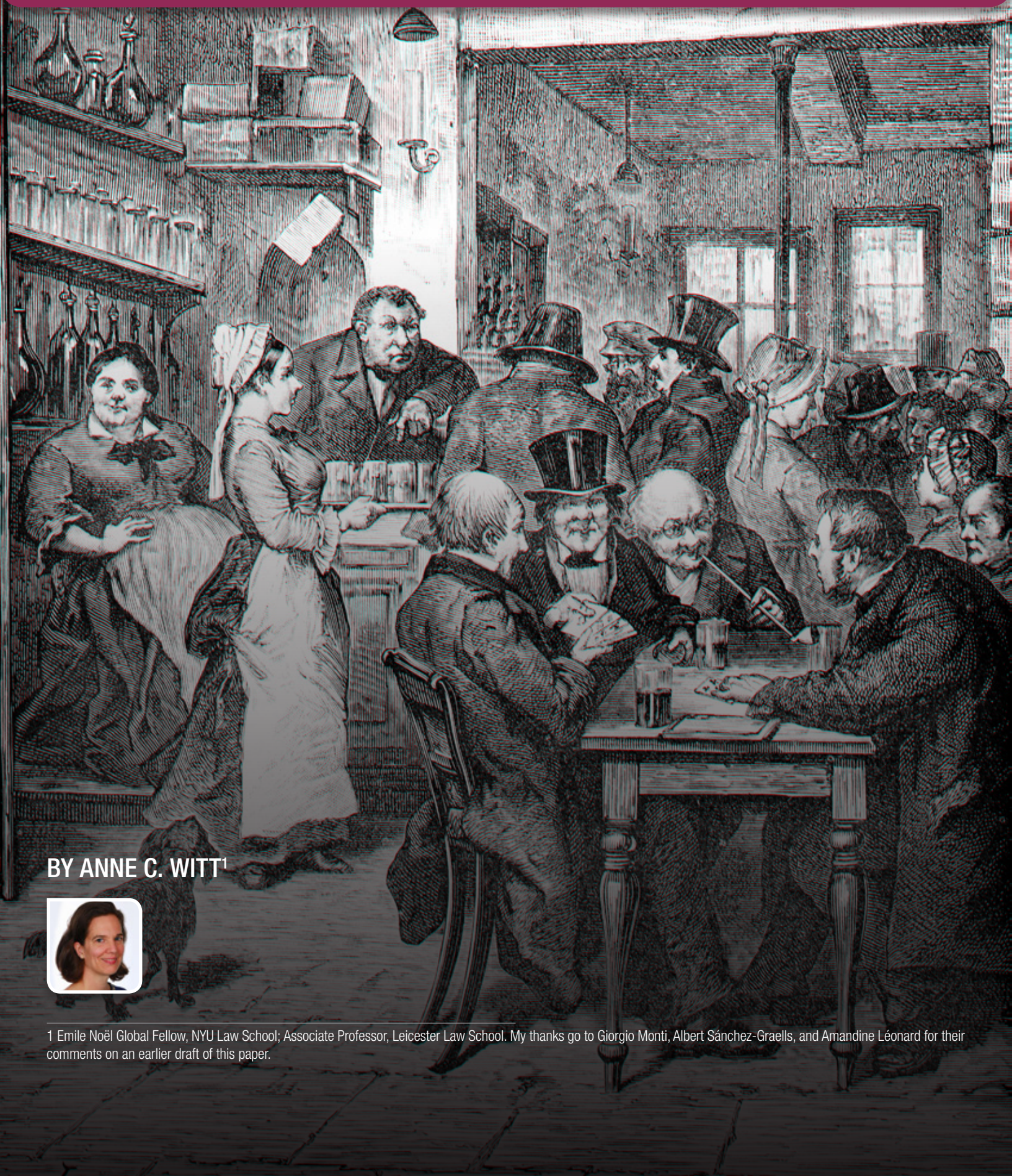
TECHNOCRATS, POPULISTS, HIPSTERS, AND ROMANTICS – WHO ELSE IS LURKING IN THE CORNERS OF THE BAR?



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I. INTRODUCTION

Few debates in competition law are as emotionally and ideologically charged as that on the aims of competition law. As Bork famously stated: "Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law — what are its goals? Everything else follows from the answer we give."[2] Although these words were written over forty years ago, they remain as valid today as they were then. The answer to Bork's question, alas, remains as elusive as it was in the 1970s. Do we protect the competitive process as such? Or do we protect competition in the aim of maximizing economic welfare? And if so, whose welfare? Do we maybe protect competition in order to safeguard fundamental legal rights and principles, such as individual economic freedom or even the democratic process? Maybe the aim is something different altogether. Also, is it necessary to decide on one single objective, or could and should competition law pursue a multitude of aims?

The controversy does not end with the legal objective, of course. Further points of contention are how to conceptualize harm to competition, what tests to apply for assessing such harm, and under what circumstances a restriction of competition can be tolerated because it also produces beneficial effects.

Since the late 1970s, the U.S. judiciary has been guided by the consumer welfare aim and the belief that consumer harm, primarily defined in terms of higher prices, should not normally be inferred from the conduct's form, but proved by the plaintiff, save in the most egregious cases. The European Commission adopted a similar albeit more moderate approach to EU competition law in the late 1990s. Ten years ago, this so-called economic approach to competition law, which is defined by the aims and tools of industrial organization, seemed to have become the unassailable model in the Western world.

More recently, however, economic and societal upheavals, brought about by factors such as the 2008 financial crisis, the rise of Big Tech, increased market concentration and growing wealth disparity, have caused politicians and academics alike to question whether the current approach to competition law is yielding appropriate results. Adherents of the *status quo* have been quick to dismiss these challenges as antitrust hipsterism, populism and/or romanticism. The challengers, in turn, accuse the other side of technocracy.

This contribution argues that these labels are unhelpful, and that academics and politicians on both sides of the debate should prioritize an objective and fact-based discussion of the issues.

2 Robert Bork, *The Antitrust Paradox* (New York, Basic Books Inc, 1978), 50.

II. THE *STATUS QUO* IN THE UNITED STATES AND EUROPE

Both U.S. and EU competition law have undergone significant paradigm shifts since their inceptions. In the United States, the last major turning point occurred in the late 1970s, when then up-and-coming Chicago scholars such as Bork and Posner convinced the majority on the U.S. Supreme Court to adopt an economic approach to antitrust.[3] The Chicago School's key premise was that antitrust law should be interpreted as pursuing the same aim as mainstream economics, namely the maximization of economic welfare. Consequently, only such restrictions of competition should be deemed anticompetitive that resulted in a tangible reduction of economic welfare. The Chicago School's second proposition was that the detrimental effect on economic welfare should not normally be inferred from the investigated conduct's form, but established in each case on the basis of rigorous economic analysis, using the insights and practical tools of modern economic theory. Their key concern was that form-based presumptions were too blunt and risked outlawing conduct that did not actually reduce economic welfare. Finally, Chicago scholars argued that markets were almost always self-correcting, which greatly reduced, if not eradicated, the need for antitrust enforcement in the first place.

The U.S. Supreme Court interpreted Bork's writings as advocating a consumer welfare aim, and reinterpreted the U.S. antitrust rules as only prohibiting restrictions of competition that negatively affected consumer welfare,[4] in particular in the form of higher end prices.[5] This was a significant departure from its earlier reading of the Sherman Act, which had (also) been guided by the aim of protecting small businesses against the exclusionary conduct of powerful companies.[6] The Court further proceeded to cull its precedent on types of conduct that could be deemed *per se* illegal, and instead required plaintiffs to prove that the conduct caused actual consumer harm.[7] These changes not only reduced the scope of the U.S. antitrust rules, but also significantly raised the bar for enforcing the law against non-cartel infringements. Not surprisingly, these developments progressively resulted in fewer cases succeeding, and ultimately being initiated, in particular with regard to monopolization claims and merger review.

Chicago arrived in Brussels with a twenty-year delay and in a somewhat tempered version – Chicago light. In the late 1990s, responding to increasingly vocal criticism that EU competition law was too legalistic and out of touch with economic theory in comparison with U.S. antitrust law, the European Commission revised its interpretation of the substantive competition rules and developed what has become known as the "more economic" approach to EU competition law.[8] Between 2000 and 2009, it spelled out this revised approach to Article 101 TFEU and the EU Merger Regulation in numerous interpretative guidelines,[9] and issued new enforcement priorities for Article 102 TFEU.[10]

The European Commission's more economic approach is based on the same key premise as the current position of U.S. antitrust law, namely that the ultimate aim of competition law is the protection of consumer welfare. It also embraced the view that only such restrictions of competition should be deemed anticompetitive that are likely to result in a tangible reduction of consumer welfare, and that only efficiency effects which are passed on to consumers can offset such harm to competition. However, the European Commission's understanding of consumer welfare is relatively generous – both in theory and practice – and includes reduced output, lower quality, reduced innovation, and less consumer choice in addition to higher prices. Also, the internal market aim remains relevant.[11] Unlike its U.S. counterparts, the European Commission actively continues to enforce all three pillars of EU competition law, including the prohibitions against anticompetitive mergers and unilateral

3 For a brief historical overview, see e.g. Eleanor M. Fox & Lawrence A. Sullivan, "Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?," (1987) 62 *N.Y.U. L. Rev.* 336; William E. Kovacic & Carl Shapiro, "Antitrust Policy: A Century of Economic and Legal Thinking," (2000) 14 *JEP* 43.

4 *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

5 While, in theory, the U.S. enforcement agencies define consumer harm more widely as also including reduced output, quality, service or innovation (e.g. FTC and U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (April 2000), p.4,), in practice, enforcement tends to focus on price increases.

6 *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323 (1897); *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

7 E.g. *Continental T. V., Inc v. GTE Sylvania Inc*, 433 U.S. 36 (1977); *State Oil v. Khan*, 522 U.S. 3 (1997); *Leegin Creative Leather Products, Inc v. PSKS, Inc*, 127 S.Ct. 2705 (2007).

8 For a detailed analysis of the changes introduced by the more economic approach, see Anne Witt, *The More Economic Approach to EU Antitrust Law*, Chapters 4 – 7 (Hart 2016).

9 European Commission, Guidelines on Vertical Restraints, OJ [2000] C 291/1 (now OJ [2010] C130/1); Guidelines on Horizontal Cooperation Agreements, OJ [2001] C3/2 (now OJ [2011] C1/1); Guidelines on Technology Transfer Agreements OJ [2004] C101/2 (now OJ [2014] C89/3); Guidelines on the application of Article 81(3), OJ [2004] C101/97; Horizontal merger guidelines, OJ [2004] C31/5); Non-horizontal merger guidelines, OJ [2008] C265/6).

10 Guidance on the Commission's enforcement priorities in applying Art. 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ [2009] C 45/7.

11 E.g. Guidelines on the application of Article 81(3), OJ [2004] C101/9713, paras 13, 24.

conduct. Also, while the more economic approach scaled back the use of legal presumptions, in particular in relation to Article 102 TFEU, unlike the U.S. Supreme Court, the European Commission did not make significant changes to the type of conduct it considers restrictive by object under Article 101 TFEU. In particular, a number of vertical agreements, such as minimum and fixed resale price maintenance or absolute territorial protection, are still considered restrictive by object, meaning that their anticompetitive effects can be inferred without in-depth economic analysis.

The more economic approach nonetheless marked a significant departure from the Commission's previous interpretation of the EU competition rules, which had been guided by a multitude of aims, including individual economic freedom, fairness, the internal market, and a rather vague and generalized notion of economic welfare. Most significantly in practice, the Commission had previously not required proof of consumer harm under any of the three pillars of EU competition law. It had further been willing to consider a broad array of beneficial effects as countervailing factors in assessments under Article 101 TFEU, including effects that were deemed desirable from the point of view of social, environmental or industrial policy. Under Article 102 TFEU, it had frequently inferred the exclusionary effects of a dominant undertaking's conduct from its form.

The changes introduced by the European Commission's more economic approach have never been entirely uncontroversial. To this day, the European Court of Justice ("ECJ") has not formally embraced the exclusive consumer welfare aim. Nor has it explicitly agreed with the other tenets of the Commission's more economic approach, i.e. that the exclusion of competitors is only problematic if it is bound to result in consumer harm, that exclusionary effects may never be inferred from the form of a dominant undertaking's conduct, or that only efficiency effects can outweigh an anticompetitive effect. And yet, the Union courts have had ample opportunity to do so over the past fifteen years. Investigated undertakings and national courts have raised these issues time and again. In 2006, the General Court ("GC") had seemed willing to take the plunge when it sided with the applicant's submission in *GlaxoSmithKline* that the objective of Article 101 TFEU was to prevent undertakings from reducing the welfare of the final consumer by restricting competition, and that an assessment under this provision therefore required establishing consumer harm.[12] However, the ECJ struck down the GC's judgment on appeal and ruled in no uncertain terms that neither the wording nor the case law supported this erroneous interpretation.[13]

Since then, the ECJ has steered clear of committing itself on the matter. One cannot help but wonder whether it is deliberately trying to avoid taking sides in what has become an increasingly polarized dispute. *Intel*[14] would have been the ideal opportunity to take a stance, had the ECJ wished to do so. But instead of unequivocally stating that Article 102 TFEU does/does not require the Commission to carry out an As-Efficient-Competitor Test to weed out cases in which the dominant undertaking only excludes a less efficient and hence less worthy competitor, it merely held that, where the Commission had gone to the trouble of carrying out such a complex and costly test, the GC had to engage with its analysis on review and could not simply ignore it.[15] Likewise, rather than state that it had overruled the precedent established in *Hoffmann-La Roche* according to which exclusivity rebates were deemed outright abusive if granted by a dominant undertaking,[16] the Court merely "clarified" that in cases, in which the investigated undertaking presented substantial evidence as to why its rebates did not have an exclusionary effect, the Commission had to engage with this evidence and could not simply ignore it.[17] It avoided any discussion of the aims of Article 102 TFEU or consumer harm as a requirement of abusive conduct.

This approach of sitting on the fence has both advantages and disadvantages. On the one hand, the ECJ thereby avoids taking sides and further fanning the flames of what has become quite a bitter ideological disagreement. On the other, its reticence is not conducive to legal certainty.

12 T-168/01 *GlaxoSmithKline v. Commission* ECLI:EU:T:2006:265, paras 118, 119.

13 Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline v. Commission* and *Commission v. GlaxoSmithKline* ECLI:EU:C:2009:610, paras 62-64.

14 C-413/14P *Intel. v. Commission*, ECLI:EU:C:2017:632.

15 *Supra,* note 14, paras 141, 144, 146.

16 Case 85/76 *Hoffmann-La Roche v. Commission* ECLI:EU:C:1979:36, para 89.

17 *Supra*, note 14, paras 138, 139.

Incidentally, the ECJ's Advocates General have, at times, shown considerably less restraint. They appear as divided as the rest of the legal community. In *Intel* and *MEO*, for example, Advocate General Wahl argued fervently in favor of an economic, i.e. efficiency- and effects-based, interpretation of EU competition law.[18] In *Post Danmark II*, on the other hand, Advocate General Kokott warned the ECJ against the dangers of embracing "ephemeral trends" and "Zeitgeist," and argued, no less passionately, against the more economic approach and in favor of adhering to the proved and tested legal principles established in the case law.[19]

III. ENTER THE HIPSTERS & CO

The Chicago School has had its critics all along. While some academics have always found fault with Chicago's sole focus on efficiency,[20] the main criticism has traditionally been that many of the Chicago School's key principles, while seductively simple, are too theoretical, speculative and unsupported by facts. From the 1980s onwards, academics have been trying to address some of these theoretical flaws by proposing Post-Chicago and even Neo-Chicago alternatives.[21] The European Commission endeavored to take these corrections on board when developing its own economic approach to EU competition law in the late 1990s.

In the past few years, the dispute has suddenly reignited, and taken on a new intensity and dimension that transcends academia this time. Politicians, the media, as well as a new generation of scholars are arguing quite forcefully that current competition law is no longer fit for purpose. There is, of course, the advent of e-commerce and electronic platforms, which raises the question whether the rules and assessment tools developed for brick and mortar outlets are also suitable for digital markets. There has been a flurry of government-commissioned expert reports on these issues in recent years. However, politicians are also asking more fundamental questions about the current state of competition law, and are querying whether the sole focus on consumer welfare, especially if reduced to price increases, in combination with the requirement for plaintiffs to prove such effects on the basis of complex and costly economic assessments, is really resulting in socially desirable results. Amongst the key concerns are increasing industrial concentration and market power, growing wealth disparity, privacy and competition concerns over the use of individuals' data by Big Tech companies, and the ability of a few powerful economic players to influence the political process. In 2017, the U.S. House of Representatives Democratic Leadership proposed "A Better Deal" for the American people, which promised to crack down on monopolies and lax federal antitrust enforcement.[22] Likewise, U.S. Senator Elizabeth Warren is currently running her presidential campaign on an economic platform that not only promises stronger antitrust enforcement but even proposes to break up tech giants such as Amazon, Google, and Facebook.[23]

In Europe, where the consumer welfare aim has not stopped competition authorities from attempting to rein in market concentration by prohibiting mergers and abusive conduct by dominant undertakings, the primary concern currently seems that the focus on economic consumer welfare is precluding enforcers from considering other policy aims such as privacy and environmental protection, and, most recently, industrial policy. In February 2019, for example, the French and German governments published a joint manifesto in which they argued in favor of amending the current EU competition rules in order to allow the Commission to take into account industrial policy considerations in merger assessments.[24] This step needs to be seen as a reaction to the European Commission's decision to prohibit the merger between Siemens and Alstom on the basis that the combination of these two major players in the European rail industry would have restricted competition to the detriment of consumers.[25] Germany and France criticized the consumer-welfare approach underlying the decision for merely looking at the short-term effects on prices, and disregarding the effects on the competitiveness of European industries. In particular, they argued that merger law should allow

18 Opinion of Advocate General Wahl in Case C-413/14 P *Intel v. Commission*, ECLI:EU:C:2016:788, para 41, and C-525/16 *MEO - Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência*, ECLI:EU:C:2017:1020, paras 62, 64, 90.

19 Opinion of Advocate General Kokott in Case C-23/14 *Post Danmark v. Konkurrencerådet*, ECLI:EU:C:2015:343, para 4.

20 E.g. Robert Pitofsky, "The Political Content of Antitrust," (1979) 127 U. Pa. L. Rev. 1051.

21 Herbert Hovenkamp, *Antitrust Policy after Chicago,* (1985) 84 *Mich. L. Rev.* 213, 225 (1985). See also the collection of essays in Robert Pitofsky (ed.), *How the Chicago School Overshot the Mark* - The Effect of Conservative Economic Analysis on U.S. Antitrust (OUP 2008).

22 U.S. House of Representatives Democratic Leadership, A Better Deal: Crack Down on Corporate Monopolies & the Abuse of Economic and Political Power, https://abetterdeal.democraticleader.gov/the-proposals/crack-down-on-abuse-of-power/ (Jul. 2017).

23 E.g. Astead W. Herndon, "Elizabeth Warren Proposes Breaking Up Tech Giants Like Amazon and Facebook," *The New York Times* (8 March 2019).

24 Franco-German Manifesto for a European industrial policy fit for the 21st Century (February 19, 2019), www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf%3F__blob%3DpublicationFile%26v%3D2.

25 Commission decision of February 6, 2019 in Case M.8677 - *SIEMENS/ALSTOM.*

for the creation of European champions in markets, in which European companies face foreign competitors that receive significant subsidies from their national governments, allowing them to win bids that companies operating under market conditions cannot match.[26] In July 2019, the French, German and Polish governments reiterated this position in another joint policy paper.[27] These arguments had been severely out of fashion for the past two decades. With the UK, a traditional advocate of open markets and a champion of the consumer welfare approach, set to leave the EU in a few months' time, it will be interesting to watch what direction EU competition law will take.

Academics have long joined the fray. In the United States, it is probably Lina Khan's 2017 paper on Amazon's unconstrained growth from a madcap idea to a titan of twenty-first century commerce[28] that has triggered the greatest media and twitter frenzy in recent years. However, she is not alone in her criticism of the current state of antitrust enforcement. There are many established academics, including Tim Wu, Jonathan Baker, and Maurice Stucke, who argue that the current approach to U.S. antitrust law, in particular, is failing society, be it because of its exclusive focus on consumer welfare, the narrow price-centric interpretation of consumer welfare, onerous standards of proof, presumption of self-correcting markets or low levels of public enforcement.[29]

Questioning the current consumer welfare standard and rule of reason approach has drawn forceful rebukes from adherents of the *status quo*. "Hipster antitrust" is probably one of the earliest labels applied to those questioning the consumer welfare standard and effects-based approach.[30] "Populist" antitrust since seems to have replaced the hipster label. It suggests that the antitrust populist, like any populist worth their salt, rejects expertise and pursues certain destructive beliefs with complete disregard for facts and science. To quote: "the populist antitrust proposals reject fundamental lessons gleaned from developments in modern economics and would send antitrust careening back to the equivalent of its Stone Age."[31] Now, romantics are said to have joined the party.[32] The defenders of the *status quo*, on the other hand, are being accused of antitrust technocracy.[33]

These labels are not entirely new. In the preface to the 2nd edition of his seminal *Antitrust Law*, Posner called the pre-Chicago approach "populist, political and ideological."[34] But is not the conviction that antitrust law should be guided by the aim of maximizing welfare alone also an ideological belief? Bork himself described his experience of being taught a price-theoretical approach to antitrust by Chicago's Aaron Director as nothing short of a "religious conversion" that turned him and his fellow students into Director's "janissaries."[35] These terms are hardly value-free.

26 In the *Siemens/Alstom* case, the offender was CRRC, a Chinese State-owned and heavily subsidized behemoth of the rail sector.

27 "Modernising EU Competition Policy," (July 24, 2019), www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf?__blob=publicationFile&v=4.

28 Lina M. Khan, "Amazon's Antitrust Paradox," 126 YALE L.J. 710 (2017).

29 See e.g. Tim Wu, *The Curse of Bigness, Antitrust in the New Gilded Age*,(Columbia Global Reports 2019); Jonathan B. Baker, *The Antitrust Paradigm* (Harvard 2019); Maurice E. Stucke & Allen P. Grunes, *Big Data and Competition Policy*, (OUP 2016).

30 See for example Elyse Dorsey, Jan Rybnicek & Joshua D. Wright, "Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent-Seeking," *George Mason Law & Economics Research Paper* No. 18-20 (Apr. 2018).

31 Elyse Dorsey, Geoffrey A. Manne, Jan Rybnicek, Kristian Stout & Joshua D Wright, "Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement," released by the Regulatory Transparency Project of the Federalist Society, April 15, 2019 (https://regproject.org/wp-content/uploads/RTP-Antitrust-and-Consumer-Protection-Populist-Antitrust.pdf).

32 Thibault Schrepel, "Antitrust Without Romance," (May 30, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3395001.

33 E.g. Sandeep Vaheesan, "The Twilight of the Technocrats' Monopoly on Antitrust?," 127 *YALE L.J. F.* 980 (2018).

34 Richard Posner, *Antitrust Law*, 2nd ed (Chicago 2001), viii.

35 Edmund W. Kitch, "1932–1970 The Fire of Truth: A Remembrance of Law and Economics at Chicago," (1983) 26 *Journal of Law and Economics* 163, 183.

IV. HOW HELPFUL ARE THESE LABELS?

Pitching technocrats on the one side against populists, hipsters and romantics on the other is not helpful. For one, these labels are too crude to capture the nuances of the usually quite complex arguments made by the alleged offenders. And can one really be a hipster, populist and romantic all rolled into one? Much more importantly, these labels are not conducive to a meaningful dialogue. They are all meant to belittle or denigrate the person on the other side of the argument. While hipsters are mostly deemed harmless, mainstream society also considers them eccentric at best, and silly at worst, depending on one's tolerance for alternative lifestyles. Populism has decidedly more sinister connotations. And while this particular author is an ardent admirer of Mendelssohn, Brahms, Chopin, Rachmaninoff et al., romanticism is a term that suggests an individual who is guided by emotion rather than reason. All parties concerned will probably agree that this is not a particularly desirable approach in legal or economic analysis. Finally, while most people would like to be considered experts in their field, few would like to be remembered as technocrats. Technocracy implies a form of governance that is run by individuals who are highly specialized in a narrow field of expertise, somewhat out of touch with everything else, and, above all, unelected and hence democratically unaccountable. It is not a compliment these days.

Trading insults is rarely a good way to begin a discussion, at least if the aim is to have a genuine exchange. Something that all parties should be able to agree on is that a non-judgmental, rational and, above all, fact-based discussion of the issues is the scientifically soundest approach. While the political rhetoric has become more polarized and polarizing in recent years, this is not conducive to consensus-building. Consensus, or at least acceptance, however, lie at the core of a stable legal system.

There is a lot to discuss. Amongst others, the proponents of the *status quo* need to engage with the concerns of the current countermovement and explain why the price-centric interpretation of the law, rejection of easy-to-apply *per se* rules and the current state of enforcement are unconnected to growing market concentration and wealth inequality. Alternatively, they need to explain why market concentration and wealth inequality are not something to be concerned about. They need to defend why one should worry about Type I, but not Type II errors in antitrust enforcement. And finally, they need to explain convincingly why the only valid objective of antitrust law is that of economic theory, i.e. maximum economic welfare, to the exclusion of all other benefits associated with a competitive economy, e.g. freedom of opportunity and protection of the democratic system.

The other side need to acknowledge the difficulty of translating their broader aims into clear legal concepts and propose rules that are predictable, administrable, result in the desired outcomes and are not open to political abuse. They need to address the concerns that more restrictive rules could undermine the incentives of businesses to compete and innovate, thereby depriving society of some of the very benefits the reformers are trying to achieve.

V. CONCLUSION

Europe and the United States are experiencing a fair amount of political turmoil at the moment. Unsurprisingly, the underlying public discontent is also stirring up significant concerns about the current state of competition law and policy. Not all of these are necessarily true. Not all of them are necessarily false. They raise important and complex questions that deserve to be discussed in an objective and evidence-based manner. Name-calling and pigeonholing are not going to facilitate a meaningful dialogue. And maybe a bar is not the best setting for this discussion.

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