

ANTITRUST HIPSTERS AND THEIR CRITICS

The renewal of competition law enforcement has become one of the focal points of political and professional debates in the United States. The main critics of the prevailing practice, the so-called antitrust hipsters campaign for bringing back the original goals of American competition law, and demand restrictions on the activities of huge corporations of the digital era, even by regulation if needed. This paper presents the ongoing and constantly evolving debate between the followers of the hipster antitrust approach and their critics.

INTRODUCTION

According to the Cambridge English dictionary, “*hipster*” means “someone who is very influenced by the most recent ideas and fashions”¹ This expression also describes the contemporary subculture formed typically by the urban youth, who would like to distance themselves from the mainstream both in fashion and their behaviour (trying to achieve this goal by combining vintage fashion with the latest trends).

In the world of antitrust law, “hipsters” are those, who criticize the currently prevailing (mainstream) approach in the enforcement of competition law, particularly in the United States, i.e., the consumer welfare paradigm related to the Chicago School of economics. These antitrust hipsters suggest that American law enforcement return to the practices of the time before the Chicago School.²

Antitrust hipsters claim that antitrust enforcement should not concentrate only on the effects on consumer welfare when it comes to pricing, but it should also consider those other aspects which were considered by the state men creating the first antitrust law, the so-called Sherman Act: mainly macroeconomic goals, such as eliminating the huge differences in wage levels, decreasing the level of unemployment, and raising the salaries.

¹ <https://dictionary.cambridge.org/dictionary/english/hipster>.

² The Chicago School expression refers to the American neoclassical economics doctrine represented by Richard Posner and Robert Bork. According to the Chicago School, the purpose of the enforcement of antitrust law, and thereby the maintenance of economic efficiency, is securing consumer welfare, i.e., the protection of competition instead of competitors.

According to the followers of the hipster antitrust movement, these goals could be achieved if the law enforcement concentrated again on the maintenance and creation of the competitive market structures, even by using new regulatory tools. To put it simply, the more competing companies in a market, the better.

For this very reason, this approach is also called the “new anti-monopolist movement” or, even more frequently, the “new Brandeis movement” (as also the followers of the movement often refer to themselves) after Louis Dembitz Brandeis, one of the judges of the Supreme Court, who fought amongst all against the creation of trusts and monopolies. Brandeis was convinced that monopolies become inefficient and less innovative, they might abuse their power against their employees, and they might gain political power and, as a result, even threaten democracy by the means of their economic concentration (*Brandeis* [1912]).

The term “hipster” started to spread in a pejorative meaning instead of referring to the honorable name of judge Brandeis. The expression was used for the first time on Twitter by Konstantin Medvedovsky, a New York lawyer specialized in antitrust cases. Later, others also started using it, and it became widespread, thanks mainly to Senator Orrin Hatch³ who, in 2017, despite having spoken up against high-tech monopolies at the end of the 1990s, called the new antimonopoly-movement a paranoid theory against huge corporations.⁴ Meanwhile, the term “*hipster antitrust*” became widely used in conferences as well as in scientific and press articles. Therefore, in my paper, I am going to call the movement “hipster antitrust” but without any pejorative sense.

THE BACKGROUND OF THE FORMATION OF THE HIPSTER ANTITRUST MOVEMENT

Nowadays, we tend to associate the new challenges of antitrust law enforcement to the market power of leading high-tech corporations of the digital market, such as Amazon, Google, Facebook or Apple, but the professional and political debate started from a more general level in the United States, dealing not only with digital markets. Several approaches emerged, identifying different problems and partly suggesting different solutions. In this paper, I am focusing on digital markets and presenting mainly the hipster antitrust approach but, where it is deemed necessary, I am also referring to other views represented by other movements. These movements also raise objections to the use of the consumer welfare paradigm or the

³ Orrin Grant Hatch was a Republican senator (he announced that he would not run again in 2018 and he retired in 2019). He represented the Utah State and he was one of the most important supporters of Donald Trump, and participated in the implementation of Trump’s tax reform in 2017 (<https://www.britannica.com/biography/Orrin-Hatch>).

⁴ <https://theintercept.com/2017/08/07/orrin-hatch-the-original-antitrust-hipster-turns-on-his-own-kind>.

prevailing theory in the enforcement of antitrust law, but they are not considered as part of the hipster antitrust movement.

U.S. politicians started to focus on the renewal of antitrust law enforcement again after several studies had been published presenting the growth of concentration and the strengthening of market power in a number of industries, and concluding that the inequality of incomes had been growing in the United States.⁵ Even though these studies do not blame or do not exclusively blame the enforcement of antitrust law for the negative trends described (as they do not even deal with ‘relevant markets’ in terms of competition law), other authors tend to refer to these researches in their publications when criticizing antitrust law enforcement. Besides, other articles were also published that identified the growth of concentration on markets defined in accordance with competition law criteria, and directly related the lessening of competition to the “weakening” of antitrust law enforcement (*Abdela–Steinbaum* [2018]).

The Democratic Party has made part of its program the enhancing of competition and the reduction of the concentration of corporations, and has been promoting the strengthening of antitrust law, urging the return to its original goals.⁶ The Party established the Antitrust Caucus with the aim of fighting against trusts both by the means of legislation and enforcement, returning to the “big is bad” philosophy and the credo of judge Brandeis, assuming that the concentration of economic power might lead to the concentration of political power and, therefore, threatens democracy in the long term.⁷ The Democratic Party’s twitter site proves that this politics is well supported.⁸

One of the Democratic Party programs, named Better Deal, also includes fighting against monopoly and the abuse of political and economic power. The components of the antitrust program of Better Deal are the strengthening of the scrutiny of mergers, the examination of post-merger effects with the implementation of correctional measures if needed, and the creation of a competition law “ombudsman”.

Concerning the scrutiny of mergers, according to the Democratic Party, investigations should be re-focused to long-term effects instead of the current practice of focusing on only short-term effects. Namely, it should be taken into account whether mergers result in lower incomes or poorer quality, restraining access to certain services, hindering innovation, reducing the competitiveness of small enterprises etc. This approach specifically refers to the role of the examination of consumer

⁵ According to the critics of the hipster antitrust movement, the writings of *Furman–Orszag* [2015] and *de Loecker et al.* [2018] are the ones most frequently cited in order to prove this. See: *Wright et al.* [2018].

⁶ See *Rolnik* [2016] on the blog of Pro Market.

⁷ The relationship between economic and political power and the doctrine that a democracy cannot function without a free and competitive economy have always been important in the United States. This thinking also appeared early in Europe, at first in Germany in Freiburg, based on the theses of ordo-liberal economic politics (see *Tóth* [2015] pp. 24–26).

⁸ <https://twitter.com/antitrustcaucus>.

data both from the perspective of the lessening of competition and the protection of data privacy. Those mergers that exceed a certain company size should be presumed illegal and the merging companies would have the burden of proof of the advantages of the merger.

The monitoring of post-merger effects should be introduced because, even if the merger had been presumed to have positive effects at the time of the transaction, the changing economic and market circumstances might result in a situation where the effects favorable for competition no longer occur, therefore competition decreases. In such a case, the enforcement agencies should react with corrective measures if they find evidence for the abuse of market power.⁹

Finally, the Democratic Party suggests the creation of the position of a consumer competition advocate (a kind of competition ombudsman). The duties of the competition “ombudsman” would be the continuous monitoring of the markets, conducting market surveys, and collecting the complaints of the consumers based on which the ombudsman would make suggestions to the U.S. antitrust authorities, i.e. the Federal Trade Commission (FTC) and the Department of Justice (DoJ), to launch investigations. The recommendations of the ombudsman should be published and the enforcement agencies would have to justify why they refrain from opening an investigation despite of the recommendation of the ombudsman. Besides, the ombudsman would frequently publish the data gathered on market concentration and the abuse of market power.¹⁰

Even though it would be interesting to elaborate further on this broader context, I will rather examine the questions more closely connected to the current mainstream enforcement of competition law. I will only cover to the extent necessary to my topic those concepts that would put antitrust law enforcement to the service of other sociopolitical goals going beyond the classical competition policy goals.

Firstly, in order to make apparent how the debate about the hipster antitrust movement evolved, I will briefly describe some of the features of the U.S. competition law enforcement. Secondly, I will present Lina Khan’s¹¹ paper, *Amazon’s*

⁹ In the original: “*abusive monopolistic conditions*.” Unfortunately, the meaning of this expression stays unexplained in the program. Therefore, it is not clear what kind of abuses should trigger enforcement, or if action should already be taken when the existence of market power is proven, or only if a monopoly is created.

¹⁰ The authentic political nature of the Better Deal program is characterised by the suggestion that the reports of the competition law ombudsman would include demographical analyses that would describe the “*impact of market concentration on communities of colour*” (*Better Deal* [n. d.]).

¹¹ Lina Khan graduated at the Williams College in political theories, and she got her law degree at the University of Yale in 2017. She deals with the research of competition policy and law. She was engaged, among others, with the Open Market Institute. At the time of the original publication of this paper, she worked as a legal fellow for Rohit Chopra, one of the commissioners of the U.S. competition watchdog, FTC. Currently she is an associate professor of law at Columbia Law School, where she teaches and writes on antitrust law, infrastructure industries law, and the antimonopoly tradition.

Antitrust Paradox (Khan [2017]),¹² which is considered revolutionary by many, and which indeed brings up important questions regarding law enforcement. Then, I will briefly present the solutions for the renewal of antitrust law enforcement suggested by the followers of the hipster antitrust and other movements. Finally, I will present the main criticism that questioned the findings and conclusions of the hipster antitrust movement, and also raised doubts about the suggestions of other new trends. My goal is to summarize the current situation of the debate.¹³

SOME FEATURES OF U.S. COMPETITION LAW

The competition law of the United States has a long history, being a hundred years ahead of many European countries in the enforcement of antitrust law. It is also important to emphasize that precedents are a source of law in the Anglo-Saxon common law system, the content of law is matured during its enforcement, and the changing social and economic circumstances are tackled, instead of new legislation, by the adaptation of law enforcement.

When the legislative body of the United States, the Congress, passed the Sherman Antitrust Act in 1890, its main goal was to step up against trusts and avoid the creation of further ones. The law declared illegal the “*restraint of trade or commerce*” or, as simply called, cartels, and “*to monopolize any part of trade or commerce*”. Then the Clayton Antitrust Act in 1914, and later the Robinson-Patman Antitrust Act,¹⁴ modifying the former in 1936, declared illegal price discrimination, exclusive agreements and tying practices if they resulted in the reduction, restraint or prevention of competition, or the development of monopoly. The Clayton Act introduced merger control in a similar spirit, prohibiting mergers that might lead to the significant lessening of competition or the creation of monopoly.

It is obvious that these laws basically focus on free trade and the protection of competition as a process and the maintenance of markets with many or at least several players. They were created in order to protect small market players possessing very little market power. Indeed, these laws do not mention consumer welfare or efficiency, but they try to prevent that any market player together with others or, if possessing sufficient market power, unilaterally conduct a behaviour or market practice that might result in the exclusion of other players, hindering the entry of new competitors, or reducing the freedom of competition.

Accordingly, U.S. courts enforcing antitrust law did not apply a standard economic approach during the first half of the 20th century. Instead, they tried to apply

¹² The paper was published in the Yale Law Journal in 2017 and it has significantly influenced the scientific debate on the competition law dilemmas raised by digital platforms.

¹³ This paper was originally published in March 2019.

¹⁴ The text of the U.S. antitrust laws can be found at DoJ’s website (DoJ [2017]).

antitrust laws in the framework of general legal principles, such as contractual freedom, in view of the different micro- and macroeconomic goals which were followed while creating the antitrust laws.¹⁵ As a consequence, they intended to maintain free trade and thereby protect competitors, in many cases condemning behavior that might have had only very little influence on the market.¹⁶

The economics of antitrust regulation started its real development from the 1950's and 1960's, first thanks to the work of the Harvard School,¹⁷ focusing on preserving competitive market structures, then that of the Chicago School. The views of the latter, focusing on consumer welfare and efficiency, became widely accepted by the 1980's, and American courts also started to follow this approach more and more, leaving behind the approach that concentrated on market structure and the number of participants and thus often led to simplification. As a result, the economic background of U.S. antitrust law enforcement became more solid and the law enforcement itself became more predictable. The currently prevailing economic approach brought along a distancing from the "original" goals which had been formulated in the Congress during the creation of antitrust laws, for example the protection of small enterprises and employees, or the elimination of the inequality of incomes.

It may seem that the hipster antitrust movement rightly claims that the original legislative intention was not limited to the efficiency-based maximization of consumer welfare. It is indeed hard to imagine, or may even be excluded, that the 19th century legislators would have, in an intuitive way, applied economic theories appearing sixty years later.¹⁸ It is more probable that they regarded free competition as a process or even a self-regulating process as being the guarantee for the proper functioning of the capitalist economy. Besides, as politicians, they naturally kept their eyes on the actual interests of their voters (for example, the protection of small enterprises against trusts).

It is the strength of U.S. legislation and law enforcement that the laws are still applicable today although they were made more than 100 years ago under completely different economic and social circumstances. This is because courts are capable of adapting the law to social changes or, in case of antitrust laws, to evolving economic theories in a way which maintains the essential purpose of the law while responding to the actual social and economic challenges.

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¹⁵ It is beyond the scope of this paper to describe the U.S. antitrust law enforcement in the 20th century and the changes in the concept of competition, and especially in the interest to be protected by competition law. In this respect, this paper refers to the essay of *Giocoli* [2018].

¹⁶ This case law is summarized by, for example, Csongor István Nagy's English language book (*Nagy* [2013]).

¹⁷ The economic school related to the Harvard University claims that competition law's mission is to prevent market concentration even if concentration led to a reduction in costs and prices. They claim that competition works properly if there are many, possibly small market players in the market, while market concentration motivates companies for anti-competitive cooperation or other practises restricting competition. The Harvard School invented the structure-conduct-performance model to describe this kind of operation of markets (see below).

¹⁸ See below Tim Wu's opinion (*Wu* [2018] pp. 6–7.).

It is a feature of the common law systems that there is no need for the continuous amendment of the laws which are often formulated on a general level, written law offering only a framework for the judicial law enforcement. As a result, any goals originally pursued by the legislator will not be relevant for law enforcement if the social or economic development explodes those original goals. Nevertheless, the U.S. courts may deliver judgements that do not handle appropriately a given anti-competitive situation, but it does not mean that it would be necessary to return to the former, i.e. the original, legislative goals.

It is also characteristic for the U.S. legal system that an antitrust case will only be ruled by the court if an interested party or, in the public interest, the FTC or the DoJ bring a suit against a company. In light of this, the question may well arise whether the authorities has become too lenient and see no reason for bringing more actions, or they are not able to solve certain problems under the current legal framework and do not trust that they could be successful before the courts under the prevailing consumer welfare paradigm.

THE MAIN CRITICAL FINDINGS OF THE HIPSTER ANTITRUST MOVEMENT: LINA KHAN'S ESSAY

Maybe it is not an overstatement that the debates on the reformation of antitrust law enforcement switched towards competition law challenges generated by high-tech industries and online platforms after Lina M. Khan's essay, *Amazon's Antitrust Paradox* was published in 2017 (see *Khan* [2017]). This paper concludes, after analysing Amazon's business policy and market conduct, that certain firms, in particular those giants which operate in the digital market, are gaining ever more market power with the aim of or by means restricting competition. According to Khan, it is possible because today's consumer welfare focused competition law enforcement is unable to handle this phenomenon. The paper suggests that it is necessary to break away radically from the approach of the Chicago School¹⁹ and return to the achievement of the original, more complex goals of antitrust law. Besides critical observations, the paper also suggests regulatory solutions.²⁰

In the next sections, I will present the hipster antitrust approach based on Lina Khan's essay because the criticism Lina Khan conceived mostly covers the main tendencies of the hipster antitrust movement.

¹⁹ The title of the essay is already an allusion. It refers to a book of great influence, *The Antitrust Paradox*, written by one of the main representatives of the Chicago School, Robert H. Bork, and published in 1978. In his book, Bork criticised the contemporary antitrust law enforcement and set the ground for the view that the original aim of antitrust law, by the means of the protection of competition, is the protection of consumer welfare and not that of competitors (*Bork* [1978]).

²⁰ In another paper published in 2018, Lina Khan summarized her views on the market power of high-tech companies, this time including not only Amazon but also Google, Facebook and Apple, and she further refined her recommendations (*Khan* [2018a]).

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Enforcement with a Focus on Consumer Welfare*

Even though Amazon operated with a loss of profit for years, nowadays it obviously dominates the online retail market with a nearly 50% market share in the United States, allegedly due to its loss-making pricing policy. Meanwhile, the company has also become vertically integrated with the help of acquisitions and by expanding its own activity, and thereby it was able to extend its alleged market power to markets adjacent to the retail markets. According to the hipster antitrust approach, this growth and market position is harmful in itself, and it would be necessary to prevent such market power by the means of the competition law.

In Lina Khan's view, the current U.S. law enforcement is unable to 'stop' Amazon because the authorities and the courts, following the Chicago School approach, concentrate solely on the effects on consumer welfare, and their analyses are highly price-focused. Price theory and the analysis of effects on prices have become dominant, instead of examining the question whether competition will be reduced due to the change of the market structure (both in case of mergers and anticompetitive conducts), or whether the market structure itself can lead to anti-competitive behaviour. Price-focused analysis results in dealing with market entry barriers inadequately. This tendency definitely prevails in non-merger cases.²¹

The proponents of the hipster antitrust approach strongly criticise the ruling theories regarding predatory pricing and vertical integration (*Khan* [2017] pp. 722–736). According to the Chicago School, this kind of conduct nearly never results in the loss of consumer welfare.

Although predatory pricing was considered illegal until the middle of the 20th century in the United States, it changed by the 1990's when the so-called recovery test was worked out, due to the spread of the economic approach, which increased the standard of proof for the plaintiffs bringing an action based on competition law. According to the test, predatory pricing could only have anticompetitive – foreclosing – effects if the firm using the predatory pricing policy can continue pricing below price long enough²² to make its competitors leave the market, after which it is able to regain the losses by raising the prices, i.e., the financial sacrifice, its short-term profit loss can be recovered.

²¹ Lina Khan admits that merger scrutiny is not strictly limited to the examination of price effects but also takes into account entry barriers and the effects on innovation (*Khan* [2017] pp. 721–722).

²² According to the case law, based on the prevailing economic theory, pricing below the average variable cost should be considered as illegal, while in case of the price level being between the average variable cost and the average total cost the company has the burden to prove that its pricing does not aim at foreclosing competitors. It is noteworthy that in Europe predatory pricing is prohibited only if applied by undertakings holding a dominant position. As opposed to this, in the U.S., the emphasis is put on foreclosure, i.e. the lessening of competition, and a given conduct may be declared illegal even in the absence of market dominance.

Naturally, this summary is a simplification; the economics of predatory pricing is much more complex (see, for example, *Motta* [2004] pp. 412–441), but the main point is that the current legal practice is unacceptable for the supporters of the hipster antitrust approach. They specifically debate that, for finding a conduct illegal, it must be proven that the company will be able to raise prices immediately after the short-term loss of profit. They emphasize that the aim of predatory pricing is not only to make way for a future price raise, but also to threaten potential new entrants, especially if the company (e.g. Amazon) is able to compensate its profit loss in other markets (for example, the profit loss generated by the low retail price of books may be recovered from publishers). It is worth noting that the critical observations of the followers of the hipster antitrust movement is not without merit; in the meantime, the theory of economics also exploded the original thinking of the Chicago School, and even law enforcement tried to react to the strategies of predatory pricing in different markets (see, for example, *Valentiny* [2004] pp. 28–33).

The hipster antitrust movement criticizes the theory and case law regarding vertical integration and vertical mergers even more strongly. Vertical integration was also considered anti-competitive until the middle of the last century, but this approach has changed after the doctrines of the Chicago School had been accepted. According to the Chicago School, vertically integrated firms offering supplementary products have no interest in rising the price of one product because this would decrease the demand for the supplementary product. Therefore, it is more likely that the aim of vertical integration is the exploitation of efficiencies rather than the extension of market power to a neighbouring market. After this approach became the norm and courts started to examine vertical mergers on this basis, remedies were mostly limited to behavioural obligations or sometimes divestiture, but vertical mergers have hardly ever been prohibited.

Contrary to the above, according to the hipster antitrust approach, it is harmful to the competitive process if a firm is able to enter another market for a product complementary to its own existing products and to distract customers from the players of this other market, while those customers directly compete with the integrated firm. In Amazon's case, retailers who compete with Amazon but use Amazon's platform for their retail activity also use Amazon for deliveries, and thereby Amazon distract customers from other delivery providers.

Based on the above-mentioned considerations and mainly observing the features of digital markets, the hipster antitrust movement demands a paradigm shift, claiming that the current theoretical framework is not able to tackle today's competition law concerns. For the antitrust hipsters, it is an important aspect that originally antitrust law, instead of concentrating solely on consumer welfare effects, followed more complex socio-political goals, which shall be achieved by free competition, open markets, and more competitors. This not only guarantees a fair price level, but quality, innovation, choice and variety as well as the maintenance of wage levels and the elimination of wage inequalities, and finally the maintenance of democracy.

The followers of the hipster antitrust movement are convinced that this approach is in line with the original legislative intention in case of all three of the Sherman Act, the Clayton Act, and the Robinson-Patman Act.

In this way of thinking, it is an important factor that antitrust enforcement is necessarily an *ex post* intervention, only occurring after harm had already been done, i.e., after the firm having market power had already distorted competition. The classical U.S. antitrust – that is antimonopoly – law enforcement tried to prevent the development of market power. This approach was left behind due to the influence of the Chicago School, which was more afraid of the harmful impacts of too much intervention, the so-called *false positive*, potentially hindering efficiency, than from the so-called *false negative*, i.e., that an anticompetitive conduct could prevail in the absence of intervention.²³

According to the hipster antitrust movement, it would be necessary to return to the original goals, and focus on the competitive process as such, instead of limiting the analyses to prices and consumer welfare effects. Hence, it would be necessary to maintain a healthy competitive structure in all markets where possible, that is, to maintain the market presence of smaller players and the continuous entry of new players because they prevent concentration. This market structure also guarantees a fairer distribution of goods.

The hipster antitrust movement does not necessarily advocate the return to the structure-conduct-performance model worked out by the Harvard School,²⁴ but antitrust hipsters emphasize the determining role of the market structure. They suggest that, in practice, several factors should be examined instead of the mono-focused, i.e., price-focused analysis in order to determine whether the market operates competitively, and whether it is sufficiently open.²⁵ These factors are entry barriers, the potential conflicts of interests,²⁶ the creation of bottlenecks, the disposal over big

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²³ A false-positive situation is one in which we act under an assumption that later turns out to be wrong. In competition law enforcement, this means unnecessary intervention and, in many cases, the prevention of actual competitive behaviour. The current general approach is to avoid this situation, that is, better not to intervene in case of uncertainty. In contrast, in the false-negative situation, the original assumption is correct, yet we do not act accordingly, i.e., in the application of competition law, anti-competitive conduct is not prevented by the enforcement agencies.

²⁴ The structure-conduct-performance model was developed in the 1950s and 1960s in the United States. According to the model, the market structure determines the conduct of the market actors (for example, the firms present in a competing market make pricing decisions in a different way than those acting in a concentrated oligopolistic market, while a monopoly's pricing is likely different from both). Finally, the chosen conduct affects the performance of both the market actors and the economy.

²⁵ I note here that European competition law enforcement is still closer to the Harvard School than to the Chicago School. Among others, the Hungarian Competition Authority also applies a refined approach of the Harvard School (see *GVH* [2007]).

²⁶ Conflicts of interest are to be understood here in the context of vertically integrated companies. Namely, for a vertically integrated company, it may be more profitable to favour its own downstream business or company, and to place its own products in a more favourable position, than to implement competitive neutrality towards its downstream competitors.

data, and the dynamics of bargaining positions. This kind of analysis is considered extremely important in the case of online platforms where, according to their view, analysing only price effects could be misleading, especially considering the role of disposal over and the utilization of data.²⁷

Lina Khan demonstrates through Amazon's example that, in her opinion, the currently prevailing antitrust law enforcement is unable or not properly able to react to certain anticompetitive practices or business policies, due to the features of the digital platforms.

Amazon's Example

Lina Khan assumes that Amazon became the dominant retail platform due taking huge profit losses, that is, by sacrificing its short-term profit it started to expand, and strengthened its position in several retail markets by expanding its business portfolio, hence becoming multiply vertically integrated (*Khan* [2017] pp. 746–747).

This kind of growth and the leading role resulting from it had been part of Amazon's business philosophy and strategy from the beginning.²⁸ In order to reach this goal, besides the aggressive expansion, Amazon also seeks to capture its consumers. Besides pricing under the market price or even below cost, one of these business policy elements was the introduction of Amazon Prime, which provides enhanced delivery and other services for its subscribers in return for an attractive annual fee so low that it generates a loss for Amazon. The level of the service fee is favourable for those subscribers who order from Amazon several times a year. This strategy is supported by the human habit of using a well known platform or the desire to minimise search costs, and it results in customers using the same platforms as a routine rather than changing to another one.²⁹ As a result of all this, Amazon Prime ties a significant number of consumers to the dominant platform.

Khan considers it an important element of the predatory pricing strategy that Amazon aspires to gain market power even through losses. This is particularly true on those market segments where e-products compete with physical ones, for example as on the book market. Amazon positioned itself rapidly into a dominant position in the e-book market, partly due to its heavy discount policy regarding best-sellers and newly published books in e-format, and partly by marketing the Kindle e-book reader. Purchasing a Kindle has been encouraging the consumers to buy the e-books also from Amazon. Besides, this way Amazon can collect a huge amount of

²⁷ It is not only the data of Amazon's consumers or the data of purchases from Amazon, but also consumer data from other merchants and purchases of products that Amazon necessarily obtains as a marketplace.

²⁸ In support of this, Khan cites the first letter addressed to Amazon's shareholders by Jeffrey P. Bezos, the founder of Amazon, in which Bezos talks about the goal sustainable market leadership on the long-term.

²⁹ Khan also cites relevant researches (*Khan* [2017] p. 753.)

data regarding consumer habits and preferences, due to which it can make tailored offers to its consumers. Although the DoJ investigated Amazon's pricing in the case of *United States versus Apple, Inc.*, it ruled that Amazon's e-book distribution is overall not loss-making, because even though Amazon sells bestsellers in e-format with loss-generating discounts (i.e., below the average market price level), the e-book business as a whole still generates profit. Therefore, the DoJ did not consider Amazon's e-book pricing as predatory by object.

As predatory pricing was ruled out in this case, it has not been analysed whether the losses could be recuperated, i.e., whether Amazon, at a later stage, would have been capable of rising its prices in the e-book market or neighbouring markets. Khan suggests that another serious concern is that Amazon's pricing is not transparent, and Amazon can attempt to apply first degree price discrimination,³⁰ hence consumers will hardly be able to detect price increases in other market segments (*Khan* [2017] pp. 763–764). Khan believes that, independent of this, Amazon may be capable of regaining its profit loss either with the help of the pricing of the other, less popular and not newly published e-books, or by cross-financing its loss from other markets, like from the market of traditional books. Thirdly, Amazon is even able to cross-finance the losses from the fees paid by the publishers (especially since Amazon's entry into the publishing market increased its bargaining power).

Khan claims that the above-described developments must have led to intervention before the dominance of the Chicago School. She thinks that intervention would even be justified based on the analysis of the consumer welfare loss because Amazon's business policy in the e-book market leads to the reduction of choice in e-books. The reduction of choice is caused partly by the increasing concentration of the publishing market as a response to the increasing market power of online platforms (in particular, as a response to Amazon's market power stemming from being dominant both in the e-book and traditional book markets, which makes Amazon an indispensable market actor for publishers).

According to Khan, Amazon has a well-construed business policy consisting of multiple elements in order to establish and sustain its market power on the long term. The main elements resulting together in the restriction of competition are predatory pricing, cross-financing losses caused by predatory pricing from other markets, price discrimination enabled by the use of the huge amount of consumer data, and prioritizing Amazon's own products. Naturally, all this would be impossible without vertical integration.

Khan emphasizes that Amazon tries to enter more and more neighbouring markets (that is exactly how the ominous trusts were created in the second part of the 19th century). By today, Amazon as an online marketplace has practically become an

³⁰ First-degree or perfect price discrimination occurs when a company is able to charge each consumer the price that the particular consumer is still willing to pay, i.e. the reservation price for each consumer.

infrastructure which provides the most important platform for the market presence of its retail rivals. Besides, Amazon has established its own delivery and logistics business, provides financial services, offers loans, operates as an auction house, publishes books, produces TV shows and films, etc.³¹ One of the important elements of this business policy was that Amazon simply acquired those smaller firms that could have entered the vertically related markets as mavericks and could have posed a real challenge. The enforcement agencies were unable to hinder these acquisitions as they either not even fell under the merger notification requirements (because the targeted firms were under the critical size), or a significant lessening of competition could not be demonstrated in the relevant markets (at least on the basis of the currently prevailing law enforcement considerations and theories) (*Khan* [2017] pp. 754 and 768–774).

These acquisitions were at times rather aggressive. Khan recalls how Amazon tried to acquire Quidsi, one of the fastest increasing online retailers selling baby products. When turned out that its owners did not intend to sell Quidsi, Amazon started to sell its own baby products at such a low price that left no other choice for Quidsi's owners than to sell the firm to Amazon. This merger was scrutinized by the FTC both under the merger provisions of the *Clayton Act* and the unfair competition rules of the *FTC Act*,³² and it found that it is not necessary to hinder the merger. In contrast, Khan views this merger case as a good example showing that the Chicago School approach is no longer capable of handling the anti-competitive conducts of online platforms. She claims that Robert Bork's theory failed which held that the firms pricing below cost were not able to acquire their competitors following the price war because this would, by definition, create a monopoly which would be prohibited by the enforcement agencies. If no entry barriers exist on the market, this strategy fails due to this because there would be potential new entrant continuously threatening the newly born monopoly (*Khan* [2017] p. 771).

Khan suggests that this theory fails in the world of online retailing because it cannot take into account the features of electronic commerce. One of these features is that the entry to the market of baby products seems to be easy, but online retailing only works successfully if it can connect many and more sellers with many and more

³¹ The amazon.com website currently [*at the time of writing the original paper*] lists 35 different services/websites that Amazon offers partly to consumers, partly to other merchants, service providers, that is, to its competitors: 6pm, Abe Books, ACX, Alexa, Amazon Advertising, Amazon Business, Amazon Drive, Amazon Inspire, Amazon Music, Amazon Rapids, Amazon Second Chance, Amazon Web Services, AmazonGlobal, Audible, Book Depository, Box Office Mojo, ComiXology, CreateSpace, DPReview, East Dane, Fabric, Goodreads, Home Services, IDBbPro, IMDb, Jungle.com, Kindle Direct Publishing, PillPack, Prime Video Direct, Shopbop, Souq.com, Subscribe with Amazon, Withaoutabox, Woot!, Zappos.

³² The law which was accepted in 1914, in addition to establishing the U.S. Competition Authority, the Federal Trade Commission, contains substantive provisions that allow intervention against unfair and deceptive commercial practices: ("*to prevent [...] unfair methods of competition [...] and unfair or deceptive acts or practices in or affecting commerce*"). <https://uscode.house.gov/view.xhtml?req=granuleid%3AUASC-prelim-title15-chapter2-subchapter1&edition=prelim>.

customers. This is where it is quite hard to compete with Amazon because it would require a huge investment to build a similarly strong brand. In the online world, the search costs are high for consumers but Amazon, to tackle this, can exploit the network effects to its advantage.

Khan analyses another interesting example about the expansion of Amazon to the delivery and logistics markets. In Khan's view, Amazon achieved to receive significant discounts due to its market power and bargaining power towards delivery and logistics firms. These delivery firms could only compensate the discounts offered to Amazon by setting higher fees for Amazon's competitors, namely the smaller independent retailers. Altogether, Amazon's costs have decreased while the costs of its competitors have increased and, obviously, those competitors must apply higher prices towards consumers. In addition to that, Amazon has launched a delivery and logistics service offered to other retailers at a price lower than those applied by the independent delivery firms. Finally, Amazon started to construct its own logistics business.³³ According to Khan, this type of expansion enables Amazon, on the one hand, to apply tying or bundling practices, i.e., to provide more favourable conditions to those retailers who also use Amazon's delivery service, and on the other hand, to apply practices driven by its presence in vertically related markets, such as the prioritizing its own products (e.g. provide a faster delivery service than the one offered to its competitors).

Finally, Amazon, as the indispensable marketplace infrastructure for online retailers, can use the data related to the sale of its competitors' products for strengthening its own market position. Similarly, it can exploit information unavoidably received from the firms having a business relationship with Amazon. One way of exploiting those data, by analysing consumer habits and preferences, is to make tailored offers and even customized prices or, seeing the success of another retailer's product, to roll out with a similar product (*Khan* [2017] pp. 780–782). That is why Khan much welcomed that the European Commission scrutinized the Facebook/WhatsApp merger in 2014 from the perspective of the exploitation of big data.³⁴ Another way of the exploitation of data appears on a higher level: Amazon makes investment decisions based on the information obtained from the start-up firms using its cloud services (*Khan* [2017] p. 783).

³³ See the news about that: <https://www.wsj.com/articles/amazon-to-launch-delivery-service-that-would-vie-with-fedex-ups-1518175920>; <https://www.ttnews.com/articles/amazon-logistics-seen-way-owning-delivery-business>; <https://www.ttnews.com/articles/rise-amazon-logistics>.

³⁴ The European Commission investigated the question of data concentration from two aspects. Firstly, if Facebook were able to match its own user profiles with the profiles of WhatsApp in order to exploit network effects. Secondly, from the perspective of the online advertising market, whether Facebook become able to acquire competitive advantage in the advertising market by collecting data from WhatsApp users following the merger. (Case No COMP/M.7217 – Facebook/WhatsApp) An interest aspect of this case is that the European Commission fined Facebook in 2017 because, according to the Commission, Facebook provided misleading information to the Commission about matching the user profiles. (Case 8228 – Facebook/WhatsApp)

In Khan's opinion, the above mentioned business policy of Amazon serves the purpose of generating strong network effects through which Amazon becomes indispensable as an online platform.³⁵ This effect is supported by the disposal over big data. It is particularly true for the online marketplaces because they operate as two sided markets. The more sellers it has, a marketplace is more attractive for the consumers, and the more customers it has, it is more attractive for the sellers. A marketplace, if disposing over nearly an unlimited amount of data, can make tailored offers to both the consumer side and the seller side, and can possibly capture both sides. When Amazon is launching products, based on the data collected from the of products, which other retailers introduced on Amazon's marketplace and which proved to be successful, Amazon is freeriding on the original risk-taking of those retailers. Khan believes that Facebook abuses its access to data similarly, when it is monitoring traffic directed towards rival social networks or other applications, and if Facebook finds that the rival threatens its position, it either tries to acquire the rival or develops a similar app that starts to compete aggressively (*Khan [2018a]* pp. 330–331).

At this point, it is to be noted that, beside antitrust hipsters, others also have concerns about digital platforms that gain market power through the possession and use of data. Following some European and especially the EU interventions, it was also raised in the U.S. that action should be taken against “*data-opolies*”. For example, Maurice E. Stucke,³⁶ who is not considered to be the follower of the hipster antitrust movement, suggests that instead of the hypothetical monopolist test (*small, but significant, nontransitory increase in price, SSNIP*) a hypothetical data privacy reduction test (*small, but significant, nontransitory decrease in privacy protection, SSNDPP*) should be introduced. This test would ‘measure’ how digital platforms collect data on a large scale and not in line with purpose limitation, i.e. not limited to the legitimate purpose for which the data collection should be happening (*Stucke [2018]* pp. 287–288). Stucke agrees that the data could, at a later stage, be used for anti-competitive goals, for example by prioritizing the digital platform's own services, or by hindering the development of rival applications and innovations that would threaten the market position of the given digital platform (*Stucke [2018]* pp. 303–307).

According to Khan, predatory pricing is indeed a rational decision in order to conquer the whole market. Besides Amazon, Uber serves as another example for this, which became a dominant platform in its own market in a very similar way. As further evidence, Khan mentions the investors' unbroken interest in both Uber and

³⁵ Obviously, the issue of network effects is not novel, but it may not be an overstatement that this question is critical in the world of social media and electronic marketplaces. Here, the ‘winner takes it all’ scenarios happen very easily and, as a result, it becomes very difficult to reach similar network effects, which in turn results in serious market entry barriers.

³⁶ Maurice E. Stucke is a practicing lawyer, a professor of law at the University of Tennessee and a member of the advisory board of the American Antitrust Institute.

Amazon. No investor would be willing to suffer losses to the extent that allowed Amazon and Uber to gain market share unless investors trusted that these companies were, sooner or later, able to recoup those losses (*Khan* [2017] pp. 787–788). Khan concludes that antitrust agencies in the U.S. are unable to act against Amazon and “its companions” because, on the one hand, the currently prevailing post-Chicago School competition law enforcement is too constrained by the theory and practice of predatory pricing, i.e., the requirement to recover losses in the near future. On the other hand, the approach to vertical integration also poses a constraint, which manifest itself both in the leniency towards vertical mergers and towards market behaviour resulting from vertical integration. All this is supported, in our Internet-age, by the growing importance of data collection and the use of big data: digital giants are further strengthening their market power by controlling information. Khan suggests two possible solutions to these problems: either antitrust enforcement should be reformed and strengthened, or online platforms should be regulated.

SOLUTIONS PROPOSED FOR THE RENEWAL OF ANTITRUST LAW ENFORCEMENT

Representatives of the hipster antitrust approach and other movements advocating the renewal of American antitrust law are similar in terms of what issues and problems they raise, however, there are radical and less radical theories from the perspective of the solutions suggested.

One of Lina Khan’s proposal is to strengthen antitrust law enforcement in order to be able to more efficiently intervene in case of predatory pricing and anti-competitive vertical integration (*Khan* [2017] pp. 790–797).

According to her, predatory pricing should be presumed in case of dominant platforms if they are pricing below cost, i.e., the platforms should bear the burden of proof that pricing below cost was not aimed at foreclosing a competitor, or distorting competition. Dominance should also be presumed over a certain market share threshold (Khan suggests 40% as a minimum). Although Khan acknowledges that it may be difficult for courts to determine whether a price is below cost, she believes that this would have less significance. This is because it would be possible for the dominant firm to demonstrate that the below-cost pricing had no anti-competitive objective, but were justified by legitimate interests, such as the response to a competitor’s price reduction, the introductory pricing of a new product, or reflecting a reduction of costs.

According to Khan, more thorough merger scrutiny is needed in cases where a digital platform acquiring data in its own market can use the data for generating advantages in a neighbouring market. Her suggestion is that this aspect should not only be analysed in mergers that meet the mandatory notification thresholds, but new rules should be introduced to ensure that mergers that allow the exchange or

integration of data are subject to merger notification irrespective of the ordinary thresholds (especially if non-U.S. companies gained access to the data of U.S. citizens). Ultimately, it may even be considered to prohibit by law the mergers that lead to such vertical integration that would result in the vertically integrated firm having an interest in favouring its own downstream business. This statutory prohibition would affect those platforms that have already achieved a certain market share in the upstream market and are attempting to acquire a company with which they compete in the downstream market (*Khan* [2017] pp. 792–793).

According to Lina Khan's other proposal, dominant platforms should be regulated similarly to the regulation of natural monopolies (*Khan* [2017] pp. 797–802).

Regulation may be justified by the fact that, in the case of online platforms, the characteristics of the operation of these markets do not allow for a competitive market structure, just as in the case of certain public services or other infrastructure that is difficult to duplicate. If we accept this conclusion, instead of preventing the creation of a dominant position, which is presumably hard to maintain on the long term, we must switch our focus to preventing *ex ante* the abuse of market power by the dominant company or companies operating in a monopolistic or, in best case, oligopolistic market structure, as opposed to the *ex post* intervention of competition law enforcement. Khan proposes such regulatory classics³⁷ as the principle of equal treatment, price regulation, and investment or innovation obligations, though she holds the latter two less important. In addition, she would consider structural separation in case of Amazon's business lines that provide services to downstream markets (*Khan* [2017] p. 800). Similarly, in case of Google (or its owner Alphabet), she would separate the apps from the operating system (*Khan* [2018a] p. 332). This solution cannot be considered revolutionary, since a similar solution had been implemented in the case of Microsoft, both with respect to search engines³⁸ and media players.³⁹

As an alternative solution, Khan would also envisage an essential facilities type of regulation. According to her, dominant online platforms, in particular Amazon, meet the criteria required by U.S. precedent for mandatorily providing access to essential facilities, i.e., 1) the essential facility is controlled by a monopoly, 2) competitors are unable to duplicate the facility, 3) the monopoly refuses to give access to the facility, and 4) sharing of the facility is feasible in practice. She believes that

³⁷ In case of public services, such solutions have also been used in the United States, and sectoral regulation has been successfully applied in Europe in the telecommunications and energy industries.

³⁸ *United States versus Microsoft Corporation*, 253 F.3d 34 (D.C. Cir. 2001). In this case, according to the first instance decision, Microsoft should have separated the application, Internet Explorer, but finally a settlement was reached, and Microsoft facilitated access for users under the same terms to rival search engines through interoperability obligations by providing access to the so-called application programming interface. The European Commission's decision in the same subject matter contained similar obligations/commitments (COMP/C-3/39.530 – Microsoft case).

³⁹ COMP/C-3/37.792 – Microsoft case. The European Commission obliged Microsoft, among others, to sell its operating system without the pre-installed Media Player, and to facilitate interoperability with other applications.

there is only some uncertainty about the monopoly position but suggests that this requirement has become outworn in the age of the Internet. Today, it is not necessary for a platform to become a *de facto* monopoly but the non-discriminatory access to the platform can still become essential for competitors to be able to remain in the market (*Khan* [2017] p. 802). Khan suggests a regulation similar to the principle of net neutrality: she would oblige platforms to treat equally all commercial transactions going through the platform, thus preventing them from creating a competitive advantage for their own products and services (*Khan* [2018a] p. 332).

Finally, Khan added to her regulatory ideas that in case of companies whose business policy is specifically based on data collection and large-scale data use, such as Google or Facebook, it may be necessary to create data protection regulations similar to the European GDPR,⁴⁰ thus ensuring that the data collected for a certain purpose cannot be used for other purposes. Furthermore, Khan proposes the structural separation of vertically related activities, such as advertising (*Khan* [2018a] p. 333).

Professor Tim Wu, who presents a less radical view,⁴¹ merely suggests that the application of antitrust law should not focus solely on consumer welfare effects when examining a particular conduct, but return to the question: “Is this merely part of the competitive process, or is it meant to ‘suppress or even destroy competition?’” (quoted by Wu from the 1918 *Chicago Board of Trade v. United States* case) (*Wu* [2018] p. 2). Recognizing that this question forms the starting point of law enforcement even now, he suggests that the most necessary change of approach should be that action be taken against any conduct that threatens the competitive process, even if no harmful effect on consumer welfare can be demonstrated. He points out that consumer welfare is an abstract concept, not to be measured accurately, hence it is not a more appropriate basis for the analysis than market structure.

According to Professor Wu, the following simplified questions should be examined in case of a complaint against a conduct: 1) Who is complaining about the conduct: the incumbent or a new entrant, or possibly an aggressively competing maverick? 2) Who is exercising the allegedly harmful conduct: a dominant firm or even a monopoly, or a market actor gradually losing market share, or a completely new entrant? 3) What type of conduct is it: actions that are an integral part of the competitive process, such as offering lower prices, or the launch of better quality

⁴⁰ When elaborating on the big data issue, Lina Khan seems to suggest that U.S. law enforcement has not yet dealt with the problem. This is obviously not the case: a discussion has been going on for years about the role of big data, also including competition law implications (see, for example, *Sokol–Comerford* [2016], *Kennedy* [2017], *Wright–Dorsey* [2016]). In the Hungarian language, Pál Belényesi published an article about the role of big data, also discussing U.S. case law, not strictly limited to competition law cases (*Belényesi* [2016]).

⁴¹ Tim Wu is an American lawyer, Professor of the Columbian University, mainly known about his researches on net neutrality. He worked for the Federal Trade Commission. He writes for the New York Times opinion column. His website is at <http://www.timwu.org>. He is not considered as an antitrust hipster, however, he just as well criticised the consumer welfare paradigm of competition law enforcement.

products, or some potentially anti-competitive behaviour (such as tying, exclusivity clauses, etc.)? 4) Is there any indication of the distortion of the competitive process, for example, a foreclosure effect or other anti-competitive effects, or an increase of the cost of competitors? 5) Does the conduct have any other adverse effect outside the anti-competitive effect, in particular, on political values (Wu [2018] p. 9)?

It seems that professor Wu seeks to represent the middle ground between the radical approach of the hipster antitrust movement, its critics and the less radical economic approach, the so-called *post-Chicago School* economists.⁴²

The post-Chicago economic school claims that we should move away from the oversimplified economic analysis postulated by the Chicago School, and the more complex economic analyses must be carried out, even if taking the risk of over-intervention (*false positive*). Thus, the followers of the post-Chicago school – distancing themselves also from the hipster antitrust movement – suggest that neither is it necessary for competition law enforcement to return to previous paradigms, nor it is justified to consider aspects unrelated to competition, but it would indeed be necessary to strengthen law enforcement.⁴³

THE VIEWS OF THE CRITICS OF THE HIPSTER ANTITRUST MOVEMENT: THE DEFENDERS OF THE CONSUMER WELFARE PARADIGM

Nearly everyone agrees that digital markets work differently from traditional markets, although many dispute the overall increase in concentration (or, at least, it is disputed that it would be linked to a weakening of antitrust law enforcement). Neither is there serious debate on the issue that online platforms raise questions that competition authorities must tackle. The debate is about whether the challenges can be met within the currently prevailing consumer welfare paradigm, or whether there is a need to move away from it in some way or the other. Followers of the hipster antitrust movement are pushing for a shift. Its critics argue that not only it is impractical, there are clear dangers of abandoning the welfare paradigm, and returning to previous law enforcement practices, or moving toward regulation.

One of the important critical observation, in general, concerns the rule of law and legal certainty. It is emphasized that the efficiency based law enforcement, which analysed consumer welfare effects, led to a matured legal practice during

⁴² It is not only Wu who claims that U.S. law enforcement should use the achievements of both the Harvard and Chicago Schools, and this is not even a completely original idea. See, for example, Piraino [2007]. On the comparison of schools of economic theory, see Atkinson–Audretsch [2011].

⁴³ It seems that one of the important representatives of American competition law, the American Antitrust Institute (AAI; a non-profit organisation promoting the protection of competition and engaged in research, education and competition advocacy) also joined this approach which they deem to be progressive (Moss [2018]).

the last 40 years and has increased the predictability and legal certainty that benefit the actors of the economy (see below *Dorsey et al.* [2018], *Medvedovsky* [2018]). In the past, that is, before the 1980s, when U.S. antitrust enforcement also focused on various socio-political goals beyond competition, the different court rulings often contradicted each other (see *id.*).

These critical voices also note that the debate about the goals of antitrust is not novel. They point out that this debate has been ongoing while law enforcement has been constantly developing and is far more complex than the hipster antitrust movement would like to picture it, it had not at all been “stuck” with the doctrines of the Chicago School (*Hovenkamp* [2018], *Yoo* [2018]).

Another important concern is that a shift from the now matured and predictable framework in a direction that also seeks to advance socio-political goals, leaves more room for lobbying, so it is not at all clear whether it would serve the wider public good, or, on the contrary, it would benefit big companies that could lobby more successfully. Hence, instead of consumer welfare, law enforcement would increase corporate welfare (*Dorsey et al.* [2018] pp. 10–13).

These criticisms are worth considering but, in this paper, I will deal with the criticism that addressed the specific conclusions and recommendations of the hipster antitrust movement. One of the most comprehensive critical analyses was published by Herbert J. Hovenkamp,⁴⁴ and another by co-authors Joshua D. Wright, Elyse Dorsey, Jonathan Klick and Jan M. Rybnicek (*Wright et al.* [2018]). In the following sections, I am mainly presenting the thoughts of these essays.

Whether the hypotheses of antitrust hipsters are well-grounded

According to its critics, the hipster antitrust movement and those who call for a renewal of U.S. antitrust law enforcement in general start from false hypotheses and they cannot substantiate their allegations that are based, in part, on opinions and speculation. According to Hovenkamp’s somewhat sarcastic note: “So far the neo-Brandeis movement has been characterized by a great deal of ad hoc complaint of the nature that firms such as Amazon and Google are too big.” (*Hovenkamp* [2018] p. 27).

According to *Wright et al.* [2018] (pp. 19–46), it is not proven that concentration has generally increased in all markets in the U.S. economy. Neither is it proven that increasing market power has led to rising prices and decreasing output. Thirdly, the allegation is unfounded that U.S. authorities have been idle in intervening against mergers that are detrimental to consumer welfare and, fourth, it is unfounded that

⁴⁴ Herbert J. Hovenkamp is a professor of the Law School at the University of Pennsylvania, one of the greatest American authority on competition law. Both the Supreme Court of the United States and lower courts quote his writings regularly.

inadequate enforcement of antitrust law leads to income inequalities (the latter issue is not addressed in this paper).

According to *Wright et al.* [2018], the studies cited in general, according to which concentration has increased in many or all of the sectors observed, should not provide a basis for conclusions regarding antitrust enforcement. One reason for this is that the research on concentration focuses on entire industries, and not on relevant markets as defined in competition law (pp. 21–23). Another reason is that the researchers dealing with concentration acknowledge themselves that the increase in concentration may not only be a result of the lessening of competition, concentration may increase in the face of intensifying competition,⁴⁵ or it could happen because of other reasons, completely independent from competition (p. 23).

According to a further critical observation, it is not supported by research or empirical facts that the increase of market power has led to an increase in prices and a decrease in output. Although research suggests that company-level margins have increased, this may also be caused by the change in the structure of the economy, i.e., the shift towards innovative sectors, services, and intellectual property-based industries. In case of activities based on research and development, the initial investment is necessarily high and higher prices may be set in order to recoup this investment (*Wright et al.* [2018] p. 25). In other cases, the increase in margins could be caused by a bigger decrease in cost due to certain efficiencies if, at the same time, prices remain at the same level or only increase slightly.

According to Wright and his co-authors, neither is it supported by sufficient evidence that the authorities had been too lenient when enforcing merger law. Although comprehensive research has been conducted to assess the price effects of mergers and the effectiveness of merger law enforcement, including the measures taken, it cannot reasonably be concluded that merger law would have failed. In this respect, Wright and co-authors make reference to John Kwoka's book *Mergers, Merger Control, and Remedies*, published in 2014 (*Kwoka* [2014]), and to the writings that critically analyse the book but, unfortunately, they neither summarize the findings of the book, nor its criticism (*Wright et al.* [2018] pp. 28–30).⁴⁶ Nonetheless, they point out that Kwoka, despite of his finding, does not recommend to move away from the analysis of consumer welfare effects, but simply calls for a more resolved law enforcement.

⁴⁵ For example, it is easy to see that market players may exit the market if they are not able to keep up with strong quality-based and innovation-driven competition that require significant investment. This increases the concentration, but it does not mean that it necessarily lessens competition.

⁴⁶ The study refers the result of Kwoka's research according to which the more than 3000 mergers that Kwoka examined resulted in a 7.22 % increase of the average price level. According to Kwoka, this means that merger law enforcement has not been aggressive enough recently, and the interventions could not prevent the price increase followed by the mergers. According to his critics, the method Kwoka used to assess price effects has been incorrect.

*Criticisms of the specific conclusions and recommendations
of the hipster antitrust movement*

As we noticed, Lina Khan claims that Amazon's main instrument for achieving the monopolization of the market is below-cost pricing, also called predatory pricing. In proof of this, Khan refers to the hostile takeover of Quidsi. According to one of Khan's critics, this example shows why Khan's conclusions are erroneous. Namely, it is not certain whether Amazon acquired one of its critical competitors, but it is obvious that Amazon did not become a monopoly, moreover, it is not even likely that Amazon could increase its market power to such an extent, as a result of the acquisition, that it could have any harmful effect.⁴⁷ After Amazon purchased Quidsi, the founders of Quidsi switched to Walmart's platform, Jet.com. Consumers were not worse off, and not even competition decreased. Consumers benefited from Amazon's price reduction after the market entry of Quidsi, and now they benefit from the fierce competition between Jet.com and Amazon (*Eisenach* [2018]).

Hovenkamp [2018] (pp. 21–22) makes further criticism in response to the arguments of the hipster antitrust movement on predatory pricing. In his view, Amazon's pricing cannot be considered as predatory because it cannot be shown that Amazon's goal was to monopolize the market. In *Hovenkamp's* opinion, the pricing of Amazon just reflected the technological changes brought about by the e-book market, which resulted in the marginal cost of book manufacturing decreasing near to zero, royalty fees remaining the only cost. He also refers to the fact that both Amazon and others make available for free those books of which the copyright expired.

All in all, as *Hovenkamp* states, the hipster antitrust movement confuses predatory pricing with product development when a firm applies low prices in order to secure its position in the market. (It is noteworthy that not many wanted to undertake the promotion of e-books.) *Hovenkamp* believes that the discounts offered by Amazon were less harmful for consumers than the cartel organized by Apple and other publishers, which tried to achieve that Amazon raise its prices.⁴⁸ He suggests that if the antitrust hipsters' attack on low prices succeeded, it would harm consumers, in particular consumers with lower income, and this would be a political blunder for antitrust hipsters, but even more so for the politicians who supported the hipster antitrust movement (referring to the fact that the Democratic Party picked up the topic of antitrust reform) (*Hovenkamp* [2018] p. 29).

A number of critics also addressed the thinking of the hipster antitrust movement on vertical integration. According to *Hovenkamp* [2018] (pp. 22–23), the services Amazon offers to other retailers, such as delivery and logistics services, expressly

⁴⁷ See Jeffrey Eisenach's post of November 5 (*Eisenach* [2018]). Eisenach is an American economist, one of the leaders of NERA Economic Consulting, adjunct professor at the George Mason University, and visiting scholar at the American Enterprise Institute.

⁴⁸ See case *United States versus Apple, Inc. et al.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013).

benefit smaller retailers and do not cause them any competitive disadvantage. Moreover, the use of these services is voluntary and retailers can sell their products on Amazon's platform without using Amazon's delivery and logistics services.

Wright and co-authors also took the view that it would not be justified to disregard the often-tested assumption that vertical integration usually benefits consumers; though it cannot be debated that harmful vertical effects do exist. Beyond that, they do not elaborate on this topic, unfortunately (*Wright et al.* [2018] pp. 49–50.).

Both Hovenkamp and Wright and co-authors stand up for the consumer welfare paradigm not only because of the settled legal practice I discussed above, but because they are convinced that the questions raised by the spread of big online platforms can be answered within the current legal and theoretical framework.

These authors and others criticise the views represented by Tim Wu for the same reason and in a similar way. According to professor Wu's critics, Wu misunderstands the nature of the analysis of consumer welfare effects (*Melamed–Petit* [2018]). Within the consumer welfare paradigm, enforcement agencies necessarily conduct an economic analysis, which cannot be influenced by other political and social goals, while the consumer welfare paradigm provides clear criteria for the case-by-case application of the regulatory framework of competition law.

Wu claims that the welfare effects or values are difficult to measure hence the outcome is uncertain which makes law enforcement unpredictable. Consumer welfare is in fact measurable only with difficulty, however, the hipster antitrust movement criticises the consumer welfare effect analysis on the basis of Bork's views, but Bork's views have been exceeded by the current economic theory and practice (see in more details *Hovenkamp* [2018] pp. 3–8). Therefore, Wu's critics debate that the analysis of consumer welfare effects would be price-focused and more static rather than dynamic. They refer to the factors considered by the enforcement agencies, primarily but not exclusively in merger cases, such as entry barriers, market foreclosing practices, dynamic competition, innovation, quality and choice. They refer to several cases which did not concern a price issue (p. 4). Furthermore, they find it incomprehensible, from the perspective of antitrust law enforcement, why professor Wu proposes the question if “the conduct have any other adverse effect outside the anti-competitive effect, in particular, on political values”. They point out that including an aspect into the analysis that is beyond competition and is certainly unmeasurable will definitely not increase but rather reduce predictability (p. 9).

Professor Wu's proposed framework of analysis, namely that the analysis should concentrate, instead of welfare effects, on the protection of the competitive process and the maintenance of a competing market structure, has also been criticised. Firstly, it is not clear how this approach would be different from the consumer welfare paradigm. Some elements mentioned by Wu, such as “actions that are an integral part of the competitive process”, or “increasing the cost of the competitors” or “anti-competitive effects” (part of Professor Wu's questions 3 and 4) also form the

central part of the analysis of the consumer welfare effects. The basic questions Wu proposed have as well been the starting point of all antitrust cases before (pp. 8–9).

Secondly, it seems that Wu would not require that the existence of market power or dominance be proven. However, it is exactly the link between the creation of dominance or the abuse of market power and the competition law intervention that guarantees that public law intervention only occurs if it is presumed that the absence of intervention would cause harmful effects. If such an extensive market power does not exist, the operation of the market and the competitive process will correct any inefficient practice. Intervention triggered by the degree of market power is exactly the guarantee for antitrust law enforcement focusing on the protection of the competitive process (as opposed to action against commercial practices that are considered undesirable for reasons whatsoever) (p. 9).

Many accept or even support (the supporters are mainly members of those groups which are less radical but still urge the reform of antitrust enforcement) that, in case of certain conducts, *per se* prohibitions or presumptions should be introduced in order to shift the burden of proof on dominant firms to demonstrate that a practice, presumed to be anti-competitive, in reality, has no anti-competitive object or effect.⁴⁹

However, the more radical suggestions, mainly proposed by Lina Khan, were criticised by many, especially the ones recommending regulation. Part of the criticism claims that the regulatory proposals are vague and cannot be treated as a well-prepared alternative (*Hovenkamp* [2018] p. 20).

It appears as a general issue that it is not clear, if the proposed regulatory solution would tackle real problems and if so, how.⁵⁰ The access obligation used in case of natural monopolies and recommended by Khan seems unnecessary since Amazon does not refuse to grant access. The obligations on investment and innovation is similarly futile. Khan herself accused Amazon of creating new solutions with continuous investments, entering new markets and offering new services (as experience shows, well received by both consumers and retailers) which, as she alleges, help the strengthening of its market power.

Regarding the pricing issue, it should be noted that it is unclear why a price cap is proposed for Amazon's consumer prices when Amazon applies expressly low prices. It is not even proven that Amazon would apply excessive fees towards retailers or publishers, or which exact fees would be excessive. Before introducing any kind of non-discriminatory mandatory access and the related price regulation, it would be critical to determine which of Amazon's services may qualify as essential facilities.

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⁴⁹ One such group is the American Antitrust Institute.

⁵⁰ Philip Mardsen, Inquiry Chair of the Competition and Market Authority in the United Kingdom, formulated a similar criticism. According to him, it is important to persist to Hippocrates principle: intervention should not be harmful. Hence, according to Mardsen, the current duty of the authorities is observing and analysing, and only taking action if they have firm evidence but, if it is necessary, by using progressive tools with the help of state-of-the-art technology. This would be real "hipster" (*Mardsen* [2018]).

Another significant and more specific criticism points out that the pricing elements, which form the central part of the regulatory model, raise a number of problems.⁵¹ The most important of all is that in case of high-tech industries, and so for Amazon and other similar firms, the initial investment and fixed costs are high, while the marginal cost, being traditionally the basis for price regulation, is near zero. Besides, calculating the invested capital and fixed costs is not easy.⁵² Khan herself admits that Amazon invested to such an extent and in so many different business areas, that it would not be easy to determine what kind of costs should be considered in order to set a reasonable price, also taking into account legitimate return expectations. She also sees the bizarre situation that her starting point was that Amazon's investments have so far generated losses due to the below-cost pricing (*Khan* [2017]). Though Khan has not expressed it, a regulated price in such a situation, taking into account return and investments, would likely lead to a significant price increase. This conclusion is in line with Hovenkamp's afore-mentioned observations (*Hovenkamp* [2018] p. 29).

WHAT IS NEXT?

It is hard to predict what the near future brings regarding the changes of American antitrust law enforcement, whether competition law would be strengthened by presumptions, more robust economic analyses or additional, more detailed regulatory proposals in order to prevent possible abuses of digital platforms or vertically integrated firms in general.

Representatives of the different approaches, academics, research institutes and practicing professionals, as well as the American Antitrust Institute, continuously publish their arguments and counter-arguments, and those proposed solutions that partly deal with the potential directions of strictly interpreted antitrust enforcement. Partly, they are more farsighted, and also seek solutions to problems such as strengthening employees' bargaining power against large corporations, reducing income inequalities or strengthening the protection of personal data. Charles River Associates organized its annual conference *Economic Developments in Competition Policy* in 2018 around these topics.⁵³

It was beyond the scope of this paper to describe all approaches and arguments, but striving for completeness would anyhow be impossible because the discussion is expanding by the day, both in professional fora and in the press.

⁵¹ See the interview by Allison Schragger with Jean Tirole (*Schragger* [2018]).

⁵² (*Schragger* [2018]). However, these problems have been tackled by economists and alternative pricing models have been worked out. *Valentiny* [2018] provides a good summary of economic debate on the marginal cost-based pricing of firms with high fixed costs.

⁵³ The conference on 15 December 2018 featured the following sessions, among others: *Do We Have a Market Power Problem After All?; Do We Need a Radical Antitrust Answer to Populist Antitrust?; Regulating Big Tech...;* and *Issues in Merger Control: Killer Acquisitions, Platform Mergers, Attention Markets and Bargaining in Media Deals* (*CRA* [2018]).

The hipster antitrust movement can thus record at least one victory, as the future of antitrust law enforcement and the possibilities for renewal have come to the forefront of both political and professional debates.⁵⁴ So much so, that the FTC announced public hearings on “Competition and Consumer Protection in the 21st Century” in June 2018 (*FTC [2018a]*). The series of hearings invited comments on issues (partly described in the present paper but exceeding it by far both in quantity and detail) such as whether the consumer welfare paradigm provides an appropriate framework for competition law enforcement in the 21st century; how platforms operate as two- or multi-sided markets, and whether a different competition law approach is needed for them, e.g. what market definition issues are raised by such platforms, and what the role of direct and indirect network effects are; whether a guidance on vertical mergers is needed, and in which cases a vertical merger should be presumed to have adverse effects, and how this presumption could be rebutted; what big data is, and how to evaluate mergers which involve the assessment of access to consumer data or other big data. In parallel, the United States House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law held hearings in 2017 and 2018 on the direction of competition law enforcement and the strengthening of competition authorities.⁵⁵

Meanwhile, in Europe, debates have focused on digital markets,⁵⁶ and European competition authorities have not been reluctant to take action against large American high-tech companies, to the delight of the hipster antitrust movement. As it is well known, the European Commission has taken action against Google in several cases,⁵⁷ and even imposed a substantial fine on Google.⁵⁸ It has also investigated Amazon’s terms and conditions for e-book publishers and this case ended with a commitment decision.⁵⁹ In 2016, the German competition authority launched proceedings against Facebook to investigate whether Facebook abused its dominant position by making the use of the Facebook social network conditional on

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⁵⁴ Lina Khan put it this way in her article published in the *Journal of European Competition Law and Practice*: “...the very fact that antitrust is again at the centre of political debates shows that the New-Brandeisians have already made a big mark.” (*Khan [2018b]*).

⁵⁵ <https://judiciary.house.gov/legislation/hearings>.

⁵⁶ Good examples are the German Federal Cartel Office’s (*Bundeskartellamt*) new series of papers on “Competition and Consumer Protection in the Digital Economy” (*Bundeskartellamt [2107/2018]*), or the mid-term strategy paper of digital consumer protection published by the Hungarian Competition Authority (*GVH [2018]*).

⁵⁷ Case AT.40099 – Google Android; Case AT.39740 – Google Search (Shopping).

⁵⁸ Case AT.40411 – Google (AdSense). On the 19th of March 2019, the Commission fine Google 1.49 million euros, “for illegal misuse of its dominant position in the market for the brokering of online search adverts. Google has cemented its dominance in online search adverts and shielded itself from competitive pressure by imposing anti-competitive contractual restrictions on third-party websites” as Commissioner Vestager explained in the Commission’s press release (https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770).

⁵⁹ Case AT.40153 – E-book MFNs and related matters (Amazon).

the consent of users to practically unlimited use of their data.⁶⁰ The German and Austrian authorities investigated together the agreement between Google and the German company Eyeo, in which Google restricted the use of Eyeo's ad-blocking service and its product development activities. The authorities achieved that parties amend the agreement, and the proceedings were finally closed without finding an infringement.⁶¹

In Europe, competition authorities do not seem to be struggling with the dilemma of how to take action against high-tech giants. However, it should be noted that most competition authorities globally, including the European ones, do not focus solely on the consumer welfare paradigm: a 2011 survey by the Dutch Competition Authority (*Nederlandse Mededingingsautoriteit, NMa*) showed that although consumer welfare is important or even crucial for most competition authorities, the vast majority of respondents also mentioned other welfare goals.⁶²

While I may have suggested that the debate in the United States about the renewal of antitrust law enforcement in general and the hipster antitrust movement in particular are very "American phenomena," it is certain that they do not go unnoticed in the rest of the world, including Europe, and *vice versa*, the American antitrust society is also monitoring the European developments. Good examples for this are the aforementioned FTC and congressional hearings that have raised the questions whether there are differences between the American and other competition law enforcement systems, and how these differences affect U.S. companies (*FTC [2018b]*). In addition, ideas originated in Europe are becoming part of the American debate. Such an idea is the "*participative antitrust*" concept of Nobel Prize winner Jean Tirole. According to this concept, competition authorities offer opinions on the proposals of market players of an industry and other stakeholders in order to promote predictability and legal certainty, without these opinions actually becoming regulations.

The debates are not over yet, and are unlikely to be over in the near future. Rather, it is likely that the ever-changing high-tech industries and innovative companies will, as always, develop newer products and applications that will force law enforcement to a continuous renewal, or at least to a progressive adaptation.

⁶⁰ Since this paper has first been published, the German authority issued its final decision prohibiting Facebook to link the data collected from different sources (<https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.html>).

⁶¹ The Bundeskartellamt published its related press release on the 21th of January 2019 (*Bundeskartellamt [2019]*).

⁶² See the annual report of the NMa about its yearly activities in 2011 (NMa [2012]). The results of the survey are summarized in more details in *Muraközy–Valentiny [2015]* pp. 180–182.

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