

# HIPSTER ANTITRUST – A BRIEF FLING OR SOMETHING MORE?



BY KONSTANTIN MEDVEDOVSKY<sup>1</sup>



<sup>1</sup> Associate, Dechert LLP, New York. Thanks to Michael L. Weiner and Samuel Stelk for their comments, although the views expressed within are mine alone.

## I. INTRODUCTION

In a series of cases in the late 1970s and early 1980s,<sup>2</sup> the Supreme Court endorsed what is known today as the “consumer welfare standard” as the key concern of U.S. antitrust policy. While that history is by now well-trod ground,<sup>3</sup> the importance of this shift cannot be overstated. Previously, antitrust law in the United States consisted of a morass of contradictory Supreme Court decisions, with no clear line of prevailing reasoning prevailing beyond “Big is Bad,” to the point that the government would at times intervene against conduct that created too much *downward* pricing pressure.<sup>4</sup> After the embrace of the consumer welfare standard, antitrust enforcers in the United States have analyzed mergers and other antitrust issues with the goal of answering a relatively narrow economic question: what will be the impact of a merger or conduct on product quality and price?

## II. A CONTENTIOUS CONSENSUS

### A. From Then...

“Hipster Antitrust” is a catchall term I coined to describe the recent spate of questions from commentators about whether the narrow focus on consumer welfare is either misplaced generally, or ill-equipped to cope with competitive concerns raised by large technology platforms in particular (namely Facebook, Apple, Amazon, Netflix, and Google). Criticisms of the consumer-welfare standard are not new. Critics have argued a diverse range of positions: that antitrust was designed to enforce economic fairness and to further distributive goals,<sup>5</sup> that antitrust should attempt to maximize material and non-material “well-being,”<sup>6</sup> that the *status quo* regime is insufficiently attentive to consumer choice,<sup>7</sup> or that antitrust should do more to address systematic economic risks posed by enterprises that are “too big to fail.”<sup>8</sup> Even as the consumer welfare standard was taking hold, soon-to-be FTC commissioner Robert Pitofsky expressed concern that an exclusively economic approach to antitrust would not be politically sustainable, because it would result in an economy “dominated by a few [presumably low priced] corporate giants,” which would both “breed antidemocratic political pressure” and make it “impossible for the state not to play a more intrusive role in economic affairs.”<sup>9</sup> Pitofsky’s words seem apt now.

### B. ...To Now

The Hipster Antitrust movement (sometimes called Neo-Brandeisian, after Justice Brandeis, who espoused the moral value of networks of small independent businesses) has been building for some time. However, it arguably reached maturity with the publication of Lina Khan’s piece in the *Yale Law Journal*, *Amazon’s Antitrust Paradox*.<sup>10</sup>

---

2 *Contl. T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979); *Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332 (1982); *Natl. Collegiate Athletic Ass’n v. Bd. of Regents of U. of Oklahoma*, 468 U.S. 85 (1984).

3 See, e.g. Wright & Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 *Fordham L. Rev.* 2405 (2013); Barak Orbach, *The Antitrust Consumer Welfare Paradox*, 7 *J. Competition L. & Econ.* 133 (2011).

4 *Utah Pie Co. v. Contl. Baking Co.*, 386 U.S. 685 (1967).

5 Lande, *Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 *Hastings L.J.* 65 (1982).

6 Stucke, *Reconsidering Antitrust’s Goals*, 53 *B.C. L. Rev.* 551 (2012).

7 Lande, *Consumer Choice As the Ultimate Goal of Antitrust*, 62 *U. Pitt. L. Rev.* 503 (2001).

8 See generally, *Too Big to Fail: The Role of Antitrust Law in Government Funded Consolidation in the Banking Industry*, Hearing before the Subcommittee on Courts and Competition Policy of the Committee on the Judiciary, U.S. House of Representatives, March 17, 2009, available at: <https://www.gpo.gov/fdsys/pkg/CHRG-111hhrg48102/pdf/CHRG-111hhrg48102.pdf>.

9 Pitofsky, *The Political Content of Antitrust*, 127 *U. Pa. L. Rev.* 1051, 1051 (1979).

10 Khan, *Amazon’s Antitrust Paradox*. *Yale Law Journal*, Vol. 126 (2017).

Khan argued that antitrust authorities' narrow focus on prices and output was misguided, and particularly prone to under-enforcement in the high-tech industry. Khan's focus on tech firms was due to the network and lock-in effects associated with broad technology platforms, which she argued increase the risks posed by predatory pricing. Using the *Amazon e-Books* case as an example, Khan argued that Amazon's practice of pricing best-sellers below cost was in fact predatory, despite the fact that Amazon's overall e-book distribution business was consistently profitable in the aggregate. Per Khan, the lock-in effects of platforms (such as the Kindle), made below-cost pricing by Amazon anticompetitive, because it "would tend to facilitate long-term dominance."

While Khan did not offer any evidence that Amazon actually recouped any of its losses, she attributed this to the fact that Amazon's prices are too difficult to track, and potentially too personalized to make a traditional predatory-pricing recoupment analysis possible. Khan also noted the possibility of Amazon (or other tech platforms) either recouping the losses from predatory pricing in a different, but adjacent product market, or by raising prices on publishers rather than on consumers.

Khan concludes that the failure of the DOJ to bring a case against Amazon is due in large part to the consumer welfare framework under which DOJ operates under. As a result, Khan argued "we should replace the consumer welfare framework with an approach oriented around preserving a competitive process and market structure," which in this case means "restoring traditional antitrust principles to create a presumption of predation and to ban vertical integration by dominant platforms." (emphasis added).

The term Hipster Antitrust itself (and associated #HipsterAntitrust hashtag) came about several months after the publication of Khan's piece, in the context of Amazon's acquisition of Whole Foods.<sup>11</sup> Several weeks later, the term hit the mainstream when Senator Orrin Hatch invoked it to draw a distinction between vigorous antitrust enforcement within the consumer welfare framework on the one hand, and "Hipster Antitrust" outside the consumer welfare framework on the other.<sup>12</sup>

### **C. A Movement with Legs**

While previous critiques on the consumer welfare standard have come and gone, the current Hipster movement appears to have staying power. "Has Antitrust Failed?" asks Jason Furman (chairman of President Obama's Council of Economic Advisors).<sup>13</sup> "Antitrust is sexy again" writes Carl Shapiro.<sup>14</sup> The drumbeat can also be seen in the popular press, with the *Wall Street Journal*,<sup>15</sup> the *New York Times*,<sup>16</sup> and the *Economist*<sup>17</sup> all recently running pieces on the apparent decline of competition in the United States. Overall, the number of news stories discussing antitrust has skyrocketed since 2014:<sup>18</sup>

11 Medvedovsky, "Antitrust hipsterism. Everything old is cool again." @kmedved, June 19, 2017, available at: <https://twitter.com/kmedved/status/876869328934711296>.

12 Hatch Speaks on Growing Controversy Over Antitrust Law in the Tech Sector, Orrin Hatch Press Release, August 3, 2017, available at: <https://www.hatch.senate.gov/public/index.cfm/2017/8/hatch-speaks-on-growing-controversy-over-antitrust-law-in-the-tech-sector>; Hatch Speaks Again on 'Hipster Antitrust,' Delrahim Confirmation, Orrin Hatch Press Release, September 25, 2017, available at: <https://www.hatch.senate.gov/public/index.cfm/2017/9/hatch-speaks-again-on-hipster-antitrust-delrahim-confirmation>.

13 Furman, *Panel Discussion: "Has Antitrust Failed?,"* presented at NYSBA Antitrust Law Section Annual Meeting, January 26, 2017, available at: <https://pie.com/system/files/documents/furman20170126.pdf>.

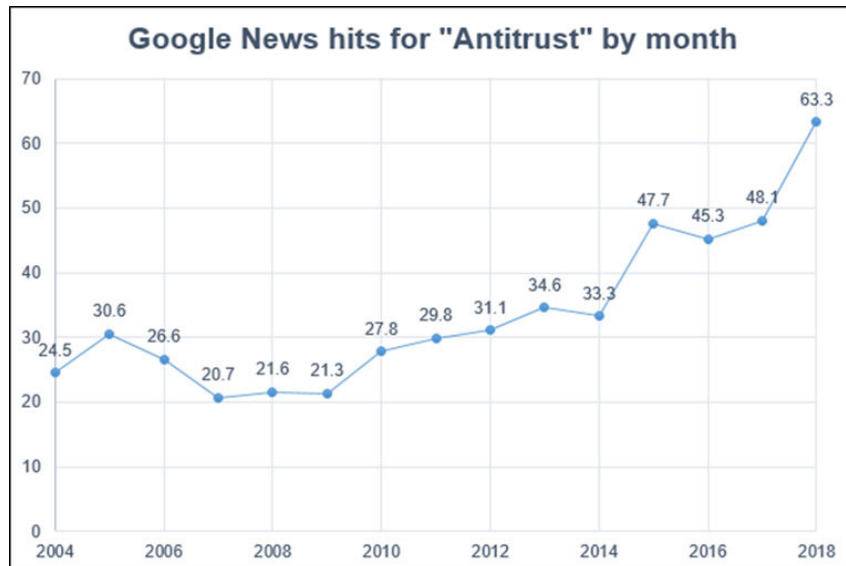
14 Shapiro, *Antitrust in a Time of Populism* (2017), available at: <https://ssrn.com/abstract=3058345>.

15 Francis & Knutson, *Wave of Megadeals Tests Antitrust Limits in U.S.*, *Wall Street Journal*, October 18, 2015, available at: <https://www.wsj.com/articles/wave-of-megadeals-tests-antitrust-limits-in-u-s-1445213306>.

16 Porter, *With Competition in Tatters, the Rip of Inequality Widens*, *New York Times*, July 12, 2016, available at: <https://www.nytimes.com/2016/07/13/business/economy/antitrust-competition-inequality.html>.

17 *Too Much of a Good Thing*, *Economist*, Mar 26, 2017, available at: <https://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing>.

18 Google Trends hits for U.S. news pieces mentioning "Antitrust," available at: <https://trends.google.com/trends/explore?cat=16&date=all&geo=US&q=antitrust>.



### III. HIPSTER ANTITRUST IN CONGRESS

Concerns over the consumer welfare standard have also reached Congress. For example, in the wake of Amazon’s announced acquisition of Whole Foods, Congressman Ro Khanna gave an interview in which he expressed concern that “Robert Bork . . . made [antitrust] a litmus test just about consumer prices.” Khanna cited *Von’s Grocery*, where the Supreme Court blocked the merger of two Los Angeles area grocers that would have resulted in combined shares of 7.5 percent, as an example of “jurisprudence that should be amplified,” and expressed an interest in “reorient[ing] antitrust policy” to consider “the loss of jobs, the impact on wages, the impact on local small businesses, and the impact on innovation within an industry.”<sup>19</sup>

Khanna is not alone. Other members of Congress, both in the House and Senate, have taken an active interest in the consumer welfare standard, and ponder whether it is broad enough to deal with a variety of social and economic issues.

#### A. Democrats Antitrust Caucus

In late 2017, Khanna and several other congressional Democrats (Rick Nolan, Mark Pocan, David Cicilline, and Keith Ellison) formed the Congressional Antitrust Caucus.<sup>20</sup> The group has held briefings on the impact of “Concentrated Economic Power” on racial and gender inequality, as well as on “Democracy and Political Inequality.” The Caucus has expressed concern about whether labor market concentration has led to lower wages.

#### B. Democrat’s Better Deal Proposal

As part of their Better Deal program, congressional Democrats unveiled a set of accompanying antitrust proposals, titled “Cracking Down on Corporate Monopolies and the Abuse of Economic and Political Power.”<sup>21</sup> The proposals call for “new merger standards that require a broader, longer-term view,” including whether a merger will “reduce wages, cut jobs, lower product quality, limit access to services, stifle innovation, or hinder the ability of small businesses and entrepreneurs to compete.” The proposal also leans into the “Big is Bad” era of antitrust, by making “the largest mergers” presumptively anticompetitive, and requiring firms to prove the benefits of the deal to be allowed to merge.

<sup>19</sup> Madrigal, *A Silicon Valley Congressman Takes on Amazon*, The Atlantic, June 19, 2017, available at: <https://www.theatlantic.com/technology/archive/2017/06/ro-khanna-amazon-whole-foods/530805/>.

<sup>20</sup> Tess Townsend, *Keith Ellison and the New ‘Antitrust Caucus’ Want to Know Exactly How Bad Mergers Have Been for the American Public*, select/all, December 4, 2017, available at: <http://nymag.com/selectall/2017/12/antitrust-bill-from-keith-ellison-seek-info-on-mergers.html>.

<sup>21</sup> *Cracking Down on Corporate Monopolies and the Abuse of Economic and Political Power*, Democratic Party, available at: <https://www.democraticleader.gov/wp-content/uploads/2017/07/A-Better-Deal-on-Competition-and-Costs.pdf>.

The Better Deal proposal was accompanied by a proposed bill from Democratic senator Amy Klobuchar that attempts to codify the Better Deal concepts.<sup>22</sup> The bill makes transactions valued over \$5 billion or those where *either* party had over \$100 billion in assets presumptively anticompetitive, rebuttable only by an affirmative showing that the acquisition would not lessen competition by any amount.<sup>23</sup> This latter requirement would effectively prohibit dozens of companies from making any further acquisitions, no matter how small, without making such a showing. This standard would apply irrespective of whether the acquisition is in an entirely unrelated industry.

The Better Deal proposal also included two other concepts, which while not directly touching on the consumer welfare standard, further demonstrate the interest of congressional Democrats in strengthening antitrust enforcement. The first would require “frequent, independent [after-the-fact] reviews of mergers” and require regulators “to take corrective measures if they find abusive monopolistic conditions where previously approved measures fail to make good on their intended outcomes.” The second would create a “consumer competition advocate” who would recommend investigations to the FTC and DOJ.

### ***C. Before the Senate Judiciary***

More recently, the Senate Judiciary Committee held a hearing entitled “The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt.”<sup>24</sup> During this hearing, members of the Senate Judiciary Committee heard prepared remarks from Tad Lipsky, Barry Lynn, Diana Moss, Carl Shapiro, and Josh Wright. Members of the Committee also questioned the panel about issues such as whether the consumer welfare standard is equipped to handle innovation competition, labor market monopsonization, and the difference between a consumer welfare and a total welfare standard. While no fireworks emerged, the simple existence of the hearing itself demonstrates that interest in reviewing the consumer welfare standard is perhaps at an all-time high.

### ***D. Booker Questions to the DOJ and FTC***

Possible 2020 presidential candidate Cory Booker has also expressed interest in the question of whether the consumer welfare standard is sufficiently broad. In a letter to the Assistant Attorney General Makan Delrahim and Acting Chairman of the FTC Maureen K. Ohlhausen, Booker asked Delrahim and Ohlhausen about tools available to the DOJ and FTC to protect labor markets.<sup>25</sup> The heavily footnoted letter cited to numerous studies concerning possible labor market monopsonization, and possible wage effects. Booker used these studies as a jumping off point to ask nearly two dozen questions regarding DOJ’s and FTC’s willingness and ability to bring labor market cases and challenge mergers due to labor issues under current law.

The current legislative interest in the consumer welfare standard sets Hipster Antitrust apart from previous challenges. Through Senate confirmations, Congressional hearings, and possible legislation, Congress has the ability to wield significant authority over the direction antitrust law should take.

## **IV. AN ANSWER IN SEARCH OF A PROBLEM**

It is difficult to respond to all of the concerns of the Hipster/Neo-Brandeis movement, since its proponents are as varied a group as any other, and do not all agree on what changes they would like to see in antitrust policy. Some want a return to the structural analysis that ruled before the consumer welfare standard, and its associated economic tools took hold. Others believe that we need special rules for the technology sector in particular. Others (particularly in Congress), are concerned primarily with labor markets, or whether social and economic equity can be furthered through antitrust law. With that caveat, I will briefly comment on some of the proposals.

---

<sup>22</sup> S.1812 - Consolidation Prevention and Competition Promotion Act of 2017, 115<sup>th</sup> Congress (2017).

<sup>23</sup> Deals where the acquiring party would exceed a \$50 billion valuation were also made presumptively illegal.

<sup>24</sup> The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?, Subcommittee on Antitrust, Competition and Consumer Rights, December 13, 2017, available at: <https://www.judiciary.senate.gov/meetings/the-consumer-welfare-standard-in-antitrust-outdated-or-a-harbor-in-a-sea-of-doubt>.

<sup>25</sup> Booker Presses DOJ, FTC on Corporate Concentration and its Impact on Competition in Labor Markets, Cory Booker Press Release, November 1, 2017, available at: [https://www.booker.senate.gov/?id=692&p=press\\_release](https://www.booker.senate.gov/?id=692&p=press_release).

## A. The Difficulty Balancing Multiple Mandates

The most immediate problem antitrust enforcers would face without the singular consumer welfare standard to guide them is what to do when considerations apart from consumer welfare come into conflict. While there are legitimate debates to be had about issues like GUPPI models, CR ratios, or the relative harm from over- or under-enforcement, these debates are occurring within the context of attempting to answer a question everyone understands. Without the “true north” of consumer welfare, enforcers would be left to balance multiple, often competing policy goals, as well as to weigh the evidence with respect to each one of those goals.

This would risk turning what is presently a data-driven, law enforcement exercise into something that is beholden to the political issues of the day. For instance, how is an agency supposed to evaluate a merger that can reasonably be expected to lower prices and improve product quality, but also to negatively impact local small businesses? The interests of consumers and small businesses would be in conflict. Antitrust enforcers would need to effectively pick one side or another in such a case, raising concerns about favoritism, lobbying, and corruption. If the answer is to simply “balance all factors,” then the weighting of each respective factor becomes paramount.

A system with multiple mandates is also less predictable. It will depend more on the views of the specific staffers and ultimately courts evaluating a merger, leading to the likelihood of different outcomes for similar fact patterns. Such unpredictability raises uncomfortable questions about the rule of law.

## B. “Short-Term Price Effects”

A frequent element of Hipster critiques of the consumer welfare standard is the claim that the consumer welfare standard is about “short-term price effects.” For instance, Lina Khan is explicit in *Amazon’s Antitrust Paradox*:

This Note argues that the current framework in antitrust—specifically its pegging competition to “consumer welfare,” defined as short-term price effects—is unequipped to capture the architecture of market power in the modern economy. (emphasis added).

Similar comments about the antitrust agencies’ alleged short-term focus are common in many other Hipster commentaries.

However, this short-termism cannot be found anywhere in the Horizontal Merger Guidelines.<sup>26</sup> As almost any antitrust practitioner can tell you, it is also missing from the real-life practice of law before the FTC and DOJ. To the contrary, much to the consternation of clients, agencies will frequently ask for more documents, data and longer-term projections than one would need to evaluate a short-term impact. This emphasis on evaluating every possible aspect of a merger is likely a major reason for why U.S. merger investigations take so long: over ten months on average for “significant” merger investigations, as calculated by the Dechert Antitrust Merger Investigation Timing Tracker (“DAMITT”).<sup>27</sup>

Tad Lipsky, former Deputy Assistant Attorney General and acting FTC Bureau of Competition director, spoke to this point at the Senate Judiciary Committee hearing on the Consumer Welfare standard referenced above. He explained that rather than the consumer welfare standard being “centrally or even uniquely focused on short-term effects on consumer prices,” the agencies considered both “long-run” impacts, and “dynamic effects.”<sup>28</sup>

<sup>26</sup> Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, August 19, 2010, available at: <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

<sup>27</sup> DAMITT: How Long Does it Take to Conduct Significant U.S. Antitrust Merger Investigations?, January 18, 2018, available at: <https://www.dechert.com/knowledge/hot-topic/damitt--how-long-does-it-take-to-conduct-significant-u-s--antitr.html>.

<sup>28</sup> Lipsky, Prepared Statement at Hearing on The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?, December 13, 2017, available at: <https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Lipsky%20Testimony.pdf>.

It is likewise difficult to square a view that the consumer welfare standard is exclusively short-term price focused with the recent emphasis by the antitrust agencies on innovation markets,<sup>29</sup> which are inherently long-term in nature. ‘Innovation and Product Variety’ likewise get an entire section devoted to them in the Horizontal Merger Guidelines. This emphasis on innovation also challenges the notion that the consumer welfare standard is solely price focused at all, let alone only concerned with short-term prices.

### ***C. Technology Platforms***

The concern over technology platforms is perhaps the single unifying thread between all Hipster Antitrust proposals and commentary, distinguishing them from previous critics of the consumer welfare standard. In particular, there is a view among many of these critics that special rules may be needed for technology platforms. As laid out by Khan, the reasons for the focus on technology platforms is relatively simple: technology platforms are “winner-take-all” due to network effects and the importance of data, so predatory pricing is an especially advantageous strategy.

Khan may well be correct that the economics of technology platforms make them more likely to result in a small number of large firms (although even this remains to be seen in the long-run). However, essentially none of the concerns raised with respect to these platforms are outside the scope of what the consumer welfare standard can address. While a technology platform may have a greater incentive to engage in predatory pricing, it remains illegal for them to do so, even within the existing consumer welfare framework. Nor does anything prevent antitrust enforcers from considering recoupment in adjacent product markets. The difficulty of proving recoupment meanwhile is not unique to technology platforms. Eliminating, or carving out the consumer welfare standard for one particular (rapidly changing) business sector, in response to an evidentiary concern seems like an overreaction at this stage.

## **V. CONCLUSION**

At the present time, the Hipster Antitrust movement seems likely to have more policy influence than previous attacks on the consumer welfare standard due to the interest in the subject from prominent members of Congress. However, the calls for rapid and radical changes to antitrust law in response to what appear to be largely speculative harms are premature. More evidence is likely needed with respect to the economics and durability of technology platforms in particular. In the meantime, the debate is healthy, and has helped heighten interest both in the history and the future of antitrust law.

---

<sup>29</sup> Rosch, Antitrust Regulation of Innovation Markets, Federal Trade Commission, February 5, 2009, available at: <https://www.ftc.gov/public-statements/2009/02/antitrust-regulation-innovation-markets>.