embraced an economic methodology based on maximizing consumer or total welfare.[35] Today's economic methodology of global antitrust is met with arguments of equity or fairness.

Often, scholars concerned with fairness and equality complain about the negative effects of economic models or an over-emphasis on economic theory. Today, many ills of society are often ascribed to economic thinking or neoliberalism.[36] For example, in the idea that there is a ubiquitous neoliberal rationality that remakes everything and everyone in the image of *homo oeconomicus* and that transposes the constituent elements of democracy into an economic register.[37]

Reality, however, cannot be described solely by economic theory. It is the ideology of every moment in time that defines reality, not a theory. Thus, resistance to economic theory or economic thinking as such cannot be understood as a recipe for challenging the reproduction of power and wealth. Instead, the existing hierarchical structure of society and ideology and the social understanding of injury that underpins it need to be challenged.[38]

To those who believe that more justice and less economics will solve the issues of inequality or produce a better antitrust regime, antitrust based on fairness will do the trick. The talk of justice, or greater emphasis on fairness over the economic approach, however, tells us little about distribution and the effect that antitrust analysis has on the daily lives of citizens. In other words, the talk of fairness can contribute to the reproduction of the status quo just as much as economic thinking.[39]

Rather than economic theory, what needs to be challenged is the existing social understanding of injury, in economic thinking as well as in thinking about equity or fairness. In arguing for a reversal of social understanding of injury, economic analysis can be used as an important tool for social transformation.[40]

33 See Damjan Kukovec, *Hierarchies as Law*, 21.1 Colum. J. Eur. L. 131, 165 (2014).

34 Piketty, Capital In The Twenty-First Century 571 (2014).

35 See Baker, supra note 3, at 2178.

36 See, e.g. Sarfaty, Values in translation: human rights and the culture of the world bank 15 (2012).

37 See generally Brown, Undoing The Demos: Neoliberalism's Stealth Revolution (2015). For a critique, see Kukovec, *Hierarchies as Law*, supra note 33, at 137; Damjan Kukovec, Law and the Periphery, European Law Journal at 412; Kukovec, *Taking Change Seriously*, supra note 18, at 325.

38 See id.

39 Kukovec, supra note 18.

40 Damjan Kukovec, Economic Law, Inequality and Hidden Hierarchies on the EU Internal Market, 38.1. Michigan Journal of International Law, 1 (2016).

VI. PARADIGM CHANGE

The tools of global antitrust law can play a role in a pursuit of equality. Rather than interplay of economic and equitable considerations, the starting point of legal and economic analysis should be the hierarchical structure of society. Law and governance should be understood as a constant hierarchical struggle.[41] In this struggle, the hierarchically privileged repeatedly injure those in a structurally subordinate position and these harms perpetuate their hierarchical position.[42]

An analytical approach that challenges the existing concentration of wealth in the world must address the privileges to harm that are allocated differently to different people in the global hierarchical structure. The complex hierarchical structure of production of goods, services, knowledge, authority and prestige in a global society that gives analytic clarity about its construction[43] should thus be the starting point of legal and economic analysis. There are countless hierarchical structures at play in our societies that contribute to the reproduction of wealth, power, knowledge and prestige in the world. Harms, however, are not entirely random, repetitive hierarchical structures can be identified and contested.

Furthermore, lawyers should articulate targeted resistance to particular hierarchical structures rather than pursue abstract goals of equality or competition and articulate new tools for addressing the reproduction of wealth and power in society. Third, a construction of new tools and doctrines requires the amendment of some of the assumptions of antitrust law, for example, the benevolent effect of low prices, the current understanding of power in the analysis and the existing understanding of injury.[44]

To give just one example of how the current analysis can misrepresent power and fails to identify injury: competition law rests on the assumption that power is concentrated in the hands of the few and that the source of power and its abuse can be easily identified. Multinational corporations are often perceived as one of the main evils in the global society. They cater to our primal desire for sugar and meat, for being connected, mobile and seen, but they also, so it is perceived, do environmental damage, abuse their position on the market *vis-à-vis* smaller companies, consumers, the environment, indigenous peoples etc. Once their power to raise prices, hinder innovation, reduce output and choice is curbed, consumer welfare and equality seem to be assured. While competition law focuses on individual or collusive actions of select agents, it fails to acknowledge dispersed structural power. For example, the power that is concentrated in certain regions of the world – in the City of London, in Munich, in the center of the European Union is out of the radar screen of the analysis.[45]

To sum up, three conclusions follow from the discussion. First, the global society needs a thorough rethinking of its perception of justice and of its daily operation. Second, the consequences of existing antitrust enforcement, as well as its ability to generate a larger pie than its alternative are unclear. Third, existing antitrust analysis often misrepresents power, inadequately addresses injury and some of its disciplinary assumptions need rethinking. Together, these conclusions point at the need for an overhaul of antitrust law.

41 See Kukovec, supra note 33 at 168.

42 See id.

43 See Kukovec, supra note 33 at 192 ; Kukovec, Hierarchies as Law (Winter 2014/2015) (unpublished SJD dissertation) (on file with the Harvard Law School library).

44 See id.

45 See Kukovec, supra note 37.

VII. CONCLUSION

Notwithstanding the shortcomings of the current antitrust analysis, there seems to be a strong aversion against paradigm change or even adjustment among competition lawyers, unlike among lawyers in any other legal discipline. There is a sense among competition lawyers that a change of paradigm will result in competition law not being competition law anymore, but will become something else. While international lawyers, family lawyers, constitutional lawyers, trade lawyers and others acknowledge that their discipline comes at the intersection of other disciplines which constantly influence and reinvent their own, competition lawyers often feel that a paradigm change will reduce the discipline of competition law to industrial policy, politics, trade policy or to something else.

Despite this pushback, the time for a paradigm change in antitrust law is now. The fear of challenging and amending the existing assumptions hinders disciplinary and social imagination and prevents us from thinking and developing legal tools that could better address the (reproduction of) inadequate distribution of power and wealth in the world and that could thus better address the "market process."