

Antitrust Populism: Towards a Taxonomy

Joshua Wright¹ and Aurelien Portuese²

Abstract

Antitrust populism—or the populist use of competition policies—is currently on the rise again. This is mainly due to the challenges brought about by the digital economy to traditional competition tools. From a normative perspective, the economics of competition law should avoid embarking into the outdated populist reasoning of the early days of antitrust policy. From a positive perspective, there is a need to conceptualize such modern antitrust populism because its rampant influence requires further scrutiny. This is the main objective of the Article: it offers a taxonomy of antitrust populism, distinguishing between conceptual antitrust populism and political antitrust populism. It is argued in this Article that both facets of antitrust populism bolster and reinvigorate one another. This taxonomy of antitrust populism enables us to better understand (and subsequently tackle) the unprincipled use of antitrust laws for populist reasons. After having introduced the notion of antitrust populism (I), we shall decipher what we call political antitrust populism (II) before delving into the intellectual roots of conceptual antitrust populism (III). We shall conclude upon the implications of the taxonomy of antitrust populism henceforth proposed (IV).

¹Professor of Law, Director of the Global Antitrust Institute of Antonin Scalia Law School, George Mason University.

²Senior Lecturer in Law, St Mary's University; Adjunct Professor of Law, George Mason University and University of Notre Dame Australia; Research Fellow, Catholic University of Paris.

I. Introduction

1.1 Antitrust Populism as a Facet of Economic Populism

Populism oftentimes pares down to economic populism. Indeed, the economic difficulties of an era are echoed by the simple and popular answers proposed by politicians throughout the world, and particularly in the Western world—be it in the European Union or in the United States.³ Open markets and liberal internationalism—or the current global economic system—seem to be the most sought-after targets of populists.⁴ Financially strained households discount the long-term economic costs of these political solutions for the short-term benefits they wish to reap in order to improve their living standards. Nurtured by economic crises and a backlash against globalization, populism can hardly thrive in times of economic prosperity.⁵ The causal relationship between economic crisis and populism’s rise is constant. Consequently, it appears that economic populism is the dominant form of populisms.⁶ Indeed, populism undeniably narrows down to its economic dimension.⁷ Economic populism is said to be any policy choice which goes against economic consensus about what fosters economic efficiency. Although this expression does not go without controversy,⁸ it is now widely used and understood by scholars and the general public.

³ For a transatlantic perspective of economic populism, see Chatham House, *Economic Populism – A Transatlantic Perspective* (2016), <https://www.chathamhouse.org/sites/default/files/events/2017-01-26-economic-populism-a-transatlantic-perspective.pdf> [<https://perma.cc/KT4Z-3G54>].

⁴ ROGER EATWELL & MATTHEW GOODWIN, NATIONAL POPULISM: THE REVOLT AGAINST LIBERAL DEMOCRACY (2018).

⁵ On populism in general, see Barak Orbach, *Antitrust Populism*, 14 N.Y.U. J.L. & BUS. 1 (2017).

⁶ On the recent rise of Europe’s populism, see *Europe’s Populists are Waltzing into the Mainstream*, THE ECONOMIST, Feb. 3, 2018, <https://www.economist.com/briefing/2018/02/03/europes-populists-are-waltzing-into-the-mainstream> [<https://perma.cc/UCD6-AQ4H>]; Robert Khan, *Addressing Economic Populism in Europe*, COUN. ON FOREIGN REL. (2015), <https://www.cfr.org/sites/default/files/pdf/2015/12/December%202015%20GEM.pdf> [<https://perma.cc/KU4Q-MQNF>].

⁷ See, e.g., the definition by N. Campos of populists: “those whose policies redistribute resources to their electoral bases while simultaneously concealing the true long-term economic costs of these policies. Populist policies today tend to be presented as anti-elite (e.g., “take back control”), anti-globalization (“MAGA”), anti-evidence (“people in this country have had enough of experts”) and anti-media (“fake news”),” in Nauro Campos, *A Curtain Call for Populism*, SOCIAL EUROPE (November 16, 2017), <https://www.socialeurope.eu/curtain-call-populism> [<https://perma.cc/MGC4-UMCZ>].

⁸ The very expression of “economic populism” can be criticized as being the view of the elite not to adopt alternative policies such as protectionism and socialism. See, e.g., Chatham House reporting that “[t]here was some disagreement among workshop participants about whether the term ‘economic populism’ was helpful in understanding the phenomenon. For example, is any form of protectionism ‘populist’, or did the use of that term simply reflect elites’ views of such policies?” Chatham House, *Economic Populism – A Transatlantic Perspective* 2 (2016), <https://www.chathamhouse.org/sites/default/files/events/2017-01-26-economic-populism-a-transatlantic-perspective.pdf> [<https://perma.cc/KT4Z-3G54>].

What is antitrust populism? It could simply be said that antitrust populism is economic populism applied to antitrust matters.⁹ More precisely, antitrust populism entails both the rejection of rigorous economic analysis in favor of politically-driven competition enforcement, as well as suspicion of the role of experts and independent agencies on antitrust matters.¹⁰ The populist use of antitrust laws is “fashionable again.”¹¹ For, “[r]ecently, a popular view has emerged calling for greater competition law enforcement to pursue different objectives” and calling for “more aggressive enforcement as a possible solution” willing to “challenge the status quo and directly assume that ‘big is bad’” as Lamadrid de Pablo rightly sums up.¹²

The global antitrust community has witnessed a reanimation of populist sentiments that once dominated the field. Contemporary antitrust law—and in particular, the consumer welfare standard that serves as its lodestar and link to economic science—stands accused of facilitating market consolidation writ large, if not aiding and abetting a global and economy-wide expansion of monopoly power.¹³ Prominent antitrust scholars have returned to the antitrust arguments of a half-century ago, once again championing an injection of socio-political antitrust goals to solve

⁹ On antitrust populism, see Thomas Kauper, *The Warren Court and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325 (1968); Barak Orbach, *Antitrust Populism*, 14 N.Y.U. J.L. & BUS. 1 (2017); Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT’L J. INDUS. ORG. 714 (2018); Sandeep Vaheesan, *The Evolving Populisms of Antitrust*, 93 NEB. L. REV. 370 (2014); Dirk Auer, *The Amazon/Whole Foods Overreaction: Antitrust Populism Exposed*, TRUTH ON THE MARKET, August 28, 2018, <https://truthonthemarket.com/2018/08/28/the-amazon-whole-foods-overreaction-antitrust-populism-exposed/> [<https://perma.cc/X45A-ZXAD>]; Richard Epstein, *Beware of Populist Antitrust Law*, FORBES, January 23, 2019; Elise Dorsey, et al., *Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent Seeking*, CPI ANTITRUST CHRONICLE, April 2018; Pallavi Guniganti, *A Populist Now: What Can Antitrust do for Inequality?*, 20 GLOB. COMP. REV. 2 (2017); Konstantin Medvedovsky, *Hipster Antitrust – A Brief Fling or Something More?*, CPI ANTITRUST CHRONICLE (April 2018); and *Populist Antitrust*, THE FEDERALIST SOCIETY (2018), <https://fedsoc.org/commentary/podcasts/populist-antitrust> [<https://perma.cc/PA6Z-QEVK>] (Podcast featuring Babette Boliek, Geoffrey Manne, William Rinehart, Joanna Tsai, Hal Singer for Pepperdine Law Review’s 2019 Symposium “Regulating Tech: Present Challenges and Possible Solutions”).

¹⁰ Or “technocratic antitrust” as Harvard law professor Einer Elhauge calls it. See John Briggs, *‘Populist Antitrust’: A Deviant Mutation or an Overdue Correction? An Interview with Einer Elhauge (Harvard Law School)*, GEORGE WASHINGTON UNIVERSITY MARVIN CENTER, September 24, 2018, <https://www.eventbrite.com/e/6th-bill-kovacic-antitrust-salon-an-interview-with-einer-elhauge-tickets-49918538693> [<https://perma.cc/58FX-HZDX>].

¹¹ Elise Dorsey, et al., *Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement*, REGULATORY TRANSPARENCY PROJECT OF THE FEDERALIST SOCIETY 3 (Apr. 15, 2019), <https://regproject.org/wp-content/uploads/RTP-Antitrust-and-Consumer-Protection-Populist-Antitrust.pdf> [<https://perma.cc/92YS-K87L>].

¹² He interestingly adds that “the fact that popular—and in some cases populist—views of competition law lack an understanding, a vision or a direction on the role of the discipline does not, however, mean that they cannot take-over. We now know that.” See Alfonso Lamadrid de Pablo, *Competition Law as Fairness*, 8 J. EUR. COMP. L. & PRAC. 147, 147 (2017).

¹³ See generally, TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* 127-139 (2018).

contemporary competition issues.¹⁴ No doubt, politically-driven antitrust enforcement is back, harking back to its populist origins. Antitrust populism is propelled mainly by the rise of the digital economy and its economic peculiarities.

1.2. Antitrust Populism and the Digital Era

Digital platforms have a multitude of business models which all have important disruptive innovation, and an ability to make the supply and demand of a market match, the strong desire to cut costs for producers and users of the platforms, and the importance of advertisement as a way to fund the platforms. Particularly, network externalities present in most digital markets lead to the emblematic multi-sidedness of these markets.¹⁵ The multi-sidedness of digital platforms is best captured by the concept of “matchmakers.”¹⁶ Digital platforms are dubbed as matchmakers since they enable the matching of the demand side of the market with the supply side of the market in mutually beneficial exchanges.¹⁷ To that extent, they improve the effectiveness of the market in an efficiency-enhancing manner: each side of the markets becomes able to transact with the other side of the market.¹⁸ This economically beneficial process spawns from the information cost minimization of digital platforms. Network effects are well-known for lubricating information

¹⁴ See Jonathan Baker & Steven Salop, *Antitrust, Competition Policy and Inequality*, 104 GEO. L. J. 1, 24 (2015) (arguing “antitrust law and regulatory agencies could address inequality more broadly by treating the reduction of inequality as an explicit antitrust goal”); Lina Khan, *Amazon’s Antitrust Paradox*, 126 YALE L. J. 710, 803-05 (2017); Sabeel K. Rahman & Lina Khan, *Restoring Competition in the U.S. Economy*, ROOSEVELT INSTITUTE, UNTAMED: HOW TO CHECK CORPORATE, FINANCIAL, AND MONOPOLY POWER 18 (Nell Abernathy, Mike Konczal, & Kathryn Milani eds., 2016), <http://rooseveltinstitute.org/wp-content/uploads/2016/06/Untamed-Final-5.10.17.pdf> [<https://perma.cc/TW8H-6SHA>].

¹⁵ See Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS’N 990, 990 (2003) (“[M]any, if not most markets with network externalities are characterized by the presence of two distinct sides whose ultimate benefit stems from interacting through a common platform.”).

¹⁶ The seminal work of David Evans and Schmalensee best outline the economic implications of digital platforms with respect to traditional economics. See DAVID S. EVANS & RICHARD SCHMALENSEE, *MATCHMAKERS: THE NEW ECONOMICS OF MULTISIDED PLATFORMS* (2016); David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multisided Platform Business*, 1 THE OXFORD HANDBOOK OF INT’L ANTITRUST ECON. 404 (Roger D. Blair & Daniel Sokol eds., 2003); David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REG. 325 (2003). See also GEOFFREY PARKER ET AL., *PLATFORM REVOLUTION: HOW NETWORKED MARKETS ARE TRANSFORMING THE ECONOMY AND HOW TO MAKE THEM WORK FOR YOU* (2017).

¹⁷ EVANS & SCHMALENSEE, *supra* note 16.

¹⁸ The extent to which multi-sidedness of digital platforms are novel to industrial organization theory or just a “refinement” of this theory is debatable but not part of our discussion. For an argument in favor of two-sided markets being only a “refinement” of traditional industrial organization theory, see Dirk Auer & Nicolas Petit, *Two-Sided Markets and the Challenge of Turning Economic Theory into Antitrust Policy*, 60 ANTITRUST BULL. 426, 428 (2015) (“[T]he two-sided markets theory is a refinement of traditional IO theory.”). See also *id.* at 431 (“[T]he theory of two-sided markets looks again like a derivative—albeit a significant one—of the mainstream theory of network externalities, with the twist that two distinct user groups are present on opposite sides of a platform.”).

amongst platform users. In that regard, the role of data in platform economics is essential to the understanding of the nature of the value exchanged in these platforms.¹⁹

Others consider that the multi-sidedness of the digital platforms is better encapsulated in the concept of “attention markets”: both producers and consumers of digital platforms tend to capture the attention of both users. Consumers of digital platforms are attracted to some features on the Web or on platforms which can be monetized through advertising revenues or through payable services. On the other hand, producers of digital platforms create services so that an increasing number of users (consumers and other producers) can reap the benefits of the platforms through catching the monetizable attention of these users.

More generally, due to important network externalities, digital markets are characterized by the rise of winner-take-all benefits due to the importance of network effects on these markets. Network effects arise whenever the users of a good or service have an increased utility in using that good or service with an additional user of the same good or service: each user’s utility grows as the user base grows.²⁰ In digital markets, network effects are exacerbated in digital applications and platforms²¹

¹⁹ Often referred as “the new oil” or “the new currency,” data provided by digital platforms is crucial to the competitiveness and wealth-creation process of digital platforms. See, e.g., Meglena Kuneva, European Commissioner for Consumer Protection, Keynote Address at the Roundtable on Online Data Collection, Targeting and Profiling (Mar. 31, 2009), https://europa.eu/rapid/press-release_SPEECH-09-156_en.htm [<https://perma.cc/EV63-LWJS>] (“Personal data is the new oil of the internet and the new currency of the digital world.”). See also Howard Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. PA. L. REV. 1663 (2013); Preliminary Opinion of the European Data Protection Supervisor, *Privacy and Competitiveness in the Age of Big Data: The Interplay Between Data Protection, Competition Law and Consumer Protection in the Digital Economy* (Mar. 2014), https://edps.europa.eu/sites/edp/files/publication/14-03-26_competition_law_big_data_en.pdf [<https://perma.cc/D59Z-2V7J>].

²⁰ See Alden Abbott, *Antitrust and the Winner-Take-All Economy*, HERITAGE FOUNDATION (2018), <http://report.heritage.org/lm224> [<https://perma.cc/45N4-SHGM>] (“[A]s the number of participants in the market rises, its value to existing participants’ rises, incentivizing more parties to join.”).

²¹ If exacerbated, network effects (or externalities) are well-known and well-evidenced in the literature. See STAN LIEBOWITZ, *RE-THINKING THE NETWORK ECONOMY: THE TRUE FORCES THAT DRIVE THE DIGITAL MARKETPLACE* (2002); OZ SHY, *THE ECONOMICS OF NETWORK INDUSTRIES* (2001); Chien-fu Chou & Oz Shy, *Network Effects Without Network Externalities*, 8 INT’L J. OF INDUS. ORG. 259 (1990); Nicholas Economides & Fredrick Flyer, *Equilibrium Coalition Structures in Markets for Network Goods*, 49/50 ANNALES D’ECONOMIE ET DE STATISTIQUE 361 (1998); Nicholas Economides & Lawrence J. White, *Networks and Compatibility: Implications for Antitrust*, 38 EUR. ECON. REV. 651 (1994); Howard S. Ellis & William Fellner, *External Economies and Diseconomies*, 33 AM. ECON. REV. 493 (1943); Joseph Farrell & Michael L. Katz, *Competition or Predation? Consumer Coordination, Strategic Pricing, and Price Floors in Network Markets*, 53 J. INDUS. ECON. 203 (2005); Gautam Gowrisankaran & Joanna Stavins, *Network Externalities and Technology Adoption: Lessons from Electronic Payments*, 35 RAND J. ECON. 260 (2004); Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424 (1985); Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP. 93 (1994); Michael L. Katz & Carl

because of the exponential utility derived by both consumers and producers of additional users of the application or platform.²² Therefore, network effects of digital platforms are beneficial to consumers and producers because they generate both economies of scale and economies of scope.²³

Consequently, bigness of firms intrinsically correlates with the winner-take-all feature of digital platforms, and prices (if present, or any alternative) would fall while the profits of the platform owner would increase. These expected benefits derived from network effects enable platform owners to charge either no price from the outset or to charge a reducing price up to zero price for others,²⁴ depending on the financial strength of the platform owner. The extent to which one side can provide for the other of the platform to subsidize a product or service for a very low (if not zero) price could erroneously lead flawed economic analyses to conclude to the presence of anticompetitive predatory pricing. Indeed, David Evans neatly emphasizes the consequences of flawed economic analysis of platforms conflating multi-sidedness with predatory pricing:

The economics of platform competition has implications for antitrust and regulatory policies in multi-sided markets. Predatory pricing is an obvious example. Efficient pricing may result in setting price on a particular market side below measures of average variable or marginal cost incurred for customers on that market side. Economic analysis that ignores the multi-sided nature of the market might conclude erroneously that this is an example of simultaneous recoupment—low prices on one side are being used to obtain or maintain market power on another side.²⁵

Shapiro, *Technology Adoption in the Presence of Network Externalities*, 94 J. POL. ECON. 822 (1986); Jean-Jacques Laffont et al., *Network Competition: I. Overview and Nondiscriminatory Pricing*, 29 RAND J. ECON. 1 (1998); Jean-Jacques Laffont et al., *Network Competition. II. Price Discrimination*, 29 RAND J. ECON. 38 (1998); Stan Liebowitz & Stephen Margolis, *Are Network Externalities a New Source of Market Failure?*, 17 RES. L. ECON. 1 (1995); Marc Rysman, *Competition Between Networks: A Study of the Market for Yellow Pages*, 71 REV. ECON. STUDIES 483 (2004); Marcel Thum, *Network Externalities, Technological Progress, and the Competition of Market Contracts*, 12 INT'L J. INDUS. ORG. 269 (1994); Gregory J. Werden, *Network Effects and Conditions of Entry: Lessons from the Microsoft Case*, 69 ANTITRUST L.J. 87 (2001); Timothy F. Bresnahan, *Network Effects and Microsoft* (Stanford Institute for Policy Research, Working Paper No. 00-51, 2001); Jeffrey Church et al., *Indirect Network Effects and Adoption Externalities* (Foerder Institute for Economic Research, Working Paper No. 02-30, 2002); Richard Kauffman & Yu-Ming Wang, *Network Externalities and the Determinants of Network Survival* (MIS Research Center, Working Paper No. 99-03, 1999).

²² See generally, Jacob Viner, *The Utility Concept in Value Theory and its Critics*, 33 J. POL. ECON. 638 (1925).

²³ Scale economies bolster the expected benefits calculus of the platform owner. But, because these expected benefits are drivers to innovation (see below), it can be concluded that scale economies are engines of innovation due to the decreasing returns enjoyed by the platform owner as the user bases grow.

²⁴ See Evans *supra* note 16, at 328 (“The optimal price on a particular side of the market, whether measured socially or privately, does not follow marginal cost on that side of the market. Many platform businesses charge one side little or nothing . . .”).

²⁵ *Id.*

This economic confusion is evidenced by Lina Khan's well-shared article titled *Amazon's Antitrust Paradox* where the author, a leading figure of the so-called "Neo-Brandesian movement," applies the historical application of predatory pricing theory to Amazon's multi-sided pricing strategies without delving into the economics of platform competition as pioneered by Evans and others.²⁶ We shall discuss these pitfalls subsequently in II.1.3.

One key legal and policy implication of the exacerbated network effects of digital platforms is that market size matters. Indeed, since the utility derived from using the network depends on the size (i.e. number of users) of the network, the bigness of the network is utility-enhancing (for both users and platform owners). Consequently, the bigness of the network can undoubtedly lead to efficiency-enhancing consequences. This economic insight does necessarily echo the current widespread concerns of the alleged monopolization of the digital markets. In the abovementioned winner-take-all paradigm, it is inevitable that observing few digital networks succeeding over failing networks provides evidence of the greater utility derived from users by entering into successful networks compared to the utility they would have derived from staying in less successful (and smaller) networks.²⁷ Unquestionably, the age of digital networks is the age of the winner-take-all economy wherein users (i.e. consumers and producers) are incentivized to reap the utility-enhancements of using larger (dominant) networks while quitting unattractive, small networks. The antitrust implications are clear: while bigness is crucial to the utility of network users, it raises concerns for antitrust authorities since current antitrust rules are predominantly governed by size concerns rather than by anticompetitive conducts as such. Whereas antitrust authorities perceive bigness of digital networks as a source of antitrust concerns, digital networks apprehend bigness as the very existential determinant of their ability to provide utility to their users in a market dominated by network effects. The pitfall of the current antitrust analyses (partly) lies in this double-edge perception of bigness: for digital platforms bigness is and remains existential to their survival whilst bigness is and remains a triggering factor for antitrust investigations by public authorities.

The multi-sidedness of digital markets carries ambiguous antitrust policy implications. Few scholars have cautioned against antitrust interventionism in a field still to be decoded by economists.²⁸ Nevertheless, some antitrust concerns may arise

²⁶ See Khan, *supra* note 14; Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131 (2018) [hereinafter Khan, *Brandeis*]; Lina Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J.F. 960 (2018) [hereinafter Khan, *Market Power*]; Lina Khan & Sandeep Vaheesan, *Market Power and Inequality, The Antitrust Counterrevolution and its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017); Lina Khan, *Capitalisn't: The Populists*, U. CHI. BOOTH SCH. BUS. (Aug. 8, 2018), <http://review.chicagobooth.edu/public-policy/2018/article/capitalisn-t-populists> [<https://perma.cc/SW3G-6593>] (Podcast featuring Kate Waldock, Luigi Zingales, and Lina Khan) [hereinafter Khan, *Capitalisn't*].

²⁷ See Kauffman & Wang, *supra* note 21.

²⁸ See, e.g., Janusz A. Ordover, *Comments on Evans & Schmalensee's "The Industrial Organization of Markets with Two-Sided Platforms"*, 3 COMPETITION POL'Y INT'L 181 (2007); Ron Knox, *Wright: Guidance on Two-Sided Markets May Prove Difficult*, GLOBAL

from the size of the digital networks with respect to the necessary competition *between* digital networks. The switching costs for users (both consumers and producers) of a digital platform must be sufficiently low so that competition between digital platforms is ensured through linkages. Digital platform competition is both necessary when inferior platform standard dominates, and superfluous when the dominant standard is the most superior standard available across platforms. Digital platform competition can be hindered by the complex development of digital ecosystems, where interoperability between these ecosystems can be hampered voluntarily. Although beneficial to consumers, these digital ecosystems can increase switching costs prohibitively for platforms users. Consequently, digital platforms disrupt the way competition policy addresses market actors because of the relative novelty of some of their economic characteristics. In that regard, the old recourse to antitrust populism can account for simple and tempting answers for these complex issues.

This article intends to assess the current revival of antitrust populism under the digital era both in the United States and in the European Union. In order to scrutinize this revival, the intrinsic links between how antitrust laws have been apprehended and practiced—what we dub “*conceptual*” antitrust populism - with the way politicians have recourse to antitrust in a populist rhetoric—what we dub “*political*” antitrust populism—shall be studied. The taxonomy we propose between *conceptual* and *political* antitrust populisms shall be useful in order to better understand how political antitrust populism is bolstered by conceptual antitrust populism (Part II). In return, conceptual antitrust populism is reinvigorated because of the political climax of our times, especially regarding digital platforms (Part III). This reciprocal reinvigoration provides for a challenging vigor of antitrust populism for the years to come (Conclusion).

II. *Political* Antitrust Populism

If antitrust is “sexy again”²⁹, antitrust populism is more appealing than ever before. There is both a revival of what the United States has experienced as the populist origins of antitrust laws and a revival of the politicized origins of European Union competition laws (1). Furthermore, this revival is being exacerbated by politicians’ use of specific rhetoric, where the meddling into antitrust matters for political reasons is instrumental to political self-portrayal (2). Both this revival of antitrust populism and the rhetoric of politicians are labeled as *political* antitrust populism.

II.1 *The Revival of Populism in Antitrust*

Antitrust laws have arisen with a populist call to tackle big corporations’ potential monopolization and cartelization attempts. Departing from these populist origins, the economic approach to antitrust from the 1970’s onwards has enabled antitrust enforcers to reduce the discretionary power of political enforcement of antitrust with a

COMPETITION REV. (2013), <https://globalcompetitionreview.com/article/1056769/wright-guidance-on-two-sided-markets-may-prove-difficult> [<https://perma.cc/MP8W-Y34W>];

²⁹ Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT’L J. INDUS. ORG. 714 (2018)

relatively objective criterion, which is the consumer welfare standard for its economic efficiency implications. A return to ante-economic approach in favor of a restoration of the populist roots of antitrust laws is vouched for by a number of influential commentators, enforcers and scholars.

II.1.1 Populist Roots of Antitrust Laws

The state-level antitrust laws in the late 19th century in the United States were ushered in from reactions to the agrarian, populist movements. These movements lobbied to thwart competition against newly centralized meat processing facilities and against the power of railroads companies. The People's Party (also called the “Populists”) was a United States political party lasting from 1891 until 1908.³⁰

At that time, Senator John Sherman proposed a law to fulfill populist claims with respect to the then silver standard by giving free, unlimited silver coinage with the Sherman Silver Purchase Act. This Act authorizing free silver coinage lasted until the panic of 1893. In the same populist vein, John Sherman introduced the famed Sherman Act in 1890 in order to ban “every contract, combination in the form of trust or otherwise [...] in restraint of trade.” Section 2 of this Act states that “every person who shall monopolize, or attempt to monopolize [...] any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of felony.” This extremely broad, as well as “strong,”³¹ language reflects the populist mood of that time. Hovenkamp notes that “[t]he Sherman Act was passed in 1890, prior to the beginning of the Progressive Era [FTC and Clayton Act of 1914], and it reflected largely populist concerns.”³² Few economists lauded the Sherman Act’s ability to prevent abusive business conduct.³³ The early cases demonstrated a strict approach by courts to ban “every” contract in restraint of trade.³⁴ After the Great Depression, the goal was to tackle economic monopolies such as railroads companies and the Standard Oil Company,³⁵ where the Court considered Standard’s 90% market share as evidence of its monopoly power, established the rule of reason according to which a case-by-case approach is adopted in order to assess antitrust violations, and finally considered that some conduct (such as predatory pricing) is unreasonably exclusionary.³⁶ In a decision with continuing significance for calls to break-up today’s digital platforms, the Supreme Court went so far as to break up Standard Oil into 34 parts as a structural remedy.

The candidate to the original trust buster, Teddy Roosevelt, wished to tackle economic concentrated powers by busting “monopolies.” Economic populism

³⁰ See Orbach, *supra* note 5, at 18-19.

³¹ See Wu, *supra* note 13, at 31.

³² Herbert Hovenkamp, *Progressive Antitrust*, 2018 U. ILL. L. REV. 71, 77 (2018).

³³ William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 44 (2000).

³⁴ See *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897).

³⁵ See *Standard Oil Co. v. United States*, 221 U.S. 1 (1910). See also *United States v. Terminal Railroad Ass’n of St. Louis*, 224 U.S. 383 (1912) (forbidding discriminatory conduct against rivals for the use of key facilities and requiring outsiders be given access on reasonable terms to such facilities).

³⁶ *Id.*

materialized by a number of regulatory reforms where economic powers could be tamed by a more interventionist government acting allegedly in pursuit of the protection of workers' and small businesses' interests against the detrimental effects of big corporations. The populist roots of modern antitrust laws have been further reinforced by Supreme Court Justice Louis Brandeis,³⁷ who gave birth to the so-called "Brandeis School" based on his worries that "concentration of economic power" was so great that "private corporations are sometimes able to dominate the State."³⁸ According to Brandeis, the economy was about to become a "feudal system" that would mean "the rule of a plutocracy."³⁹ Calling the Federal Trade Commission "a stupid administration"⁴⁰ for its alleged lack of antitrust enforcement, Justice Brandeis ambioned using antitrust enforcement in courts as instruments of economic planning models of the mid-30s following the Great Depression. From the mid-1930's until the 1970's, "antitrust's pendulum had swung dramatically away from the permissiveness of the 1920's and early 1930's"⁴¹ in favor of a prima facie antitrust illegality of any increase of concentration,⁴² where efficiency claims were rebutted⁴³ and market shares as low as 4.5 percent were considered at risk for antitrust enforcement.⁴⁴

The "Structure-Conduct-Performance" ("SCP") paradigm⁴⁵ dominated legal and economic thinking whereby market concentration and performance were interrelated so that the better the market is competitively structured, the more likely it is that the market will perform well. This paradigm invariably downplayed efficiency claims of large-scale enterprises due to the disruption such companies caused to the market structure. Market shares and market structure mattered more than any balancing exercise between efficiency losses and efficiency gains of the specific conduct examined. The Warren Court era (1954–1969) exemplifies the rejection of economic arguments in favor of a political use of antitrust policy.⁴⁶ Hovenkamp notes that this era was characterized by "its treatment of economic efficiency almost as an affirmative evil rather than a goal to be pursued. This was coupled with an antitrust policy that was intended to protect small business at the expense of consumers, manifested by an aggressive merger policy that condemned mergers even among very small firms."⁴⁷ One illustration of the intellectual atmosphere of these years, where economics arguments mattered less than the protection of small business and small communities, is the speech from Richard McLaren, then U.S. Antitrust Division Chief

³⁷ See *Liggett Co. v. Lee*, 288 U.S. 517, 565 (1933) (Brandeis, J., dissenting).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Kovacic & Shapiro, *supra* note 32, at 48.

⁴¹ *Id.* at 51.

⁴² See *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963) (where market shares de facto determined the outcome of the antitrust case).

⁴³ See *Fed. Trade Comm'n v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

⁴⁴ See *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966).

⁴⁵ See JOE S. BAIN, *BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES* (1956); JOE S. BAIN, *INDUSTRIAL ORGANIZATION* (1968); Edward S. Mason, *Price and Production Policies of the Large-Scale Enterprise.*, 29 AM. ECON. REV. 61 (1939).

⁴⁶ Thomas E. Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325 (1968).

⁴⁷ Hovenkamp, *supra* note 31, at 85.

at the Department of Justice who opposed mergers because of the loss of headquarters, following the merger, in small towns:

When the headquarters of one or two large companies are removed from the nation's smaller cities to New York or Chicago or Los Angeles, I think we all recognize that there is a serious impact upon the community. The loss is felt by its banks, its merchants, its professional and service people [...] The community loses some of its best educated, most energetic and public spirited citizens.⁴⁸

This uneconomic perspective was further illustrated in 1972 with what the FTC called “the most important development in antitrust law since 1911”: the fining of the first ever “shared monopoly” (oligopoly) between Kellogg, General Mills, General Foods, and Quaker Oats.⁴⁹ Again, in 1973, the FTC broke up eight oil companies (Exxon, Shell, Mobil, Texaco, Socal, Gulf, Amocom and Arco) by forcing them to sell 40-60% of their refining capacity: so-called “no fault oligopoly” (oligopolists presumed to share out a market) was chased out aggressively from a structuralist perspective with structural remedies.⁵⁰ In a pivotal moment, the question was whether to bolster such an interventionist view or to return to more judicial restraint: it was indeed said that “[i]t is quite possible that in the coming years [the Supreme Court] will decide that the ‘limits of judicial competence’ have to be stretched. The question then would be whether the popular feeling against over-regulation or against big business would prevail.”⁵¹ This dominant view of antitrust laws as tackling big business per se (“big-is-bad”) had shifted towards a more economically influenced approach in order to fulfill the goal of antitrust laws, which is to promote economic efficiency in society.

II.1.2 A Paradigm-Shift: The More Economic Approach

Until the 1970’s, the populist paradigm of antitrust laws dominated intellectual scholarship and enforcement.⁵² Yet, in the 1970’s, a profound intellectual turn took place in U.S. antitrust scholarship and enforcement. Rejecting the “previous incoherent hodgepodge of socio-political goals governing antitrust”⁵³ prevailing until the 1970’s, the law and economics scholars of the 1970’s undertook an intellectual turn whereby economic analysis of economic efficiency would reshape antitrust enforcement. In antitrust thinking, the law and economics movement was represented by the so-called Chicago School with scholars such as Robert Bork and Richard Posner following the initial steps of Aaron Director and George Stigler.⁵⁴ The main

⁴⁸ Richard W. McLaren, *Statement Before House Committee on Ways and Means*, March 12 1969, in 5 TRADE REG. REP. 50, 233 at 55, 467 (Mar. 12, 1969).

⁴⁹ See *American Antitrust*, THE ECONOMIST, Jan. 6, 1979, at 43, 46.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See Robert Ptiofsky, *Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission*, 72 U. CHI. L. REV. 209, 209 (2005) (“In the 1960s, emphasis was on populist values, hostility to ‘Bigness,’ protection of competitors (especially small business) as opposed to the competitive process, and neglect or outright hostility toward efficiencies.”).

⁵³ Dorsey, *supra* note 9.

⁵⁴ William Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413 (1990).

contribution of the Chicago School was to question the per se rules of illegality in favor of a more economic analysis where the overall economic efficiency of a said company's conduct is assessed in balancing the efficiency losses and gains in order to exempt efficiency-enhancing behaviors, and the analysis of price effects (rather than structure effects) became the paramount lens of antitrust analysis. The prohibitions are restricted to efficiency-decreasing behaviors, analyzed though the harm caused to consumers. This consumer welfare framework has become the translation of the economic efficiency proxy for antitrust cases because antitrust laws were deemed to promote economic efficiency as measured by consumer gains.⁵⁵

This “Antitrust Revolution”⁵⁶ is exemplified by the seminal case *Sylvania* of 1977,⁵⁷ where economics entered the courtroom with a focus on the efficiency consequences of every conduct with analysis from a rule of reason perspective. The more economic approach of antitrust policies⁵⁸ has been justified by economic research and has prevailed up to today, as the antitrust laws are prominently economic in nature.⁵⁹ Indeed, as economics findings evolved, so has the law and the judicial reasoning. This is clearly stated by the Supreme Court in *Kimble* where the Court “has felt relatively free to revise [its] legal analysis as economic understanding evolves and to reverse antitrust precedents that misperceived a practice's competitive consequences.”⁶⁰

⁵⁵ See *Will America's trustbusters free the Fortune 500?*, THE ECONOMIST, Apr. 10, 1982, at 83 (quoting William Baxter, then head of the Department of Justice's antitrust division, describing himself as a “fellow traveler” of the Chicago School of free market economics and believing that “the sole goal of antitrust is economic efficiency.” The Economist rebuked Mr. Baxter's interpretation, stating that “antitrust laws are not only concerned with economic efficiency, even though Mr. Baxter wishes it otherwise. They grew out of the great, court-affirmed, populist revulsion around the turn of the century against abuses of corporate power.”).

⁵⁶ See John Kwoka & Laurence White, *Preface to THE ANTITRUST REVOLUTION*, at xi (J. Kwoka & L. White eds., 2009) (arguing that “the term revolution—literally a ‘turnaround’—has come to be applied to a wide variety of events, products, and ideas. This book is about the truly revolutionary transformation of modern antitrust into an economics-based policy.”).

⁵⁷ See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); see also *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

⁵⁸ See generally DANIEL GIFFORD & ROBERT KUDRLE, *THE ATLANTIC DIVIDE IN ANTITRUST: AN EXAMINATION OF US AND EU COMPETITION POLICY* (2015); ROBERT MARKOVITZ, *1 ECONOMICS AND THE INTERPRETATION AND APPLICATION OF U.S. AND E.U. ANTITRUST LAW: BASIC CONCEPTS AND ECONOMICS-BASED LEGAL ANALYSES OF OLIGOPOLISTIC AND PREDATORY CONDUCT* (2013); ROBERT MARKOVITZ, *2 ECONOMICS AND THE INTERPRETATION AND APPLICATION OF U.S. AND E.U. ANTITRUST LAW: ECONOMICS-BASED LEGAL ANALYSES OF MERGERS, VERTICAL PRACTICES, AND JOINT VENTURES* (2014); Edward Mason, *Price and Production Policies of the Large-Scale Enterprise*, 29 AM. ECON. REV. 61 (1939).

⁵⁹ This hold true despite the so-called “post-Chicago synthesis” according to which Chicago School lessons of the 1980's are curbed in order to square them with the existence of market failures. Be that as it may, the economic approach to antitrust laws has prevailed, even if richer and more complex analyses have become necessary given the changing nature of innovation. Post-Chicago synthesis is not a “unified alternative paradigm” and “has not displaced Chicago approach”: instead, post-Chicago is more skeptical of regulatory failures and less confident with self-correcting market failures. See KWOKA, *supra* note 55, at 4-5.

⁶⁰ *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2413 (2015).

Therefore, stickiness to “outmoded, amateur, jerry-built, pseudo-economic propositions”⁶¹ for novel and disruptive business practices would be tantamount to legal pitfalls with respect to the economic rationale of antitrust laws.

In the European Union, competition laws have endorsed, with some time difference, the economics of antitrust as hinted by Chicago School with the so-called “More Economic Approach” to E.U. competition law. Based on German Ordoliberalism, which contends that the competitive process must allow for economic freedoms of market actors to be exerted (even if this means the preservation of a market structure in a similar vein than the SCP paradigm), the 1957 Treaty provisions for E.U. competition law represented the thinking of the time that the economic strength exerted by large companies included a risk of influence over the political process.⁶² This argument resonates today’s antitrust populists of the New Brandeisians.⁶³ A number of initiatives at the European level evidenced the turn towards a more economic approach to E.U. competition policy. Indeed, it is the former European Competition Commissioner Neelie Kroes who has reinforced this more economic approach and started a review process, which led to key documents where economic efficiency has been brought to the cornerstone of E.U. antitrust enforcement.⁶⁴ Be that as it may, the European economic approach⁶⁵ has always been, and remains, much

⁶¹ According to Mr. Baxter, “the sole aim [of antitrust] should be to do the best by the consumer. This, presumably, means letting firms, big and small, go at each other flat out; and stopping them from agreeing to do otherwise. Many will go bust. Others might grow very big; that is all right by Mr. Baxter so long as they keep fighting. Such a view of antitrust will outlast Mr. Baxter’s term (and a sympathetic President Reagan’s term) because it has established itself in American law schools and courts. This academic victory is important because of the way antitrust is enforced in America.” Editorial, *Trusting the Markets More and the Trustbusters Less*, THE ECONOMIST, Dec. 10, 1983, at 61.

⁶² DAVID GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS 240 (1998).

⁶³ See *infra* II.1.3.

⁶⁴ Neelie Kroes commissioned a report from economists which supported “an effects-based rather than a form-based approach to competition policy. Such an approach focuses on the presence of anti-competitive effects that harm consumers, and is based on the examination of each specific case, based on sound economics and grounded on facts” and considered that “[a]n economic approach to Article 82 focuses on improved consumer welfare.” Econ. Advisory Grp. on Competition Pol’y, *An Economic Approach to Article 82*, (July 2005). This report was followed by a speech by the Competition Commissioner. See Neelie Kroes, Preliminary Thoughts on Policy Review of Article 82, Speech at Fordham Corporate Law Institute (Sept. 23, 2005). The Speech ushered a public consultation on a DG Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuse in December 2005. A number of press releases were in the same vein. See European Commission Press Release, Competition: Commission publishes discussion paper on abuse of dominance, IP/05/1626 (Dec. 19, 2005); see also E.U. Commission, *Guidance on the Commission’s Enforcement priorities in applying Art.82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, 2009 O.J. (C 45) 7.

⁶⁵ See generally Esteva Mosso, *The More Economic Approach Paradigm – an Effects-Based Approach to EU Competition Policy*, STRUCTURE AND EFFECTS IN E.U. COMPETITION LAW: STUDIES ON EXCLUSIONARY CONDUCT AND STATE AID 11 (Jörgen Basedow & Wilfried Wurmnest eds., 2011).

more interventionist than its American counterpart.⁶⁶

The economics of antitrust has enabled competition policy to become economically sound and to depart from its populist inceptions (which lasted in the United States until the 1980's and in the European Union until the 2000's). For, "[t]he challenge represented by the Chicago School both sharpened the focus of antitrust and helped to discredit some of its more dubious past pursuits. For example, most students of antitrust are at some time led through cases of the 1960's that endorsed the populist objective of protecting small business and that prohibited mergers between companies with small market shares."⁶⁷ In that regard, the arguments for a revival of antitrust enforcement as it originated before significant economic research findings and before fundamental industrial changes are bound to be invitations for an obsolete (if not populist) enforcement of antitrust in today's world.⁶⁸

II.1.3 Modern Antitrust Populism: The Revival of Populist Roots in the Digital Era

"Is big bad?" asked *The Economist* on the October 9, 1971 about the U.S. Congress investigation led by U.S. Representative Emanuel Celler, Chairman of the House Antitrust Subcommittee, about the rise of conglomerate mergers which sparked popular concerns about a too concentrated American economy. In 1969, 4,550 mergers took place in the United States, spurring a "political will to cope with the problem of conglomeration." The report, *The Economist* writes, criticizes these mergers on populist, not economic, grounds:

One cause for opposition is the populist feeling against big business: 'growth of these vast corporate structures [...] presages imposition of cartel-like structures throughout American business'. However, the case that conglomerates lead to a decrease in competition was not really proven in the report, which is largely a description of the growth and operations of seven conglomerates.

Populism, which spawned modern antitrust laws and prevailed much until the 1980's before fading away due to the ascendancy of the economic approach to antitrust laws, needs to be "revived" according to antitrust populists. Indeed, Senator Elizabeth Warren, among others, argues that:

⁶⁶ For instance, resale price maintenance is still considered to be a restriction of competition by object (akin to a *per se* ban) if no exemption applies whereas a rule of reason applies in the United States; exploitative abuses in the European Union are prohibited whereas U.S. antitrust laws do not sanction exploitative abuse by dominant firms.

⁶⁷ KWOKA & WHITE, *supra* note 55, at 3.

⁶⁸ One of these famous calls is found in Lina Khan's famous article *Amazon Antitrust Paradox*, as well as subsequent work, where the enforcement of predatory pricing as it were applied in the early 20th century is portrayed both as a model and as a guidance for the pricing strategy of Amazon, irrespective of consumer welfare consideration and the novelty of Amazon's pricing mechanism. See Khan, *supra* note 14 at 722; Khan, *Brandeis*, *supra* note 26 at 132; Khan, *Market Power*, *supra* note 26 at 960; Lina Khan, *Capitalism't*, *supra* note 26.

Strong Executive leadership could revive antitrust enforcement in this country and begin, once again, to fight back against dominant market power and overwhelming political power. But we need something else too – and that’s a revival of the movement that created the antitrust laws in the first place. For much of our history, Americans organized and protested against the forces of consolidation.”⁶⁹

This revival is indeed taking place currently. For the last few years, it appears clear that Open Markets Institute’s Director Barry Lynn’s “argument [about antipolitical and anti-economic-concentration objectives rather than consumer prices] has moved from the fringes of politics to the mainstream of the Democratic Party.”⁷⁰ This idea is definitively not new since it harkens back to the populist roots of modern antitrust laws influenced by the Brandeis School, but is appealing politically for voters. This old-new way of thinking

allows Democrats to advance a populist economic agenda without asking the public to swallow large new tax increases or trust the government to competently administer a big new government program. In an era of high and rising distrust in major institutions, using the power of the state to check the power of big corporations may be an easier sell than counting on the state itself to grow.⁷¹

Consequently, the Congressional Democrats unveiled in July 2017 “A Better Deal: Cracking Down on Corporate Monopolies and the Abuse of Economic and Political Power.”⁷² This political manifesto laments on the “growing corporate influence and consolidation” which have led to “reductions in competition, choice for consumers, and bargaining power for workers.”⁷³ To prevent further consolidation and to effectively “crack down” on monopolies, the Better Deal proposes (i) “to prevent big mergers that would harm consumers, workers, and competition;” (ii) “to require regulators to review mergers after completion to ensure they continue to promote competition;” and (iii) “to create a 21st century ‘Trust Buster’ to stop abusive corporate conduct and the exploitation of market power where it already exists.”⁷⁴ This traditional rhetoric of antitrust populists is illustrated by a number of instances. One telling instance is Senator Warren calling for “more competition – and more competitors – to accelerate economic growth (...).”⁷⁵ In order to do so, Senator

⁶⁹ Elizabeth Warren, *Reigniting Competition in the American Economy*, Keynote Remarks at New America’s Open Markets Program Event (June 29, 2016), https://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf [<https://perma.cc/W6R6-YVWY>].

⁷⁰ Matt Yglesias, *Democrats’ push for a new area of antitrust enforcement, explained*, VOX, July 31, 2017, <https://www.vox.com/policy-and-politics/2017/7/31/16021844/antitrust-better-deal> [<https://perma.cc/K4T6-AAAZ>]. On Barry Lynn's influence over antitrust matters as journalist and writer, see his short bio at <https://openmarketsinstitute.org/staff/barry-c-lynn> [<https://perma.cc/ZK3J-R3QC>].

⁷¹ *Id.*

⁷² Democrat Senators, *A Better Deal: Cracking Down on Corporate Monopolies* (July 2017), <https://perma.cc/U3ZS-8K5C>.

⁷³ *Id.* at 1.

⁷⁴ *Id.* at 1.

⁷⁵ Warren, *supra* note 68, at 5.

Warren vouches for a new President to “reinvigorate antitrust law” by (1) disapproving anticompetitive mergers; (2) scrutinizing vertical mergers; and (3) appointing all agency heads who promote market competition.⁷⁶ Senator Warren laments the risks of the few firms that can compete on a specific industry, as she perceives economic concentration as a tool for political concentration and regulatory capture.⁷⁷ The Democrats’ Better Deal is illustrative of the long-standing historical roots of antitrust populism. This Better Deal raises a number of questions and remarks.

First, how can we revamp antitrust rules without mentioning a single time the word “cartel or even the phrase “concerted practices?” Antitrust undoubtedly would be reinvigorated should collusive practices that are unquestionably detrimental to today’s economies be better and more strictly enforced, as opposed to alleged abuses of dominance or controversial mergers which are areas where legal and economic debates are more heated. Why so much emphasis on mergers and market power through unilateral practices without any reference to trusts and cartel behavior? The answer lies in the fact that, because of the effectiveness of antitrust enforcement with respect to Section 1 actions in the United States and Article 101 TFEU in the European Union (cartel and collusive practices), the focus is meant to be on big corporations which have not gained their bigness through trust formations but through first-mover advantages coupled with network effects (as discussed in Part I). This bigness is conflated with the bigness of the trusts in the turn of the 20th century, which paved the way to modern antitrust laws. This fundamental confusion epitomizes the confusion between market power gained through cartel-like behaviors (rightly tackled in the early birth of antitrust laws throughout the 20th century) with market power gained through disruptive innovation and highly competitive firms (controversially tackled with the revival of antitrust populism).

Second, they call for stricter antitrust enforcement, justified by consolidation of economic sectors which is not evidenced as subsequent to abuses of market power. This desire is intended to address key and legitimate issues which are outside the ambit of antitrust policy. Indeed, the Better Deal vouches for “robust antitrust laws and enforcement” and the “need to re-invigorate and modernize our antitrust laws” in order to “level the playing field for American workers.”⁷⁸ This workers’ policy can be better achieved through labor laws, trade union laws, or bolder initiatives such as minimum wages and other regulatory interventions outside antitrust laws. Competition policy is not meant, nor is it effective, to improve wages and individual conditions. The Better Deal does not require a modernization of antitrust laws as

⁷⁶ *Id.* at 6-7.

⁷⁷ Warren, *supra* note 68, at 3 (arguing that “concentrated markets create concentrated political power. The larger and more economically powerful these companies get, the more resources they can bring to bear on lobbying government to change the rules to benefit exactly the companies that are doing the lobbying. Over time, this means a closed, self-perpetuating, rigged system – a playing field that lavishes favors on the big guys, hammers the small guys, and fuels even more concentration.”) This is partly true, but ignores the potential for specific lobbying restrictions and that big is not bad per se. From an antitrust perspective, the focus should be on designing strict lobbying rules rather than changing antitrust rules.

⁷⁸ *Id.* at 3.

proclaimed but underpins more deeply a disdain about the crucial limits of antitrust laws. The Better Deal proposed by U.S. Democratic Senators reveals not only the fundamental confusion between concepts such as consolidation, abuse, and monopoly but also the political meddling into the work of antitrust agencies such as the Federal Trade Commission and Department of Justice. This political interventionism requested by proponents of the Better Deal is at the core of the revival of antitrust populism—what we call *Modern Antitrust Populism*.

Modern Antitrust Populism pares down to a less economic approach to antitrust policy in favor of a more politically-driven agenda.⁷⁹ Antitrust agencies should, according to modern antitrust populists, pursue a number of objectives, which are much wider than economic efficiency fostered through the consumer welfare standard.⁸⁰ There are indeed a number of objectives which are propelled by proponents of a more politically-driven approach. These objectives are: fairness (or, more precisely, redistributive justice in an Aristotelian perspective), the fight against concentration (irrespective of harm to the competitive process), labor market mobility (despite labor laws and regulations essentially aimed at fulfilling this objective), and the fight against monopolization (irrespective of pro-competitive behaviors from “monopolists.”). The proponents of this new approach call themselves members of the New Brandeis School⁸¹—in memory of Justice Louis Brandeis who focused on tackling economic and political power as a goal of antitrust laws. The New Brandeis School aims at reinvigorating the populist era of antitrust laws when Louis Brandeis effectively tackled big companies. Neo-Brandeisians specifically target companies such as Amazon, Google, and Facebook mainly because of their bigness – the view is that the size of these tech companies jeopardizes democracy and economy, as the historical argument goes. Indeed, as Hesse argues, “there are some versions of the popular view that reflexively conclude that ‘big is bad.’ This view sees the rise of large corporations—and the effects they have on communities, culture, and politics—as a proper focus of antitrust enforcement. The big-is-bad view takes aim, as I see it, at the wrong target for antitrust enforcers.”⁸²

Neo-Brandeisians scholars are nicknamed “Hipster Antitrust”⁸³ in order to indicate that they are using old (and obsolete) concepts in a cool way and in the contemporary environment of tech giants.⁸⁴ Coined by Medvedovsky,⁸⁵ “Hipster Antitrust,” in short,

⁷⁹ Carl Shapiro, *Antitrust in a time of populism*, 61 INT’L J. INDUS. ORG. 714, 748 (2018).

⁸⁰ For an interesting account of the rise of economic populism in corporate law, with the view of giving up shareholder wealth maximization norm in favor of populists’ request for the people’s interest, see Sean Bainbridge, *Corporate Purpose in a Populist Era*, 18-09 UCLA SCH. OF L. L. & ECON. RES. P.S. 1 (2018).

⁸¹ See Khan, *Market Power*, *supra* note 26 at 132; see also Khan & Vaheesan, *supra* note 26 at 234.

⁸² Renata Hesse, *And Never the Twain Shall Meet? Connecting Popular and Professional Visions of Antitrust Enforcement*, Keynote Address at the Global Antitrust Enforcement Symposium (Sept. 20, 2016).

⁸³ See Konstantin Medvedovsky, *Hipster Antitrust—A Brief Fling or Something More?* CPI ANTITRUST CHRON., April 2018, at 1-7; see also Joshua Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*. 51 ARIZ. ST. L.J. 293, 369 (2018).

⁸⁴ We shall now refer to Hipster Antitrust, Neo-Brandeisian and antitrust populists indistinctly.

is said to be old wine in new bottles: it fosters the populist roots of the intellectual foundations of Louis Brandeis by merely imitating Brandeis' thought on tech giants like Google. As an "elegant illustration," Lina Khan, one of the leading figures of the New Brandeis School, wrote in a widely read article titled *Amazon's Antitrust Paradox*:

I think Amazon is a particularly elegant illustration of what's wrong with our current antitrust regime, because it shows how a company can come to monopolize certain markets, or at least grow very dominant, but in ways that don't trigger our antitrust laws, and so I use the story of Amazon as a way to tell the larger story about our antitrust laws.⁸⁶

Obviously, discussing the dominance of Amazon on a number of markets was the only goal of that article, seen as the flagship scholarly piece of Hipster Antitrust. Not only does Khan fail to demonstrate that Amazon abused its alleged dominance, but she also fails to provide policy guidance in a pragmatic and realistic way. *Amazon Antitrust Paradox* is therefore illustrative of the big-is-bad motto repeated from the Brandeis School. This article is also illustrative of the lack of antitrust guidelines outside of radical solutions such as nationalization or structural remedies.

Years ago, the antitrust populists called for the break-up of Walmart, the then retail giant.⁸⁷ The reasons beneath the alleged need to break-up Walmart were that Walmart's power was so vast that there was "little need to recount at any length the retailer's power over America's marketplace" and that Walmart "does not participate in the market so much as use its power to micromanage the market, carefully coordinating the actions of thousands of firms from a position above the market."⁸⁸ For these reasons, despite a development through "smart innovation, a unique culture, and a focus on serving the customer,"⁸⁹ the "goliath"⁹⁰ Walmart had to be broken up "into pieces"⁹¹ because, as suggested by Lynn, "we should be confident that [in so doing] we act squarely in the American tradition, as illuminated by the cases against Standard Oil and the A&P."⁹² Years after the natural decline of then-goliath Walmart due to the innovativeness of the new giant Amazon, the structural remedy of breaking up Walmart now appears to be both unnecessary compared to the efficiency of the market forces which led to the rise of Amazon, and inappropriate since the level of competition exerted onto Walmart was much greater than the proponents of the break-up wrongly assumed. Indeed, there was room in the American marketplace for a more innovative and efficient player, such as Amazon, which would trump Walmart as a prime retailer. The lack of analysis of the dynamic forces at play on the American marketplace justified calls for breaking-up of Walmart. Economic efficiency (here,

⁸⁵ Medvedovsky, *supra* note 82, at 1-7.

⁸⁶ Lina Khan, *Capitalisn't*, *supra* note 26.

⁸⁷ See, for instance, Barry C. Lynn, *The Case for Breaking Up Wal-Mart*, ALTERNET (Jul. 24, 2006), https://www.alternet.org/2006/07/the_case_for_breaking_up_wal-mart/ [<https://perma.cc/U8UW-W63M>].

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

dynamic efficiency) revealed to be a much more powerful (and appropriate) tool for weakening the market characteristics of Walmart blamed by antitrust populists.

Equally, revived calls for breaking up Amazon, as well as other tech giants (such as Apple, Facebook, or Google) were ushered in recently for the same reasons:⁹³ allegedly unprecedented bigness, measured by market shares, necessitates the break up of these digital platforms. Be that as it may, the fight against bigness (monopolization) and, what can be called, “fewness” (concentrated power through mergers & acquisitions) remains a crucial endeavor of antitrust populists. This endeavor results from a “simplistic”⁹⁴ and flawed economic reasoning⁹⁵ and a misguided understanding of antitrust goals.⁹⁶

As New York University professor Scott Galloway advised, “it’s time to break up big tech” because “over the past decade, Amazon, Apple, Facebook, and Google—or, as I call them, ‘the Four’—have aggregated more economic value and influence than nearly any other commercial entity in history.”⁹⁷ As explained extensively in his book, *The Four*,⁹⁸ Galloway writes that stock capitalization and market monopolization are sufficient reasons to break up the four main companies he targets – Google, Facebook, Amazon, and Apple⁹⁹. Without antitrust analysis based on evidenced consumer harm and an initial definition of relevant markets, Galloway concludes hastily¹⁰⁰ that “their massive size and unchecked power have throttled competitive

⁹³ See, e.g., John Heskett, *Is It Time To Break Up Amazon, Apple, Facebook, or Google?*, HARV. BUS. SCH. (Dec. 6, 2017), <https://hbswk.hbs.edu/item/is-it-time-to-break-up-amazon-apple-facebook-or-google> [<https://perma.cc/A8UT-QGCU>].

⁹⁴ Debbie Feinstein, then Head of the Bureau of Competition at the Federal Trade Commission, argued at the American Bar Association’s Annual Antitrust Masters Conference in September 2016 that it was “a little simplistic” to perceive increased consolidation as being necessarily harmful to the economy. See Guniganti, *supra* note 9.

⁹⁵ Alleged “abuses” of market power are often seen as anticompetitive behaviors by antitrust populists, although they can often be analyzed as a race to economic efficiency. For instance, Google’s Android business strategy can *a priori* be perceived as being abusive whereas Android phones cut costs compared to Apple’s iPhones, thereby enabling consumers to be offered products of greater productive efficiency. Indeed, the average Android device is a 1/3 of an Apple device. See Owen Andrew, *The History and Evolution of the Smartphone: 1992-2018*, *TextRequest*, August 28, 2018, available at: <https://www.textrequest.com/blog/history-evolution-smartphone/>.

⁹⁶ Economic efficiency for the sake of consumer welfare and innovation is substituted by a number of politically-driven goals as described below.

⁹⁷ Scott Galloway, *Silicon Valley’s Tax-Avoiding, Job-Killing, Soul-Sucking Machine*. *ESQUIRE*, Feb. 8, 2018, https://www.esquire.com/news-politics/a15895746/bust-big-tech-silicon-valley/?src=nl&mag=esq&list=nl_enl_news&date=020818 [<https://perma.cc/5TMC-CY29>].

⁹⁸ SCOTT GALLOWAY, *THE FOUR: THE HIDDEN DNA OF AMAZON, APPLE, FACEBOOK, AND GOOGLE* (Penguin Random House Large Print: New York 2017)

⁹⁹ *Id.*

¹⁰⁰ Hastily, because while recognizing that these four companies do not have “monopolies” in their markets, they should still be broken up irrespective of the evidence of consumer harm. Indeed, Galloway argues in his op-ed that “the Four, by contrast, have managed to preserve their monopoly-like powers without heavy regulation. I describe their power as ‘monopoly-like,’ since, with the possible exception of Apple, they have not used their power to do the one thing that most economists would describe as the whole point of assembling a monopoly, which is to raise prices for consumers.” Galloway, *supra* note 95.

markets and kept the economy from doing its job—namely, to promote a vibrant middle class.”¹⁰¹

Hipster Antitrust’s fight against bigness has populist, but not economic, justifications. Indeed, from rigorous economic analysis, big firms in concentrated markets can compete harshly as long as entry barriers are low. The fight against concentration lies at the heart of antitrust populism toward tech giants.¹⁰² A prime example of a populist perspective of an antitrust matter is given by the letter of U.S. Congressman David N. Cicilline (D-RI) of the House Judiciary Antitrust Subcommittee calling for a hearing on Amazon’s proposed acquisition of Whole Foods.¹⁰³ While not questioning the “legality” of the merger, Cicilline “heard concerns” that this merger “in terms of size, consumer reach . . . may potentially discourage innovation and entrance into emerging markets, such as grocery and food delivery.” Even though “several leading antitrust law scholars have suggested that the transaction appears unlikely to injure competition or consumers,” Cicilline notes, he writes that “this transaction occurs during a long period of economic concentration that has already caused a decline in workers’ wage mobility.”¹⁰⁴ Furthermore, he sides with those who “have expressed concerns that the proposed acquisition will result in additional consolidation in the retail sector, erode American jobs through increased automation, and threaten local communities through diminished economic opportunity for hardworking Americans.”¹⁰⁵

Hipster Antitrust, or antitrust populism, is worried about economic (and thus, political) concentration which would derail economic prosperity and opportunities. The main remedies are structural, such as breaking up big tech companies. More generally, some actions have been advocated by Hipster Antitrust’s ambassadors K.

Therefore, in the absence of proper antitrust analysis where prices are analyzed and potential anticompetitive practices harming consumers are evidenced, Galloway vouches for a break-up of big tech because of their bigness.

¹⁰¹ *Id.*

¹⁰² Concentration is said to endanger the very basic foundations of democracy. *See, e.g.*, Elizabeth Warren, Reigniting Competition in the American Economy. Keynote Remarks at New America’s Open Markets Program Event, (June 29, 2016), at 10 https://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf [<https://perma.cc/K448-Z4SV>] (arguing that “[l]eft unchecked, concentration will destroy innovation. Left unchecked, concentration will destroy more small companies and start-ups. Left unchecked, concentration will suck the last vestiges of economic security out of the middle class. Left unchecked, concentration will pervert our democracy into one more rigged game.”).

¹⁰³ Letter from Rep. David Cicilline to the Hon. Tom Marino, (July 13, 2017), https://cicilline.house.gov/sites/cicilline.house.gov/files/images/Amazon_Whole_Foods_Acquisition.pdf [<https://perma.cc/UC4G-8CFC>].

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* In the vein of antitrust populists who vouch for antitrust to achieve many political objectives against the economic objective of consumer welfare, Cicilline concludes his letter by stating that “although the role of employment and inequality in antitrust enforcement has declined in recent decades, the Subcommittee should have an active oversight role in determining whether this trend services the public interest, is faithful to the legislative intent of the antitrust laws, or whether additional enforcement is warranted to reverse the harmful effects of consolidation on workers and labor inequality.” *Id.*

Sabeel Rahman and Lina Khan: “revise merger guidelines; reinvigorate agency action; pass new antitrust law; reduce platform power and data consolidation with antitrust enforcement; employ public utility regulation.”¹⁰⁶ New Brandeisians have developed a so-called “neo-Brandeisian agenda” against big tech companies in order to tame their fears of concentration problem¹⁰⁷ and, more precisely, in order to “help us return to an economic vision that prizes dynamism and possibility, and ultimately attunes economic structure to a democratic society.”¹⁰⁸ This agenda, aimed at reviving the pre-Chicago style antitrust enforcement without consideration for the economic knowledge amassed during the second half of the 20th century, revolves around:

- “broader and tougher merger standard, especially when it comes to the largest, most important mergers.” Despite the fact that to “abandon economic analysis entirely would be implausible,” it is called to “consider a return to structural presumptions, such as a simple per se ban on mergers that reduce the number of major firms to less than four.”¹⁰⁹
- “democratization of the merger process,” because “merger reviews are too important to the public to be so secret.” This “politicization of merger review” is completely accepted because “big mergers are political, and the idea that the public or its representatives be kept in the dark is hard to support.”¹¹⁰
- “big cases” where “America can borrow from Europe,” especially its “scrutiny on ‘big tech,’ including the case against Google’s practices . . .” For, “European antitrust . . . should serve as a model for American enforcers and for the rest of the world;”¹¹¹
- “breakups” of big tech companies because, for instance, “the simplest way to break the power of Facebook is breaking up Facebook.” More generally, it is argued that “breakups or structural remedies are, effectively, self-executing, and thereby, a much cleaner way of dealing with competition problems.”¹¹²
- “market investigations” that “would serve as a particularly effective tool for stagnant and longstanding but not particularly abusive or aggressive monopolies or duopolies” and the adoption of rules “designed explicitly to weaken obvious barriers to market entry or otherwise to promote a healthy competitive process;”¹¹³
- “antitrust’s goals” should be revamped in order to give up the consumer welfare standard in favor of the wider goal of the “‘protection of competition’ standard [which] is not to break new grounds but to return to what the democratic majority asked for.”¹¹⁴ This would mark “a return to Brandeis’s original ‘rule of reason’ which was far more concerned with the competitive

¹⁰⁶ Sabeel Rahman, & Lina Khan, *Restoring Competition in the U.S. Economy, Untamed: How to Check Corporate, Financial, and Monopoly Power*, A ROOSEVELT INSTITUTE REPORT (2016), 9 <http://rooseveltinstitute.org/wp-content/uploads/2016/06/Untamed-Final-5.10.17.pdf> [<https://perma.cc/Y5ZY-CJEE>].

¹⁰⁷ TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 127-139 (2018).

¹⁰⁸ TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 138 (2018)

¹⁰⁹ TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 128-29 (2018).

¹¹⁰ *Id.* at 130.

¹¹¹ *Id.* at 131.

¹¹² *Id.* at 133.

¹¹³ *Id.* at 134.

¹¹⁴ *Id.* at 137.

process” since any restraint that would suppress or even destroy competition would be deemed to be illegal.¹¹⁵

This “strident populist rhetoric” proposed by Wu and other New Brandeisians does not bring a general principle to antitrust analysis.¹¹⁶ Antitrust laws do not necessarily tackle monopolies and concentrated power in some areas of industries, but only abuses of market power by dominant firms. One does need to be “big” (thus dominant) to abuse one’s market power—but bigness does not necessarily induce either abuses of dominance or a lessening of the competition level. Indeed, a monopoly—if it ever existed as described in textbooks—can have competitive behavior as long as barriers to entry on the market are kept low. Monopolization itself is not an antitrust infringement. Indeed, “because antitrust exists to protect competition, not competitors, an antitrust complainant cannot base a claim of monopolization on the mere fact that its business was injured by the defendant’s conduct.”¹¹⁷ Furthermore, the Internet age is conducive to the rise of giants which are nevertheless “gentle” because technological monopolies (or “technopolies”) evolve in an industry which has a “propensity to coalesce around one winner” imposing accepted “standards” and enjoying a market position on “their ability to out-innovate their peers.”¹¹⁸ In that regard, it is true that:

Markets can become concentrated for benign reasons. For example, where fixed costs are high, new entry may be sufficiently unattractive to all but a handful of firms. Alternatively, network effects could lead one firm to gain all or the lion’s share of a market for a time. Moreover, so long as large firms do not wield their power to exclude new rivals, charging higher prices could accelerate the process by which new firms challenge the dominant firms of today. In other words, antitrust enforcers don’t go after firms that become large just because they are good at competing.¹¹⁹

Antitrust agencies should, according to antitrust populists, target their efforts to maximize labor mobility, rather than to foster economic efficiency and consumer welfare. For instance, Democratic Senator Cory Booker epitomizes this request when, while addressing the Federal Trade Commission as well as the Department of Justice via an open letter on November 1, 2017, he writes that, “your Agencies have not prioritized the responsibility to ensure that workers have meaningful choices that allow them to fairly bargain among potential employers.”¹²⁰

¹¹⁵ *Id.* at 138.

¹¹⁶ Richard Epstein, *Beware of Populist Antitrust Law*, FORBES (Jan. 23, 2019), <https://www.forbes.com/sites/richardepstein/2019/01/23/beware-of-populist-antitrust-law/%237b05fdbb586b> [<https://perma.cc/W2F7-TSAN>].

¹¹⁷ Tom Lambert, *Commissioner Wright’s McWane Dissent Illuminates the Law and Economics of Exclusive Dealing*, TRUTH ON THE MKT. (Feb. 17, 2014), <https://truthonthemarket.com/2014/02/17/commissioner-wrights-mcwane-dissent-illuminates-the-law-and-economics-of-exclusive-dealing/> [<https://perma.cc/72VM-JZ7H>].

¹¹⁸ Editorial, *Gentle giants*, THE ECONOMIST (Dec. 21, 1996).

¹¹⁹ Hesse, *supra* note 81.

¹²⁰ Letter from Sen. Chris Booker to the FTC and DOJ Regarding Monopsony (Nov. 1, 2017), <https://fr.scribd.com/document/363201855/Monopsony-Letter> [<https://perma.cc/F9GZ-5QH8>].

Labor market mobility as an objective to antitrust laws pushes for monopsony powers¹²¹ to be tamed by strong regulatory interventions from antitrust agencies. These concerns deriving from monopsony powers of corporations echo the historical and populist roots upon which U.S. antitrust laws have been designed. Indeed, the fear that railroad workers could suffer from the monopsony powers of the railroad companies justified the birth of modern U.S. antitrust laws and regulations. Kwoka & White have written, no later than in 2009, that:

advances in economic understanding continually improve the rationality and consistency of antitrust policy. As these advances gain acceptance, they progressively narrow the range within which policy decisions are made. That is, by demonstrating that some propositions are correct, lack generality, or suffer from other defects, the advances limit the degree to which future policy can ever revert to those defective propositions. That does not imply complete agreement about the purpose course of antitrust. A considerable range of acceptable policy remains, and there is—and will be—legitimate disagreement over goals and strategies within that range. But to an increasing extent that range is bounded by economics and will shrink as our economic understanding grows. The antitrust revolution is secure.¹²²

Ten years later, with the rise of tech giants which spurred the Modern Antitrust Populism call for a return to pre-Chicago School teachings, one can hardly assert that economic “advances gain acceptance:” the antitrust revolution is no longer secure. A risk of disregarding Chicago School teachings in favor a structure-based approach grounded on populist objectives of antitrust laws can hardly be underestimated. This risk holds reality from the language of elected politicians calling a return to a more politicized antitrust policy. It is the illustrations of this language we shall now decipher.

II.2 The Rhetoric of Antitrust Populism

Democrats, with their Better Deal agenda issued in 2017, expressed renewed interest on antitrust matters to advance their goal of workers’ interests and small businesses through competition policy.¹²³ More generally, the populist tone of President Trump

¹²¹ Monopsony is defined as the mirror image of a monopoly: whereas monopolists use seller (or market) power to raise prices, monopsonists use buying power to lower prices. See Jeffrey Harrison, *Complications in the Antitrust Response to Monopsony*, GLOBAL LIMITS OF ANTITRUST (D. Sokol & I. Lianos eds., Stan. Univ. Press 2012). Equally, monopoly and monopsony are said to be “symmetrical distortions of competitions.” See, *Vogel v. Am. Society of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984). Monopsonies induce a misallocation of resources, wealth transfers, and associated consumer harm whenever the buying power of monopsonies is used in a detrimental manner. The best example of monopsony markets remains the labor market where, classically, employees are much less powerful and more numerous than employers in order to bargain over prices (here, income and working conditions).

¹²² Jonathan Kwoka & Laurence White, *Preface to THE ANTITRUST REVOLUTION* at 5 (Kwoka & L. White eds., Oxford Univ. Press).

¹²³ Democrats are said to be “ditching centrism for economic populism” in general and for antitrust matters in particular. See, *The Democrats are Ditching Centrism for Economic Populism*, THE ECONOMIST (Sept. 21, 2017), <https://www.economist.com/united->

on antitrust matters both stimulates and corroborates the claims prefigured by the New Brandeisians (II.2.1). In the European Union, the political tone of the Commissioner Vestager conceptualizes an anti-bigness perspective based on a precautionary approach to antitrust laws (II.2.2).

II.2.1 Trump Antitrust

In the United States, the debate has reached presidential electoral politics. Various presidential candidates have included in their platforms calls to replace the consumer welfare standard, proposals to break up the largest tech firms, or to change merger law to more aggressively police consolidation regardless of its impact on consumers.¹²⁴ Even Republicans have joined the call.¹²⁵ In Europe, E.U. Commissioner Margrethe Vestager routinely adopts rhetoric emphasizing the importance of “fairness” in competition while levying record fines against large firms—with what some have argued is a special emphasis on large American technology companies.¹²⁶ Politicians across the ideological spectrum have found something attractive about the new antitrust populism, whether described as “Hipster Antitrust” or “Neo-Brandeisian.”¹²⁷

It is crucial for practitioners and academics alike to avoid repeating history’s mistakes. There are parallels between this latest wave of populism and pre-1970’s American antitrust jurisprudence, when courts struggled with the Sherman Act’s broad mandate and ruled based on vague socio-political goals. The earliest courts understood antitrust law as a protection for small businesses and “worthy men,” even if it meant sacrificing lower prices for consumers.¹²⁸ In 1945, Judge Learned Hand declared “great industrial consolidations are inherently undesirable, regardless of their

states/2017/09/21/the-democrats-are-ditching-centrism-for-economic-populism
[<https://perma.cc/56PK-2585>].

¹²⁴ See, e.g., Sen. Klobuchar’s remarks: “We need to change the laws so they’re looking at other factors, like monopsony... we need to change the standard. That would be an appropriate thing to do.” In Brian Fung, Sen Amy Klobuchar: “We have a major monopoly problem”, *The Washington Post*, March 5, 2019, available at: <https://www.washingtonpost.com/technology/2019/03/05/sen-amy-klobuchar-we-have-major-monopoly-problem/>. Elizabeth Warren, *supra* note 99, at 7; see also, Elizabeth Warren, *Here’s How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019), <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c> [<https://perma.cc/3F94-WBWF>].

¹²⁵ See, e.g., Sen. Hawley who said that “[w]e need to think about more than just breaking [tech companies] up or making them smaller ... We also need to think about the underlying model.” Mark Sullivan, *Big Tech’s Toughest Critic in Washington*, FASTCOMPANY (Jun. 15, 2019), <https://www.fastcompany.com/90363935/big-techs-toughest-critic-in-washington-just-might-be-this-freshman-gop-senator-from-missouri> [<https://perma.cc/5242-L7K3>].

¹²⁶ See Margrethe Vestager remarks: “We can’t let [innovation and disruption] override our most fundamental values – values like freedom, and fairness, and democracy.” Margrethe Vestager, *An Innovative Digital Future*, Speech at Digital Czech Republic, Prague (Feb. 8, 2019), https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/innovative-digital-future_en [<https://perma.cc/8ZEQ-V89E>].

¹²⁷ See Wright et al., *supra* note 82 at 294; Seth B. Sacher & John M. Yun, *Twelve Fallacies of the “Neo-Antitrust” Movement*, Geo. Mas. L. & Econ. Res. Paper N°19-12 at 3.

¹²⁸ *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 323 (1897).

economic results.”¹²⁹ The caselaw that developed from these attitudes established crude bright-line rules based on market share structural presumptions, ushering a period of enforcement now almost universally recognized as detrimental to consumers.¹³⁰

The “populist”¹³¹ Donald Trump has expressed clear views on antitrust matters. Trump Antitrust is characterized by a populist critique of the benefits of disruptive innovation delivered by tech firms. This view of antitrust populism is nurtured with a discourse by politicians which favors the “average citizen” against the economic culture of the elites. A telling illustration is obviously President Trump who condemned traditional antitrust policies. Indeed, as Guniganti recaps Trump’s electoral message:

Trump’s positioning as a rogue outsider gripped the imagination of voters who felt the existing economic and political system had failed them. He attacked policies that had united recent presidents of both parties – such as the lowering of trade barriers and the welcoming of immigrants – as detrimental to the interests of average Americans. This included the current mainstream antitrust view of vertical deals as potentially procompetitive, and of online retailers as a desirable source of competition. Regardless of his motivations and the likelihood that his administration will follow through on those campaign comments, his pre-election remarks suggest that under Trump, populism will infiltrate the margins of US antitrust enforcement, and do away with a generation of neoliberal and laissez-faire competition policy.¹³²

The “outsider” campaign run by Trump when applied to antitrust matters meant that the bipartisan antitrust consensus¹³³ could easily be targeted by Trump, who advocated for a fight against concentration and big companies, and more wealth redistribution to workers and the protection of small businesses in antitrust cases. For, “the popular media narrative that Trump was carried into office on a rising wave of populism that shunned corporate power and big business consolidation” has been evidenced by a number of Trump’s positions.¹³⁴ For instance, Trump’s anti-establishment leitmotif resonated during the presidential campaign when he opposed

¹²⁹ *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

¹³⁰ William Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. OF ECON. PERS. 43, 51 (2000) (“Most commentators today share [Justice] Stewart’s gloomy assessment of merger jurisprudence in the 1960s and view the Supreme Court’s antipathy toward mergers and doubts about market forces as indefensible.”).

¹³¹ See Editorial, *What is populism?*, THE ECONOMIST, Dec. 19, 2016 (describing Donald Trump as “the populist American president-elect”).

¹³² Guniganti, *supra* note 9

¹³³ The lack of change in antitrust policy when U.S. administrations change is “grounded” in the general consensus about the “contemporary economic principles” such as economic efficiency and the consumer welfare standard. See Maureen K. Ohlhausen, Comm’r, Fed. Trade Comm’n, *International Convergence, Competition Policy and the Public Interest*, Mar. 8, 2014, <https://www.ftc.gov/public-statements/2014/03/international-convergence-competition-policy-public-interest> [<https://perma.cc/RK66-Y6LY>].

¹³⁴ Guniganti, *supra* note 9.

AT&T's vertical deal with Time Warner.¹³⁵ Two weeks before election day, the announcement by AT&T of a vertical deal with Time Warner spurred fury by Trump, who denounced the allegedly corrupted American institutions and American media.¹³⁶ However, the economic rationale of merging AT&T with Time Warner was clear, since the combined firms could be a more efficient and effective Netflix competitor.

Trump's stance on Amazon is not less infuriated. Calling Amazon "a huge antitrust problem," Trump designated Amazon as the perpetrator of the end of many of its brick-and-mortar rivals. As the *Washington Post* is owned by Amazon's CEO Jeff Bezos, Trump has not hesitated to revoke the *Post*'s press credentials in order, to not be "sued for monopolistic tendencies that have led to the destruction of department stores and the retail industry."¹³⁷ According to Trump, deals leading to too much concentrated power "destroy democracy."¹³⁸ Indeed, Trump's antitrust view of Amazon is much more motivated by the political power of Jeff Bezos through the *Washington Post* than by economically sound analysis. It is well-established that "the Trump administration has been committed in punishing wealthy capitalists who publicly criticize him. For example, Trump threatened to use antitrust laws to punish Amazon, in retaliation to the billionaire Jeff Bezos, who also owns *The Washington Post* that has been persistent in its investigations of Trump's scandals."¹³⁹

Trump Antitrust materializes these critiques by micro-managing antitrust matters with public calls to either block merger deals or by blame firms for anticompetitive conduct, all without proper antitrust analysis by his Office or by any agency. Trump Antitrust is characterized by a direct causal relationship, according to President Trump, between bad antitrust policy—meaning, self-restraint antitrust stance by

¹³⁵ A call echoed by left-wing populist Bernie Sanders, who declared that the Obama Administration "should kill the Time Warner/AT&T merger." Greg Evans, *Bernie Sanders: Obama Administration "Should Kill" The AT&T-Time Warner Deal: "Higher Prices & Fewer Choices"*, DEADLINE (Oct. 23, 2016, 3:02 PM), <https://deadline.com/2016/10/bernie-sanders-att-time-warner-tim-kaine-donald-trump-1201841354> [<https://perma.cc/69AF-G8U7>].

¹³⁶ At a rally in Gettysburg, Donald Trump argued, "they're trying desperately to suppress my vote and the voice of the American people. As an example of the power structure I'm fighting, AT&T is buying Time Warner and thus CNN, a deal we will not approve in my administration because it's too much concentration of power in the hands of too few." Emily Stephenson, *Trump Uses Policy Speech To Attack Media, Promises To Sue Accusers*, REUTERS (Oct. 22, 2016, 10:26 AM).

¹³⁷ Cited by Howard Harrison, *The Great Divide: Story of the 2016 U.S. Presidential Race*. Indianapolis: Dog Ear Publishing, p.225.

¹³⁸ The 2011 merger between Comcast and NBCUniversal was considered by Trump to concentrate "far too much power in one massive entity that is trying to tell the voters what to think and what to do [W]e'll look at breaking that deal up, and other deals like that. This should never, ever have been approved in the first place, they're trying to poison the mind of the American voter." Marcus Baram, *President Trump could block AT&T/Time Warner merger*, FAST COMPANY (Nov. 18, 2019, 3:40 PM), <https://www.fastcompany.com/4024540/president-trump-could-block-atttime-warner-merger> [<https://perma.cc/XD4K-XAYM>].

¹³⁹ Salvador S. Regilme, *The decline of American power and Donald Trump: Reflections on human rights, neoliberalism, and the world order*, 102 GEOFORUM 157, 160 (2019); See also Jeet Heer, *Why Conservatives Tolerate Trump's Crony Capitalism*, THE NEW REPUBLIC (March 30, 2018), <https://newrepublic.com/article/147701/conservatives-tolerate-trumps-crony-capitalism> [<https://perma.cc/RX5Q-SU9W>].

agencies – and the state of American politics and vote. Indeed, as he links the media “oligopolies” with the Washingtonian establishment of U.S. politics, Trump vows to revamp antitrust policy in order to shake up the U.S. political process. He wants to “break up the new media conglomerate oligopolies” that have “gained enormous control over our information, intrude into our personal lives, and in this election, are attempting to unduly influence America’s political process.”¹⁴⁰

II.2.2. Vestager Antitrust

The strong stance taken by Vestager against tech giants in general and against Google in particular has sparked comments, if not apprehensions, about the use of E.U. competition policy for politically-motivated antitrust rules vis-à-vis more innovative U.S. digital platforms. It is indeed true that:

dispute is arising within the legal case from the EU’s exercise of political power against the United States technological innovation. European Commission’s charges against Google have highlighted the gap between the scarcity of tech innovation in the EU and the seemingly harsh, globally spreading innovation from the US companies . . . The Google case also allows the E.U. to flex its economic muscles to stress its policy preferences in other areas of digital policy . . . In this sense, competition law reflects not only fundamental E.U. principles but also a source of European power in international relations.¹⁴¹

Whereas the European Commission has always required Member States to establish their own national independent agencies staffed with experts and isolated from party-politics, the main responsibility for E.U. competition policy falls to an elected politician with no independent agency at the E.U. level. Indeed, the Competition Commissioner is a member of the cabinet, which is the European Commission elected by the European Parliament. Against its own recommendations towards Member States, the European Commission does not have an “FTC-like” agency where antitrust can be independently (yet accountably) enforced. This politicization of the European antitrust is particularly apparent with the change of political tone from one Competition Commissioner to another.

As the first-ever appointed economist in this role from 1995 until 2004, Competition Commissioner Mario Monti ushered a period of economically literate Commissioners such as Neelie Kroes (2004-2010) and Joaquin Almunia (2010-2014). With the arrival, in 2014, of this “seasoned politician,”¹⁴² Margraethe Vestager has brought politics into the Directorate General Competition like never before. A professional politician since age 21 and Danish Minister of Education at age 29, Vestager became

¹⁴⁰ Peter Navarro, Trump’s senior economic advisor, quoted in Rebecca Savransky, Trump will “break up the new media conglomerate oligopolies” camp says, *The Hill*, October 23, 2016, available at: <https://thehill.com/blogs/ballot-box/presidential-races/302420-trump-will-break-up-the-new-media-conglomerate> .

¹⁴¹ Himanshu Handa, *Abuse of Dominance in Cyberspace: A Critical Analysis*, 1 NAT. J. OF CYB. SEC. L. 1, 5 (2018).

¹⁴² Nicolas Petit, *EU engaged in antitrust gerrymandering against Google*, *THE HILL*, Mar. 31, 2018.

Danish Minister of Economic and Interior Affairs in 2011 before becoming European Competition Commissioner in 2014. Her portrayal as “the rich world’s most powerful trustbuster”¹⁴³ helps advance her political career as she aims to become the President of the European Commission from 2019 until 2024.¹⁴⁴ In that regard, her revolutionary decisions against big tech companies cannot be seen as void of political motives:

Margrethe Vestager, the EC antitrust chief, is reported to be eyeing a top E.U. job in 2019. A seasoned politician, Vestager knows that the payoffs of whacking a tech platform are immense in a continent rife with popular distrust against corporate bigness, U.S.-style capitalism and tech platforms’ permission-less attitude toward innovation.¹⁴⁵

Her decisions against big tech companies can rightly be described as “revolutionary” in the sense that they constituted a U-turn from the stance of her predecessor, Joaquin Almunia. Google investigations provide a telling illustration of such a U-turn. Commissioner Almunia opened investigations against Google in November 2010 based on complaints by U.K. shopping website Foundem, Microsoft Corp.’s Ciao unit, and French search service eJustice for abuse of dominance in online search. The 1st of February 2013, Commissioner Almunia announced that it closed the case as the Commission reached settlement with Google¹⁴⁶. When she arrived in office in 2014, Vestager re-opened investigations against Google. Vestager fined Google three times with the highest fines ever imposed by a European Competition Commissioner: *Google Shopping* fined €2.42 billion in 2017 for abusing dominance as a search engine by giving illegal advantages to its own comparison shopping service;¹⁴⁷ *Google Android* fined €4.34 billion in 2018 for illegal practices regarding Android

¹⁴³ Editorial, *Is Margrethe Vestager Championing Consumers or Her Political Career?*, THE ECONOMIST, Sept. 14, 2017.

¹⁴⁴ Mehreen Khan & Rochelle Toplensky, *Vestager Discloses Ambition to Become Next EU Commission Chief*, FINANCIAL TIMES, Mar. 21, 2019. However, her recent prohibition of the Alstom-Siemens merger has created a Franco-German obstacle for her nomination following European elections. Thus, the politicization of antitrust decisions is further evidenced. See also Charlie Duxbury & Maia de La Baume, *Vestager Faces Brutal Obstacle Course to Succeed Juncker*, POLITICO, Mar. 20, 2019.

¹⁴⁵ Petit, *supra* note 136.

¹⁴⁶ Joaquin Almunia, Statement on Google Investigation, Speech on the 5th of February 2014, available at:

https://ec.europa.eu/commission/presscorner/api/files/document/print/en/speech_14_93/SPEECH_14_93_EN.pdf

¹⁴⁷ Eur. Comm., *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service*, Press Release IP/17/1784 (June 27, 2017), http://europa.eu/rapid/press-release_IP-17-1784_en.htm [https://perma.cc/GXZ4-JC2C].

mobile devices to strengthen dominance of Google's search engine;¹⁴⁸ *Google AdSense* fined €1.49 billion in 2019 for abusive practices in online advertising.¹⁴⁹

More generally, her rhetoric is a return to politicized E.U. competition policy, where its goals are multiple rather than focused on consumer welfare as Commissioners Monti and Kroes in the early 2000s favored with the rise of the so-called “more economic approach” to E.U. competition policy by enforcers. Indeed, Vestager's rhetoric is exemplified in a number of instances where the politicization of the E.U. competition enforcement is proudly embraced. True, Vestager argues that “innovation and disruption aren't positive in themselves . . . we can't let them override our most fundamental values - values like freedom, and fairness, and democracy . . . Because in the end, it's not technology that will decide our future. It's us.”¹⁵⁰ Fairness seems to be the most fundamental value for competition policy, even though this may ignore the winner-take-all economic characteristic of the digital economy as discussed above:

[T]he most fundamental [principle for Europe] is fairness. That belief in fairness is a vital part of what it means to be European. We welcome success. But we don't believe the winner should take it all. We don't believe a few people should get all the opportunities, while almost one in four Europeans are at risk of poverty or social exclusion. We don't believe that Europe's wealth and power should be concentrated in the hands of just a few companies.¹⁵¹

This fairness approach to competition rules unsurprisingly calls for “strong competition enforcement,” i.e. regulatory interventionism of antitrust policy:

History is full of examples of the dark turns of societies can take if their citizens are filled with anger fueled by injustice. But it can also be a force you can use to try to change things to become more fair. And the point is we all have a responsibility to help build a fairer society: Politicians, law enforcers, businesses and citizens. From my point of view, enforcing

¹⁴⁸ Eur. Comm., *Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine*, Press Release IP/18/4581 (July 18, 2018), http://europa.eu/rapid/press-release_IP-18-4581_en.htm [<https://perma.cc/569C-KGRT>].

¹⁴⁹ Eur. Comm., *Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising*, Press Release IP/19/1770 (Mar. 20, 2019), http://europa.eu/rapid/press-release_IP-19-1770_en.htm [<https://perma.cc/K3Y7-QAQQ>].

¹⁵⁰ Margrethe Vestager, Eur. Comm'r, *An innovative digital future*, Speech at the Digital Czech Republic Conference (Feb. 8, 2019), https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/innovative-digital-future_en [<https://perma.cc/F4EH-64YP>].

¹⁵¹ Margrethe Vestager, Eur. Comm'r, *A shared vision for Europe's future*, Speech at the “What is the Future of Europe?” Conference (Nov. 26, 2018), https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/shared-vision-europes-future_en [<https://perma.cc/QKL6-RM5A>].

strong competition rules by the book is indeed part of that responsibility.¹⁵²

Vestager also hints to an essential facility approach to competition when she argues that “competition can't work if just a few companies control a vital resource that you need to be able to compete—and if they refuse to share it with others.”¹⁵³ What types of “vital resources” of the digital economy is she referring to? We cannot know, although she hints that “data is becoming one of those vital resources.”¹⁵⁴ These “vital resources” are discussed in her speech below:

[Competition rules] won't change the fact that big online platforms will still have a lot of power in our lives. In this modern world, we depend on those platforms, almost as much as we depend on the electricity or the water that run into our homes. And we need to discuss what the dependence means for us. We need to think about the rules that we want to put in place—besides the competition rules—to make sure platforms behave in a way that's good for society. Because in the end, the effect digital technology has on our lives is not really a question about technology at all. It's a question about society—about the way we respond to the changes that technology is causing to our world.¹⁵⁵

Therefore, these vital resources cause dependency, which itself requires an overhaul of our regulatory tools in order to avoid these “big online platforms” controlling our lives. This benign objective is better fit to the ambits of data regulation, as antitrust rules are ill suited to pursue such goals. The bigness of digital platforms is essential to the rhetoric of Vestager, as portrayed in the following excerpt:

The businesses that have become the Internet's giants have changed too. They're not startups any more, fighting for a toehold among big, powerful companies. Now, they themselves are the big beasts. And if they deny today's startups a chance to do what they did, and carve out a market by doing things differently, then we all lose out on the benefits of innovation can offer.¹⁵⁶

¹⁵² Margrethe Vestager, Eur. Comm'r, Competition and fairness in a digital society, Speech at the AmCham EU 35th Competition Policy Conference (Nov. 22, 2018), https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-fairness-digital-society_en [<https://perma.cc/295F-WX78>].

¹⁵³ Margrethe Vestager, Eur. Comm'r, Making the data revolution work for us, Speech at the Mackenzie Stuart Lecture (Feb. 4, 2019), https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/making-data-revolution-work-us_en [<https://perma.cc/34Z6-FCYB>].

¹⁵⁴ *Id.*

¹⁵⁵ Margrethe Vestager, Eur. Comm'r, New Technology as a Disruptive Global Force, Speech at the Youth and Leaders' Summit (Jan. 21, 2019), https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/new-technology-disruptive-global-force_en [<https://perma.cc/HTL9-G2MZ>].

¹⁵⁶ Margrethe Vestager, Eur. Comm'r, Protecting Consumers in a Digital World, Speech at the Slush Conference (Dec. 4, 2018),

The idea of a “harm to innovation” caused by big business is circulated without evidence such as, for instance, the idea that big businesses buy competitors out in order to shun innovations (whereas they do indeed buy them out in order to exploit and foster these innovations). Vestager argues that “promising ideas from smaller innovators can disappear, not because consumers don’t like them, but because bigger businesses buy up those innovations just to close them down.”¹⁵⁷ Most strikingly, as Competition Commissioner, in none of the speeches reviewed and analyzed did Vestager use the word “efficiency” or the seminal expression “consumer welfare.” She always promoted “open and fair competition” which is so vague as to comprehend any kind of political objective of competition policy.

II.3 Enough of Experts: Break-up tech giants!

Antitrust populists fight the so-called “technocratic antitrust,”¹⁵⁸ as Harvard Law Professor Einer Elhauge calls it, which is allegedly prone to under-enforcement.¹⁵⁹ Antitrust, with the economic-dominated perspective derived from the Chicago School, has become an area of law requiring economic expertise. The level of expertise in antitrust matters has continuously increased throughout the years.¹⁶⁰ With the populist attack on establishments from many alike – including scholars, journalists, media, and of course “experts,” the bone of contention revolves around how much place experts have taken out of politicians’ margin of maneuver. Antitrust populism pares down to anything against “technocratic antitrust.”¹⁶¹ The economic approach to antitrust has paved the way for independent agencies that are staffed with experts, insulated as much as possible from party politics.¹⁶² This was justified by the complexity of

https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/protecting-consumers-digital-world_en
[<https://perma.cc/5LG4-X8KP>].

¹⁵⁷ Margrethe Vestager, Eur. Comm’r, Shaping Competition Policy in the Era of Digitisation, Speech at the Conference: Shaping Competition Policy in the Era Of Digitisation (Jan. 17, 2019), https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/shaping-competition-policy-era-digitisation_en [<https://perma.cc/LP3G-MWQQ>].

¹⁵⁸ John Briggs, ‘Populist Antitrust’: A Deviant Mutation or an Overdue Correction? An Interview with Einer Elhauge (Harvard Law School) by John Briggs (Axinn), Interview at the 6th Bill Kovacic Antitrust Salon Conference: “Where Is Antitrust Policy Going?” (Sept. 24 2018).

¹⁵⁹ *Id.* (Elhauge arguing that “technocratic antitrust has also become so complicated that it is no longer understandable to many, including not only the electorate and juries, but also judges armed with only general legal sophistication. This lack of understandability contributes to underenforcement.”).

¹⁶⁰ *See* Hesse, *supra* note 81 (arguing that “for the last several decades of the twentieth century, antitrust functioned largely as a practice of experts – economists and economics-savvy lawyers – confined to the halls and conference rooms of the expert agencies (...) But that sort of conversation is one that resonates very little – if at all – with those engaged in the straightforward, popular dialogue about the dangers of increasing corporate concentration. The language of economic theory does not sound like the language of economic fairness that is the raw material for most popular discussions about competition and antitrust.”).

¹⁶¹ Briggs, *supra* note 151.

¹⁶² Alfonso Lamadrid de Pablo, *Competition Law as Fairness*, 8 J. OF EUR. COMP L. & PRAC. 147, 147 (2017).

economic reasoning that conflicted with the apparent simplicity of political discourse (justified in alike manner as the case for independent monetary policies).

Today, given the rise of antitrust populism, “there is a growing risk that [antitrust matters] may be taken away from experts or that experts will yield to the pressure.”¹⁶³ Of course, this criticism is raised on behalf of the voices of citizens who are allegedly deprived and who want to democratically influence antitrust matters. In an important speech revealing the tone of the moment, Acting Assistant Attorney General Renata Hesse of the Antitrust Division acknowledged that “antitrust is making headlines again” since “increased public interest in antitrust and competition is a good thing,”¹⁶⁴. He nevertheless also noted “some tension between the views of the general public and the views of those who practice antitrust professionally.”¹⁶⁵

Antitrust agencies are ideally independent from party-politics so that the most rational economic policy can be designed while being insulated from electoral considerations. This argument pertains to the economic rationale of agencies’ independence from governments in general. Inasmuch as a central bank should design its monetary policy independently from government as much as possible, antitrust agencies have historically gained independence incrementally in order to design antitrust policies that suit consumer welfare and innovation rather than political interests of policymakers. This traditional independence has been institutionally enshrined by agencies’ independence and politically bolstered by the law and economics movement in the United States and the “more economic approach” in the European Union. Antitrust populists agree with populists in general who “abhor restraints on the political executive”¹⁶⁶ while willing to tame any economic (and political) power of big firms. “Populists’ aversion to institutional restraints extends to the economy, where exercising full control ‘in the people’s interest’ implies that no obstacles should be placed in their way by autonomous regulatory agencies, independent central banks, or global trade rules.”¹⁶⁷ Thus, more specifically, antitrust populists dislike independence of antitrust agencies, where political whim and regulatory interventionism can face institutional obstacles.

Consequently, antitrust agencies are subject to institutional threats from antitrust populists with respect to the agencies’ independence. For, in order to enshrine and enforce the political objectives of antitrust enforcement, not only must antitrust populism change antitrust laws for socio-political goals beyond the consumer welfare standard, but they also take control of these agencies by deteriorating their independence.

The *political* antitrust populism that we identified is legitimized and fortified only because the intellectual bedrocks for the stances voiced by politicians and some influential scholars are underpinned by some instrumental use of concepts of

¹⁶³ *Id.*

¹⁶⁴ See Hesse, *supra* note 81.

¹⁶⁵ See Hesse, *supra* note 81.

¹⁶⁶ Dani Rodrik, *In Defense of Economic Populism*, PROJECT SYNDICATE (Jan. 9, 2018), <https://www.project-syndicate.org/bigpicture/populist-grains-of-truth> [<https://perma.cc/YNV9-GXKC>].

¹⁶⁷ *Id.*

competition law. Indeed, the *political* antitrust populism is rendered possible only because scholars and writers vouch for these concepts to be twisted in a politicized manner: this is the populist use of antitrust concepts, or what we call *conceptual* antitrust populism. To illustrate this interaction between *political* antitrust populism and what we call *conceptual* antitrust populism, we shall scrutinize the two main concepts of competitions laws—market definition and consumer welfare standard—in order to demonstrate how they prompt *political* antitrust populism when applied to big tech cases exemplified by the Google cases in Europe.

III. Conceptual Antitrust Populism

We shall delve into the way fundamental concepts of antitrust laws are being applied, in the digital era, from a purportedly flawed economic perspective in order to bring about more politically-driven applications of antitrust rules. By way of illustration, the two fundamental concepts to be scrutinized successively are market definition (III.1) and consumer welfare (III.2). *Conceptual* antitrust populism is the necessary underpinning legitimizing the *political* antitrust populism resorted to by politicians' rhetoric analyzed above.

III.1. Market definition

As a “necessary first step” of evidencing market power in antitrust analysis¹⁶⁸, market definition is weakly carried out in an antitrust analysis involving digital platforms and other tech giants. Indeed, new practices, novel products and services, and innovative business models are the very characteristics of what makes a tech giant a competitive and innovative firm.¹⁶⁹ However, flawed definitions of relevant markets by regulators lead to monopolization bias, as explained famously by Nobel laureate economist Ronald Coase:

If an economist finds something—a business practice of one sort or another—that he does not understand, he looks for a monopoly explanation. And as in this field we are very ignorant, the number of un-understandable practices tends to be very large, and the reliance on a monopoly explanation, frequent.¹⁷⁰

The monopoly explanation for unknown (and oftentimes innovative) behaviors entails a biased analysis on narrowly defined markets where the tech giants can exert their immense market power. Therefore, the analysis is upside down: rather than starting from defining the market, assessing market power, and then looking at potential anticompetitive behaviors, the regulators may assume that the monopoly explanation mauled by Coase justifies market power, which itself can only lead to a narrowly defined market. The intellectual basis for such a conclusion is weak, since the end-

¹⁶⁸ Daniel Crane, *Market Power without Market Definition*, 90 N. D. L. REV. 31, 32 (2014)

¹⁶⁹ *But see* Daniel Mandrescu, *Applying (EU) Competition Law to Online Platforms: Reflections on the Definition of the Relevant Market(s)*, 41 WORLD COMPETITION 3 453, 484 (2018) (considering that digital platforms do not imply a change in the current European practice of market definitions with respect to big tech companies).

¹⁷⁰ Ronald Coase, *Industrial Organization: A Proposal for Research*, ECON. RES.: RETROSPECT & PROSPECT 3: POLY ISSUES & RES. OPPORTUNITIES IN INDUS. ORG., 59, 67 (Victor Fuchs ed., 1972).

point—defining the market—should have been the starting-point.¹⁷¹ Cramped views of market definition are illustrated by a number of recent cases applied to tech giants. After having outlined the economics of market definition in antitrust rules (III.1.1), we shall illustrate the increasingly politically-driven appraisal of market definition through “gerrymandering” of market definition (III.1.2).

III.1.1 Economics of Market Definition

Although not really an economic concept,¹⁷² market definition is the initial step¹⁷³ for determining whether or not a firm has abused its dominant position under Article 102 TFEU and for determining the reality of the competitive constraints in a market in order to apply Article 101 TFEU.¹⁷⁴ With respect to Article 102 TFEU,¹⁷⁵ the definition of the relevant market aims at identifying the existence of any competitive constraints¹⁷⁶ and is mostly apprehended through the substitutability of the products from a consumer perspective.¹⁷⁷ Markets are generally defined from a product

¹⁷¹ In that regard, we embrace Kaplow's view when he argues that “there does not exist any coherent way to choose a relevant market without first formulating one's best assessment of market power, whereas the entire rationale for the market definition process is to enable an inference about market power. Why ever define markets when the only sensible way to do so presumes an answer to the very question that the method is designed to address? A market definition conclusion can never contain more or better information about market power than that used to define the market in the first place.” Louis Kaplow, *Why (Ever) Define Markets?* 124 HARV. L. REV. 437, 440 (2010).

¹⁷² Franklin Fisher, *Economic Analysis and “Bright-Line” Tests*, 4 J. COMP. L. & ECON. 129, 132 (2008) (arguing “what, then, does economic analysis have to say about market definition? In one sense, the answer is ‘Nothing at all.’ The question of what is ‘the’ relevant market never arises in economics outside of antitrust.”); see also Adriaan Ten Kate & Gunnar Niels, *The Relevant Market: A Concept Still in Search of a Definition*, 5 J. COMP. L. & ECON. 297, 298 (2009) (arguing that “it is hard to find a satisfactory description or definition [of what are relevant market is] in textbooks on microeconomics or industrial organization, if the concept is mentioned at all in such readings.”).

¹⁷³ See Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805, at 1807 (1990) (arguing that “[k]nowledgeable antitrust practitioners have long known that the most important single issue in most enforcement actions—because so much depends on it—is market definition.”); see also Jonathan Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L. J. 129, 173 (2007). The European Court of Justice in 1998 stated in relation to the merger control procedure in its *Kali und Salz* decision: “Proper definition of the relevant market is a necessary precondition for any assessment of the effect of a concentration on competition.” Joint Cases C-68/94 & C-30/95, *France v. Comm’n*, 1998 E.C.R. I-1453, para.143.

¹⁷⁴ Case T-62/98, *Volkswagen v. Comm’n*, 2000 ECLI:EU:T:2000:180, para. 230; Case C-7/97, *Bronner v. Mediaprint*, 1998 ECLI:EU:C:1998:569, para. 32; Case C-52/07, *Kanal 5 Ltd v. Föreningen Svenska Tonsättares Internationella Musikbyrå*, 2008 ECLI:EU:C:2008:703, para. 19. In the United States, market definition is also the first step for determining the existence of market power by defining the relevant market consisting of the “commodities reasonably interchangeable by consumers for the same purposes.” *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1965) (the “cellophane case”).

¹⁷⁵ See generally, *Commission’s Guidance paper on Article 102 priorities*, n. 9, par.30.

¹⁷⁶ See generally, Daniel Mandrescu, *Applying (EU) Competition Law to Online Platforms: Reflections on the definition of the relevant market*. 41 WORLD COMPETITION.

¹⁷⁷ Case 27/76, *United Brands v. Comm’n*, 1978 E.C.R. 207 at para. 12 (stating that “as far as the product market is concerned it is first of all necessary to ascertain whether, as

perspective,¹⁷⁸ a geographical perspective,¹⁷⁹ and an (oftentimes underestimated) temporal perspective.¹⁸⁰

The interchangeability of the products concerned shall be assessed from the “Small and Significant Non-Transitory Increase in Prices” (“SSNIP”) test¹⁸¹ hinted at by the *1997 Notice on the Definition of the Relevant Market* by the European Commission:¹⁸² a small price increase (5-10%) is presumed, then, it is asked if this would cause so many customers to go elsewhere or buy a substitute as to make the price rise unprofitable, i.e. loss of sales so great that profits do not increase. If a small but significant, non-transitory price increase is profitable for the (hypothetical) monopolist, then there is a relevant market. Designed in a time when two-sided

the applicant maintains, bananas are an integral part of the fresh fruit market, because they are reasonably interchangeable by consumers with other kinds of fresh fruit such as apples, oranges, grapes, peaches, strawberries, etc. Or whether the relevant market consists solely of the banana market which includes both branded bananas and unlabeled bananas and is a market sufficiently homogeneous and distinct from the market of other fresh fruit”); Case 85/76, *Hoffmann-La Roche v. Comm’n*, 1979 E.C.R. 461 at para. 28 (stating that “the concept of the relevant market in fact implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned”); Case 322/81, *Nederlandsche Banden Industri Michelin v. Comm’n*, 1983 E.C.R. 3461 at para. 37 (adding that “[f]or the purposes of investigating the possibly dominant position of an undertaking on a given market, the possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products. However, it must be noted that the determination of the relevant market is useful in assessing whether the undertaking concerned is in a position to prevent effective competition from being maintained and behave to an appreciable extent independently of its competitors and customers and consumers. For this purpose, therefore, an examination limited to objective characteristics only of the relevant products cannot be sufficient: the competitive conditions and the structure of supply and demand on the market must also be taken into consideration.”); *see also* Case T-219/99, *British Airways, v. Comm’n*, 2003 E.C.R. II-5917; Case T-340/03, *France Télécom v. Comm’n*, 2007 E.C.R. II-107 at para. 80 (stating that “the concept of the relevant market in fact implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned.”).

¹⁷⁸ For demand-side substitution, *see* Case C-457/10, *AstraZeneca v Comm’n*, 2013 EU:C:2012:770, 4 CMLR 233, at paras. 46-51; Case C-95/04, *British Airways v. Commission*, EU:C:2007:166, para.86; Case C-413/14, *Intel v. Comm’n*, 2017 EU:C:2017:632. For supply-side substitution, *see* Case C-413/14, *Intel v. Comm’n*, 2017 EU:C:2017:632; Case C-382/12, *Mastercard v. Comm’n*, 2014 EU:C:2014:2201; Case C-67/13, *Groupement des cartes bancaires v. Comm’n*, 2014 EU:C:2014:2204.

¹⁷⁹ *See* Case C-553/12 P (2014) *Commission v DEL*, EU:C:2014:2083; Case T-260/13 (2015) *Ryanair Holdings plc v Commission*, EU:T:2015:873.

¹⁸⁰ *See* Case COMP/39654 (2012) *Reuters Instrument Codes*, paras. 29-30.

¹⁸¹ First introduced with the U.S. DEP’T OF JUSTICE, 1982 U.S. Merger Guidelines.

¹⁸² *Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law*, COM (1997) 372/5. For the U.S. perspective, *see* Patrick Ward, *Testing for Multisided Platform Effects in Antitrust Market Definition*, 84 U. CHIC. L. REV. 2059 (2017).

platforms were nonexistent and when high-tech products were embryonic, and left non-updated since then, the relevance of the Commission Notice to today's multi-sided platforms is questionable.¹⁸³

Defining a relevant market implies starting with homogeneous goods from firms' products and assessing whether or not other dissimilar goods are substitute products according to the SSNIP test.¹⁸⁴ Once the market has been delineated by including all substitute products, the firm's market share in that defined market is ascertained. This market share provides for a clear guidance of the firm's market power. Market power should not be inferred from market definition, but quite the contrary: market power should be assessed first, and market redefinition thus delineated.¹⁸⁵ Indeed, Kaplow considers that "the market definition/market share paradigm is incoherent. Among other reasons, there exists no way to employ it—which requires a determination of which market definition is best according to some plausible criterion—without first determining the extent of market power as best one can."¹⁸⁶ Consequently, it appears that market power is the economic notion which should be first assessed, instead of this non-economic notion of market definition incorrectly inferring market power. The market "definition/market share paradigm" is flawed because:

[T]he inferences drawn from market shares in relevant markets generally contain less information and accordingly can generate erroneous legal conclusions - unless one adopts a purely results-oriented market definition stratagem under which one first determines the right legal answer and then announces a market definition that ratifies it.¹⁸⁷

¹⁸³ For a reformed way to apply the SSNIP test, see Lapo Filistrucchi et al., *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. COMP. L. & ECO. 293 (2014); Ralf Dewenter et al., *Market Definition of Platform Markets*. Working Paper Series N°176, (March 2017); Michael Katz & Carl Shapiro, *Critical Loss: Let's Tell the Whole Story*, 17 ANTITRUST 49, 52 (2003); David Evans & Michael Noel, *The Analysis of Mergers That Involve Multisided Platform Businesses*, 4:3 J. of COMP. L. & ECON., 663 (2008); David Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 3 COL. BUS. L. REV., 667 (2005). Some authors recommend abandoning market definition, as it is considered to be useless and flawed for two-sided markets. See Evans & Noel, *supra* note 174; Kaplow, *supra* note 162; Louis Kaplow, *Market Definition Alchemy*, 57(4) ANTITRUST BULL., 915 (2012).

¹⁸⁴ Kaplow, *supra* note 162 at 439.

¹⁸⁵ In that regard, see Robert Sitz, *The Inevitable Arbitrariness of Market Definitions and the Unjustifiability of Market-Oriented Antitrust Analyses*, ECON. & THE INTERPRETATION & APPLICATION OF U.S. AND E.U. ANTITRUST L. I: BASIC CONCEPTS & ECONOMICS-BASED LEGAL ANALYSES OF OLIGOPOLIST & PREDATORY CONDUCT 165 (Springer Books: Heidelberg, 2013). See also Rupperecht Podszun, *The Arbitrariness of Market Definition and Evolutionary Concept of Markets*, 61(1) ANTITRUST BULL. 121 (arguing that "[m]arket definition is the base of abuses cases (and other cases as well), yet lacks a theoretical 'superstructure'—a theoretical framework that structures the process of defining markets in a theoretically well-founded way, thereby providing legal certainty. In one of the most important fields of antitrust law, there is a certain conceptual vacuum.").

¹⁸⁶ Kaplow, *supra* note 162 at 517.

¹⁸⁷ *Id.* at 439; See also Kaplow, *supra* note 174 (demonstrating that market definition is "unnecessary.").

This market definition stratagem of witnessing market power, inferring market shares and thus concluding to define the relevant market heavily relies on the structural approach of the “largely-discredited”¹⁸⁸ Structure-Competition-Performance (“SCP”) paradigm.¹⁸⁹ Defining market definition as “antitrust’s analytical core,” Crane laments that it is “crumbling” but finds “no clear replacement” of market definition.¹⁹⁰ The “indirect” market definition/market share approach to market power may nevertheless be substituted by the “direct” evidence of market power through evidentiary proofs.¹⁹¹ However, this “direct proof is only rarely available, courts more typically examine market structure in search of circumstantial evidence of monopoly power.”¹⁹² Crane pertinently argues that evidencing market power through market definition/market shares lens is flawed mainly because, as Kaplow criticizes,¹⁹³ the very cross-elasticity upon which market definition is grounded is “quite arbitrary” an estimation.¹⁹⁴ Indeed, market power can be proved through direct evidence rather than through the structural approach of proving market power through market definition/market shares misguidance.¹⁹⁵ More importantly regarding the measurement of market power itself, the notion of market power is sabotaged in order to achieve its aims of finding dominance and abuses of dominance. Indeed, market power is classically defined as the ability of a firm or firms to be able to raise prices alone or take actions that prevent new competition.¹⁹⁶ The *1997 Notice of the European Commission* defines market power as:

the power to influence market prices, output, innovation, the variety or quality of goods and services, or other parameters of competition on the market for a significant period of time [...] An undertaking that is capable of substantially increasing prices above the competitive level for a significant

¹⁸⁸ See Elise Dorsey et al., *Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement*, REGULATORY TRANSPARENCY PROJECT OF THE FEDERALIST SOCIETY, (Apr. 15, 2019), <https://regproject.org/wp-content/uploads/RTP-Antitrust-and-Consumer-Protection-Populist-Antitrust.pdf>, at 28.

¹⁸⁹ See, e.g., the seminal case *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (describing the rule of reason as “an inquiry into market power and market structure designed to assess [a restraint's] actual effect.” On the SCP paradigm, see JOE BAIN, *BARRIERS TO NEW COMPETITION* (Cambridge: Harvard University Press 1956); JOE BAIN, *INDUSTRIAL ORGANIZATION* 372-468 (John Wiley & Sons, 1968). On its criticism, see Yale Brozen, *Economists’ Views: The Concentration-Collusion Doctrine*, 46 ANTITRUST L. J., 826 (1977); Harold Demsetz, *Economics as a Guide to Antitrust Regulation*, 19 J. L. & ECON., 371, 374 (1976).

¹⁹⁰ Daniel Crane, *Market Power without Market Definition*, 90 N. D. L. REV. 31, 34 (2014). He goes further and eloquently describes market power itself as misconceived since market power cannot be measured in absolute sense (the difference between “the actual market and the textbook ideal market”) but should be assessed as the “delta between a plausible competitive counterfactual and the actual circumstances.” *Id.*

¹⁹¹ *Id.* at 40.

¹⁹² *United States v Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) (en banc).

¹⁹³ Kaplow, *supra* note 162 at 440.

¹⁹⁴ Crane, *supra* note 181 at 42.

¹⁹⁵ For an overview of how market definition has become a stumbling block in many antitrust complaints, see Jonathan Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L. J., 129, 129 (2007); William J. Rinner & Avishalom Tor, *Behavioral Antitrust: A New Approach to the Rule of Reason After Leegin*, 805 U. ILL. L. REV. 805, 860 (2011).

¹⁹⁶ Kaplow, *supra* note 162 at 444.

period of time holds a substantial market power and possesses the requisite ability to act to an appreciable extent independently of competitors, customers and consumers¹⁹⁷

But, this ability to raise prices or take restrictive actions independently from competitors¹⁹⁸ is not the definition embraced by antitrust populists. Indeed, they look at concentration level in order to conclude to market power, irrespective of the study (and evidence) of the firms to act independently from competitors.¹⁹⁹

However, market power is an antitrust issue only if anticompetitive means enable firms to increase or maintain such market power. Additionally, the evidence supplied to conclude an unprecedented rise of market power fails to take into consideration the expenses on R&D by firms which are evolving into an economic environment where innovation has become the determinant parameter over price.²⁰⁰

Therefore, given the relative conceptual “weakness”²⁰¹ of the market definition in general, the study into the relevant market for products involving multi-sided platforms under the digital era requires greater precaution. Indeed, the definition of relevant market for digital products has recently been narrowly defined in order to ex ante evidence the presence of substantial market power of the accused digital platform in the said relevant market. A number of recent cases illustrate the tendency, described by Kaplow,²⁰² to infer market power from market definition rather than the reverse.

¹⁹⁷ COM (1997) 1997 Notice of the European Commission, para.24.

¹⁹⁸ A wide and flawed acceptance of this ability is illustrated with the *Cellophane* fallacy, where it has been said that “[m]onopoly power is the power to control prices or exclude competition.” *E.I. du Pont de Nemours & Co. (Cellophane)*, 351 U.S. at 391. On the *Cellophane* fallacy, see Crane, *supra* note 181 at 40-41.

¹⁹⁹ See Hesse, *supra* note 81 (arguing that “many concentration studies simply do not measure market power in this way. For example, an Economist magazine study divided the entire U.S. economy into 900 some sectors and measured the change in concentration from 1997 to 2012, finding “[t]wo-thirds of them became more concentrated between 1997 and 2012” during this period. Other recent studies have employed similar approaches. Some people have suggested that greater antitrust enforcement should be used to combat these trends. A simple example, however, illuminates why these measures are prone to error. In the complaint the DOJ filed in 2011 to block the proposed merger of AT&T and T-Mobile, we alleged that the most important competition for consumer cellular telephone services took place in local markets among providers that had assembled nationwide networks. Under this framework, the proposed merger between AT&T and T-Mobile threatened competition between two of the most important national competitors. By contrast, a merger among multiple non-overlapping regional networks might enhance competition by enabling a regional network to become more relevant to cellular customers by becoming a national network capable of competing with AT&T, Verizon, Sprint, and T-Mobile (the only competitors with national networks). But the measure employed in the Economist magazine study I mentioned would treat the merger among regional networks – just as it would an AT&T/T-Mobile merger – as an increase in concentration.”).

²⁰⁰ See Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications*. NBER Working Paper 23687 (2017); Simcha Barkai, *Declining Labor and Capital Shares*, Job Market Paper, U. OF CHI. (2017).

²⁰¹ See Crane, *supra* note 181 at 42.

²⁰² Kaplow, *supra* note 162.

Be that as it may, it appears that market definition remains, without a credible substitute in judicial and administrative practices, the main initial step to antitrust analysis. Assuming that market definition is ever useful and appropriate (something we have cast doubt about), the very use of market definition is applied in a dishonest, if not populist, manner through a politicized version of market definition. This is the “gerrymandering” of market definition as Petit judiciously labels it.²⁰³

II.1.2 Gerrymandering of Market Definition

Even if one would maintain market definition as the unchallenged initial step for any antitrust analysis, the definition of relevant product market is undeniably more complex when a more accurate portrayal of business realities is ascertained²⁰⁴. Indeed, connected markets often consist of a “cluster” of services²⁰⁵ whereby firms evolve within business eco-systems on a range of products and services which are different goods and closely related. As Dewenter, Heimeshoff & Löw argue, “applying traditional tools like the SSNIP test—being the most important analytical tool for regulatory and antitrust cases in the EU—on a two-sided market leads to erroneous market definition.”²⁰⁶ Indeed, defining a relevant market for antitrust purposes by

²⁰³ Nicolas Petit, *EU Engaged in Antitrust Gerrymandering Against Google*, The Hill, July 31, 2018, available at: <https://thehill.com/opinion/technology/399742-eu-engaged-in-antitrust-gerrymandering-against-google>.

²⁰⁴ On the difficulty to define relevant market for digital platforms heavily relying on data mining, see Inge Graef, *Market Definition and Market Power in Data: The Case of Online Platforms*, 38 *WORLD COMPETITION* 473, 504-505 (2015) (arguing that, despite that “no ‘real’ market exists in which supply and demand for data can be identified . . . a hypothetical or potential market for data can be defined by looking at the substitutability of different types of data and in particular at the functionality which can be offered with a specific set of data as input. In this way, separate relevant markets can possibly be defined offline and online data and, as further subsegmentations within the latter market, for search, social network and e-commerce data.” This narrow view of market definition applied to online platforms as opposed to the broad view of market definition applied to offline market actors is both detrimental to the fair-level playing field of competition between offline and online actors and is ill-conceived given the excessive “subsegmentations” called for without economic evidence of consumers’ lack of interchangeability.).

²⁰⁵ See Case COMP/39839 (2013) Telefonica/Portugal Telecom, para.186 where the Commission considered, within the electronic communications sector, that “the precise limits of the definition of each of the relevant markets may be left open given the broad scope of the clause.” Be that as it may, despite having acknowledged the connectedness of these markets, the Commission subsequently embarks into a narrow appraisal of each relevant market (fixed telephony, leased lines, mobile telephony, Internet access, cross-border services, TV services) where each and every market is sub-divided into two markets: retail market and wholesale market. Therefore, the acknowledgment of the connected markets does not prevent antitrust authorities from narrowly defining relevant markets. See also C-56/12 P (2013) European Federation of Ink and Ink Cartridge Manufacturers (EFIM) v Commission, EU:C:2013:575; C-553/12 P (2014) Commission v DEI, EU:C:2014:2083.

²⁰⁶ Ralf Dewenter et al., *Market Definition of Platform Markets*, Working Paper Series. N°176, (2017) at 3.

looking at only one side of the multi-sided platform leads to too narrowly defined relevant markets.²⁰⁷

In the digital era, where multi-sided platforms and zero-priced goods are inherently the core of most business models, the irrelevance of defining relevant markets comes to the fore, with the most acute critics arising from leading scholars and practitioners.²⁰⁸ The indirect network externalities and multi-sidedness of digital platforms hinder the classical application of traditional tools of competition policy such as the SSNIP test.²⁰⁹

Cramped views on market definitions cause unfounded and hasty conclusions on substantial market power—just a step before concluding anticompetitive practices²¹⁰. Market power is therefore crucial to antitrust analysis, but is inadequately explored when it comes to tech giants. The argument that market power increased at an unprecedented speed and scale is put forward in order to advocate further antitrust scrutiny, if not antitrust remedies such as breaking-up tech giants and other economic behemoths. However, this argument is obviously unconvincing, as the relevant market was inadequately defined as a first step of analysis as discussed above. Professor Petit rightly considers that the European Union has embarked in “antitrust gerrymandering:”

On its face value, this preliminary step called ‘market definition’ is legitimate. Its practice, however, is much less satisfactory. Market definition lends itself to risks of gerrymandering. Or the idea that if antitrust watchdogs draw markets narrowly enough, every company can be made to look dominant.²¹¹

Narrow definitions of relevant markets prevent permissible trade-offs between pro- and anticompetitive effects of the different sides of the multi-sided platforms within a relevant market.²¹² On the other hand, relevant markets defined relatively broadly so as to encompass all sides of the platforms enable greater space for allowable trade-offs between pro- and anticompetitive effects of some conducts²¹³.

²⁰⁷ Evans, *supra* note 16; Dewenter, *supra* note 196 at 6 (arguing that “as price levels and price structure in two sided markets are closely linked to the scope of indirect network effects, they can hardly be analyzed in the conventional way of antitrust economics.”).

²⁰⁸ On the difficulty to use the SSNIP test and market definition of zero-priced goods of the digital platform, see Magali Eben, *Market Definition and Free Online Services: The Prospect of Personal Data as Price*, 14 J. L. & POL. FOR THE INFO. SOC., 227, 237 (2018) (arguing that market definition can be carried out in zero-priced markets “through the SSNIP test, by fitting ‘personal data as price’ within the confines of the test.”).

²⁰⁹ Evans, *supra* note 16; Julian Wright, *One-sided Logic in Two-sided Markets*, 3.1 REV. NET. ECON., 1–21 (2004).

²¹⁰ Nicolas Petit, *EU Engaged in Antitrust Gerrymandering Against Google*, The Hill, July 31, 2018, available at: <https://thehill.com/opinion/technology/399742-eu-engaged-in-antitrust-gerrymandering-against-google>

²¹¹ *Id.*

²¹² See generally, Olivier Williamson, *Economics as Antitrust Defense: The Welfare Trade-Offs*, 58 AM. ECON. REV. 18 (1968).

²¹³ Patrick Ward, *Testing for Multisided Platform Effects in Antitrust Market Definition*, 84 U. CHIC. L. REV. 2059, 2060 (2017)

Market definition involving the price-based SSNIP test is inapt for the zero-priced market. In that vein, Podszun asks: “what is the relevant market if customers do not have to pay in a directly financial manner and are thus not susceptible to a price-based test? In an early case involving Google, the [California] Court held that there is no relevant market for antitrust.”²¹⁴ Google antitrust cases are particularly illustrative of both the arbitrariness (if not uselessness) of market definition and the instrumental use of market definition for slashing big tech companies with novel business models based on zero-priced products and services. Indeed, the so-called gerrymandering of market definition is particularly true when it comes to big tech companies, as illustrated by Google’s market definitions:

[I]n Brussels, antitrust officials see a Google monopoly everywhere they look. Recently, the EC declared Google dominant on the Android operating system for mobile phones. Just about a year ago, it found Google dominant in general Internet search services. This new case displays an old trick well-known by antitrust experts. It frames a firm within a tightly defined market to expose a dominant share. For regulators, antitrust gerrymandering is a tempting cheat. Once the label of “dominance” is attached to a company, most of an infringement is established: the rest—proving an abuse—is just a walk in the park. Consider this: In the present case, the EC pretends that Google Android is dominant on the market for “licensable smart operating systems.”²¹⁵

Indeed, the cramped view of market definition in the 2018 *Google Android* decision went so far as to exclude Apple's iOS as viable competitor of Google Android. More precisely, the European Commission considered that Apple's iOS, a non-licensable smart operating system, did not exert sufficient competitive constraints onto Google Android's licensable smart operating system. Concluding that Apple and Android are not competitors is absurdly disconnected from consumers choices and preferences.²¹⁶ How can one argue that consumers, when buying a smartphone or swapping to one operating system to another one, are not considering factors (such as prices and quality) and do not consider these two operating systems as interchangeable? Such a cramped view on market definition justifies Petit's labeling of gerrymandering of market definitions.²¹⁷

²¹⁴ Podszun, *supra* note 176 at 125; *see also* C 06-2057 RS *Kinderstart v Google Class Action*, Mar. 17, 2006 (arguing that “KinderStart cites no authority indicating that antitrust law concerns itself with competition in the provision of free services. Providing search functionality may lead to revenue from other sources, but KinderStart has not alleged that anyone pays Google to search. Thus, the Search Market is not a ‘market’ for purposes of antitrust law.”).

²¹⁵ Nicolas Petit, *EU Engaged in Antitrust Gerrymandering Against Google*, The Hill, July 31, 2018, available at: <https://thehill.com/opinion/technology/399742-eu-engaged-in-antitrust-gerrymandering-against-google> .

²¹⁶ The very rationale for Google Android from its inception has precisely been to compete with Apple.

²¹⁷ If gerrymandering is U.S. politics, antitrust gerrymandering on market definitions can be European competition policy. Petit, *supra* note 136 (“[i]n the U.S. tradition, gerrymandering is political. In antitrust, this is equally true. Margrethe Vestager, the EC antitrust chief, is reported to be eyeing a top EU job in 2019. A seasoned politician,

Equally, market definitions were artificially narrowed down in the 2017 *Google Shopping* decision by the European Commission, where Google Shopping was also not considered to face competitive constraints from Amazon. How could a shopping comparison service such as Google Shopping not be a strong (let alone useful) competitor to Amazon's comparison shopping services? Again, from a consumer perspective, such market definition conclusions make little sense given the interchangeability of these platforms, apps, and websites for consumers to shop and find their widgets online.²¹⁸

In Google Shopping, the structuralist narrow definition of the relevant market at stake has been favored in dismay of the business realities experienced in such innovative and fast-changing digital sectors. Indeed, the European Commission has decided, in order to fine Google Shopping for self-favoring and demoting Google Shopping's rivals in Google's search results, to define Google Shopping's relevant market extremely narrowly. "As Microsoft has faded as antitrust's tech *bête noire*,"²¹⁹ Google has appeared to abuse its market power contrary to E.U. competition rules.

An "elegant" illustration is the intention of Amazon to purchase the Whole Foods grocery chain in a proposed merger.²²⁰ The Amazon/Whole Foods merger, which was recently approved, is a telling illustration of the market definition being distorted because of the nature of the company requesting the merger. Indeed, seen as a "super-monopoly,"²²¹ the merged company would "dominate food within the next two years."²²² This proposed merger, allowing Amazon to develop a massive physical presence, triggered a spur of critics from those suspicious about tech giants in general and about Amazon in particular. While monopolization risks have been proven to be exaggerated,²²³ the merger yielded many pro-competitive benefits—namely, price reductions²²⁴ and innovation on the retail industry.²²⁵

Vestager knows that the payoffs of whacking a tech platform are immense in a continent rife with popular distrust against corporate bigness, U.S.-style capitalism and tech platforms' permission-less attitude toward innovation.").

²¹⁸ Professor Petit calls this "multi-dimensional rivalry." Nicolas Petit, *EU Engaged in Antitrust Gerrymandering Against Google*, The Hill, July 31, 2018, available at: <https://thehill.com/opinion/technology/399742-eu-engaged-in-antitrust-gerrymandering-against-google>.

²¹⁹ Crane, *supra* note 181 at 72.

²²⁰ See International Center for Law & Economics, Amazon–Whole Foods After One Year Symposium, TRUTH ON THE MARKET (2018), <https://truthonthemarket.com/symposia/the-amazon-whole-foods-merger-after-one-year-symposium/> [<https://perma.cc/G2TT-2Y9N>].

²²¹ Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*. COL. GLOB. REPORTS (2018).

²²² Auer, *supra* note 9.

²²³ *Id.*; see also Heather Haddon, *Natural Grocers Shrug Off Amazon-Whole Foods Threat*, WALL ST. J., Aug. 26, 2018 (evidencing the lack of rivals' losses with respect to capitalization after the merger, indicating that Amazon's rivals resisted the merger and that competitive forces are still vigorous on U.S. retail market).

²²⁴ Andrew Willford, *Consumers the big winners of Amazon-Whole Foods Merger*, THE HILL, Sept. 13, 2018; Crane, *supra* note 181 at 31-80.

²²⁵ Indeed, not only are competitors now developing the same-day delivery typical of Amazon, but the merger can be seen as a Trojan horse for Amazon to materialize its most innovative and disruptive product: Amazon Go. This prototype cashierless grocery store

The next question to ask is why this gerrymandering of market definitions occurs? The answer lies in the politicized antitrust enforcement agencies and decisions that courts are keen to impose in order to reach the outcome hinted by the “big-is-bad” motto of antitrust populists—i.e. fining (or breaking-up) big tech companies.²²⁶ A more economic approach would not overestimate the function of market definition and would endorse definitions that encompass the consumer’s perceptions of interchangeability of goods and services. From one economic viewpoint, only the potential consumer harm (hence the consumer’s perspective) would be conclusive to any antitrust laws’ violation. Such an economic perspective would enable enlarging the space of allowable trade-offs by enlarging the definition of relevant markets by taking into consideration all sides of the platform²²⁷ (Ward 2017:2087). Instead of such economic perspective where consumer harm is evidenced, the cramped views of market definition when it comes to big tech companies facilitate the “evidence” of monopolization, and subsequently, of abuse of dominant positions. Big tech companies are all monopolies, according to antitrust populists. But what is the relevant market where each big tech company is supposed to be a monopolist? Failure to answer this question in a convincing manner illustrates that antitrust has unfortunately become instrumental to politically-laden motives rather than economic motives exemplified by the consumer welfare standard.

This standard is the other illustration we shall now turn to in order to provide instances of the conceptual facet of antitrust populism: because consumer welfare has been intellectually demonized on a consistent basis, the abandon of this economic standard in favor of vague political objectives has gained momentum in the political sphere.

III.2. Consumer Welfare

The consumer welfare standard²²⁸ belonging to antitrust economics is ripped off political whim and regulatory discretion in order to favor an economically-based antitrust analysis.²²⁹ The consumer welfare standard is not only a criterion of analysis,

could be developed physically through the channel of the Whole Foods grocery stores. This innovation on the retail industry could potentially disrupt the market by digital innovation for the sake of consumer welfare.

²²⁶ The economics of multisided digital platforms, as discussed above, is ignored and antitrust enforcement is keen to apply one-sided market definition to two-sided platforms. Consequently, “cases that define relevant market as encompassing fewer than all sides of the platform narrow the space of allowable pro- and anticompetitive trade-offs and effectively eliminate a defendant’s arguments that it manages interconnected demand.” Patrick Ward, *Testing for Multisided Platform Effects in Antitrust Market Definition*, 84 U. CHIC. L. REV. 2059, 2078 (2017).

²²⁷ Patrick Ward, *Testing for Multisided Platform Effects in Antitrust Market Definition*, 84 U. CHIC. L. REV. 2059, 2087 (2017).

²²⁸ ROBERT BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 61 (2d ed., New York: Free Press 1993) (Bork seminally argued that the U.S. Congress wanted courts to implement the policy of “consumer welfare” when it enacted the Sherman Act.).

²²⁹ On the meaning of “consumer welfare,” see Herbert Hovenkamp, *Progressive Antitrust*, FACULTY SCHOLARSHIP 1764 89-94,

but it has legitimately become a prime—if not exclusive—antitrust objective. Indeed, as Crane recaps:

Today there is a wide consensus that the primary, if not exclusive, goal of antitrust law is to promote economic efficiency and consumer welfare by deterring firms from subverting the competitive process and thus deriving the power to reduce output, price above competitive levels, and stymie innovation²³⁰.

Antitrust laws are aimed at ensuring a strong competitive process in order to provide for an efficient economy. In order to achieve these objectives, antitrust laws should focus on enhancing the principle of economic efficiency, which is materialized in antitrust matters, as an enhancement of consumer welfare (or surplus). This argument, convincingly elaborated by the Chicago School,²³¹ enabled the consumer welfare standard to become the essential lens through which antitrust analysis should be carried out. However, consumer welfare is questioned by antitrust populists who wish to use antitrust law as a lever to achieve a number of different goals. Lina Khan, a prime figure of Hipster Antitrust trying to revive antitrust populism, said that she believes that the “thinking that antitrust law is only supposed to address consumer welfare is misguided.”²³² Before delving into the inadequacy of the politically-driven goals other than consumer welfare for antitrust, we shall demonstrate that consumer welfare itself is poorly analyzed by regulators and scholars who are determined to sanction impenetrable but innovative behaviors. The first illustration of the inability to assess consumer welfare properly is revealed by the light (if not absent) interest for assessing the “countervailing benefits to consumers or to competition” enshrined in Section 45(n) of the FTC Act.²³³ Such inability is evidenced in the *Apple* case before the FTC:

[T]he Commission effectively rejects an analysis of tradeoffs between the benefits of additional guidance and potential harm to some consumers or to competition from mandating guidance . . . I respectfully disagree. These assumptions adopt too cramped a view of consumer benefits under the Unfairness Statement and, without more rigorous analysis to justify their application, are insufficient to establish the Commission’s burden.²³⁴

Indeed, competition harm, or any other impact on the level of competition, can only be measured from a net basis. Thus, the practice must be assessed by its pro-competitive effects minus its anti-competitive effects in order to see if the practice has

http://scholarship.law.upenn.edu/faculty_scholarship/1764

[<https://perma.cc/4FEZ-KADB>].

²³⁰ Daniel Crane, *Market Power without Market Definition*, 90 N. D. L. REV. 31, 35 (2014)

²³¹ See the seminal case of *Reiter v. Sonotone*, where the U.S. Supreme Court acknowledges explicitly that the Sherman Act implies a “consumer welfare prescription.” *Reiter v. Sonotone Corp.*, 442 US 330, 343 (1979).

²³² Lina Khan, *Brandeis*, *supra* note 26 at 131-132.

²³³ 15 U.S.C. § 45 (2012).

²³⁴ Dissenting Statement of Commissioner Joshua D. Wright, In the Matter of Apple, Inc., FTC File No. 1123108, 14 (Jan. 15, 2014).

a net competitive effect.²³⁵ Any other hasty assessment would undoubtedly be biased in favor of a status quo (not allowing a new practice) and against of excessive regulatory interventionism.²³⁶ Choosing different antitrust objectives than strict maximization of economic efficiency through the consumer welfare standard (and the innovation goal, as detailed below) would lead to what Hovenkamp rightly calls “populist interjections:” “interjection of populist goals, by broadening the proscriptions of business conduct, would multiply legal uncertainties and threaten inefficiencies not easily recognized or proved.”²³⁷

Not only is legal certainty weakened due to legal vagueness of the antitrust goals sought, but the whole efficiency of the economy and the efficacy of the goals of institutional tools²³⁸ are diminishing. The consumer welfare standard is not really the exclusive antitrust objective under Chicago School theories, since the allocative economic efficiency sought by the consumer welfare standard must be accompanied by the dynamic economic efficiency sought by innovation. Indeed, allocative economic efficiency increases consumer welfare. However, consumer welfare may excessively rely on price-related factors of antitrust analysis. In the high-tech sector where zero-priced products are a plethora and advertisement is the income generation of one of the two-sided markets, prices play a much less important role.

While antitrust populists perceive Amazon as a prime example of anticompetitive behaviors from a tech behemoth, the history of the retail market reveals that Amazon has partly succeeded in dominating the retail market because it championed innovation for the benefits of consumers (through lower prices, greater consumer reach, and new services) and the society at large (through inventions). Indeed, attacks

²³⁵ Former FTC Chairwoman Edith Ramirez when stated, in 2014, that “[o]ur most recent Section 5 cases show that the Commission will condemn conduct only where, as with invitations to collude, the likely competitive harm outweighs the cognizable efficiencies. This is the same standard we apply everyday in our investigations.” Edith Ramirez, *The FTC: 100 Years of Antitrust and Competition*, on KEYNOTE, 17TH ANNUAL GEO. MASON L. REV. SYMP. ANTITRUST L. (2014).

²³⁶ In commenting on the *Apple* case, Geoffrey Manne nailed such regulatory interventionism and vouched for greater regulatory humility: “the FTC majority failed to act with restraint and substituted its own judgment, not about some manifestly despicable conduct, but about the very design of Apple’s products. This is the sort of area where regulatory humility is more—not less—important.” Geoffrey Manne, *Bringing Antitrust’s Economic and Institutional Limits to the FTC’s Consumer Protection Authority*, 1 CPI ANTITRUST CHRON. 7 (2014).

²³⁷ Hovenkamp, *supra* note 216.

²³⁸ The argument that antitrust policy is poorly designed (and not intended) to pursue various political goals other than economic efficiency is a well-known argument. Other regulatory and institutional tools are better suited to pursue, say, economic fairness and wage increases. For instance, tax laws and regulations are better suited to pursue the former political goal, while labor laws and regulations are better suited to pursue the latter. As Joshua Wright sums up, “whatever the merits of these various policy goals, antitrust is an exceptionally poor tool to use to achieve them . . . Economic analysis has more often than not trumped ideological politics in antitrust policy for the past 35 years. Let’s keep it that way.”, in Pallavi Guniganti, *A Populist Now: What Can Antitrust do for Inequality?*, 20 GLOB. COMP. REV. 2 (2017).

of the then dominant retail actor—A&P—from the 1960’s are puzzlingly similar to the current attacks on Amazon.²³⁹

New Brandeisians discard the consumer welfare standard vehemently, particularly in big tech cases, as evidenced in another recent Google case in Europe: the *Google Android* case. The consumer welfare objective requires antitrust authorities to intervene in the market, given the error costs of regulatory interventionism, only when consumer harm is evidenced. In the *Google Android* case, no consumer harm being evidenced, the concept of harm to innovation is discreetly introduced while setting aside the consumer welfare standard. Indeed, Google Android was fined €4.34 billion by the European Commission in 2018 for having illegally imposed “restrictions on Android device manufacturers and mobile network operators to cement its dominant position in general internet search.”²⁴⁰ While the public decision is not yet available, the Competition Commissioner Vestager clearly argued that Google has imposed restrictions on Android device manufacturers and network operators in order to cement dominance of the Google search engine. These restrictions, according to Vestager, “have denied rivals the chance to innovate and compete on the merits. They have denied European consumers the benefits of effective competition in the important mobile sphere.”²⁴¹

The vertical restrictions imposed by Google Android to its device manufacturers and network operators can be justified, given the fact that Google gives Android for free to its manufacturers. This is in opposition to Apple, who has established a closed, chargeable operating system²⁴². The contractual restrictions imposed are the necessary condition of the viability of Google’s business model, based on zero-priced platforms where downstream players can access, without charge but in exchange of contractual restrictions (so-called “Android forks”), highly valuable assets. Ignoring the economics of multi-sided platforms mentioned above, Commissioner Vestager has sanctioned Google Android on three counts:

1. Illegal tying of Google's search and browser apps;
2. Illegal payments conditional on exclusive pre-installation of Google Search; and
3. Illegal obstruction of development and distribution of competing Android operating systems.

Delineating the relevant market very narrowly again,²⁴³ the Commission has ignored the competitive constraints (or benefits, since Android used to be outsider of Apple’s

²³⁹ Timothy J. Muris & Jonathan E. Nuechterlein, *Antitrust in the Internet Era: The Legacy of the United States v. A&P*, GEO. MASON L. & ECON. RES. PAPER N°18-15 (2018).

²⁴⁰ Press Release from the European Commission, (Jul. 18, 2018), http://europa.eu/rapid/press-release_IP-18-4581_en.htm [<https://perma.cc/5MKN-3NAL>].

²⁴¹ *Id.*

²⁴² Aurelien Portuese, *The Rise of Precautionary Antitrust: An Illustration With Google Android*. COMPETITION POLICY INTERNATIONAL, November 17, 2019, available at: <https://www.competitionpolicyinternational.com/the-rise-of-precautionary-antitrust-an-illustration-with-the-eu-google-android-decision/>

²⁴³ The Commission considered that the relevant markets are the general search engine (where Google is 90% dominant), the smart mobile market available for license (where

iOS) exerted by Android against Apple's iOS. More specifically, on the search for consumer harm, the consumer harm is not evidenced, while the harm to innovation is clearly referred to (and indirectly this harm to innovation is considered to be harming consumers). However, what appears to be evidenced is a consumer harm derived from this decision, since Google has announced that it will charge device manufacturers as much as \$40 per phone in the European Union.²⁴⁴ No doubt this extra cost paid by device manufacturers will be borne by the final E.U. consumers, thus leading to higher prices and reduced outputs—the very opposite of the competition law objectives. This is the opposite of consumer welfare: consumer harm is indeed created and evidenced by the Commission's decision, while the consumer harm of Android's practices revolves around potential, un-evidenced harm to innovation which is not (if ever) defined by the Commission.

Twisting the notion of consumer welfare by resorting to a dubious concept of harm to innovation contributes to the legitimization process, according to which antitrust concepts are used in an instrumental manner in order to fulfill political objectives rather than the exclusive economic objective of economic efficiency through the consumer welfare standard. Consequently, be it with market definition or with consumer welfare, fundamental antitrust concepts are politicizing the competition enforcement in the Europe Union and to convince for a return to populist enforcement of antitrust laws in the United States.

IV. Conclusion

Antitrust populism has clearly gained a momentum with the rise of the digital platforms. These novel market actors bring about challenges for antitrust enforcement. However, a return to pre-economics of competition policies would be detrimental for both the innovativeness of these disruptive industries and for the advancement of academic knowledge because this would be tantamount to neglecting decades of scholarly contributions and improvements in antitrust enforcement.

The antitrust economic revolution beginning in the mid-1970's greatly improved on an aimless doctrine.²⁴⁵ The adoption of the consumer welfare standard gave antitrust

Google is 95% dominant), and the app stores market (where Google is 90% dominant). To distinguish between the market for smart mobile available for license and the market for smart mobile not available for license artificially excludes Apple's iOS as a competitor to Android, whereas the final consumer sees these products undoubtedly as interchangeable and competing with one another. More specifically, the Commission argued that "as a licensable operating system, Android is different from operating systems exclusively used by vertically integrated developers (like Apple iOS or Blackberry). Those are not part of the same market because they are not available for license by third party device manufacturers. Nevertheless, the Commission investigated to what extent competition for end users (downstream), in particular between Apple and Android devices, could indirectly constrain Google's market power for the licensing of Android to device manufacturers (upstream). The Commission found that this competition does not sufficiently constrain Google upstream" *Id.*

²⁴⁴ Jacob Kastrenakes & Nilay Patel, *Google Will Start Charging Android Device Manufacturers Fee for Using its Apps in Europe*, THE VERGE, Oct. 16, 2018.

²⁴⁵ See generally, Wright, et al., *supra* note 82 for a comprehensive defense of the benefits of the consumer welfare and the flaws of the populist Hipster Antitrust movement.

enforcers a coherent mission: protect the benefits of the competitive process by preventing activities likely to raise market prices, lower market output, or otherwise harm competition.²⁴⁶ When antitrust focuses upon socio-political goals, it detracts from this mission, likely slowing economic growth and depriving consumers of goods and services.²⁴⁷ As antitrust populists propose making consumers worse off by trading away some of these benefits, it is appropriate to ask what offsetting benefits (if any) their proposals will generate. Economics can tell us much about the likelihood and magnitude of the effects at work in these tradeoffs. For example, multiple economists reject the confident populist proclamations that U.S. competition is declining due to widespread increased market concentration.²⁴⁸

The antitrust world should welcome the debate between antitrust populism and economic welfare. Territory earned by the populists in this debate will be taken from consumers. The stakes are high. A return to antitrust populism signals a potential return to market share and conduct presumptions that protect small firms from their more efficient rivals. Using antitrust law to tackle socio-political objectives threatens to stifle innovation and inflate prices, as it has done in the past. Populism feeds on the perception of antitrust as a technocratic, experts-only arena that favors intellectual complexity and cronyism over practical interests. Lawyers, economists, and academics within antitrust institutions should welcome the current debate—as the authors in this volume do with great skill—over the fundamental normative conceptions of fairness and competition.

However, antitrust populism is not a phenomenon propelled by people outside academia or antitrust enforcers. Indeed, Wright et al. argue that those inside the antitrust community (scholars and enforcers) dispel antitrust populism, whereas those outside antitrust community (politicians, journalists, and policy advocates) adhere to antitrust populism.²⁴⁹ This dichotomy is true to some extent, but can be replaced with a more refined taxonomy as proposed in this Article. The evidenced claim of this Article is the following one: antitrust populism is indeed vouched for by people inside and outside the antitrust community as we have illustrated, but those inside antitrust community strengthen *conceptual* antitrust populism whereas those outside antitrust community strengthen *political* antitrust populism. Both categories of actors engage into a reciprocal, mutually self-reinforcing debates wherein *conceptual* antitrust populism used by scholars and enforcers enables fundamental concepts of antitrust to be twisted in a way which echoes the discourse of *political* antitrust populism expressed by politicians and policy advocates. Benefitting from its both legs, antitrust populism is legitimized because it has entered the antitrust community more than ever before. Therefore, the proposed taxonomy better represents the rise of antitrust populism compared to the insiders/outside dichotomy.

The taxonomy of antitrust populism therefore evidenced and discussed bears some implications with respect to the role of scholars and the academic community at large. Indeed, because *political* antitrust populism is bolstered by *conceptual* antitrust populism, scholars have a special responsibility. The academic community has a

²⁴⁶ See Dorsey, et al., *supra* note 9 at 10.

²⁴⁷ See Shapiro, *supra* note 9 at 744-745.

²⁴⁸ See *id.* at 729-730; Sacher, *supra* note 122.

²⁴⁹ Wright, et al., *supra* note 82.

responsibility in accepting that antitrust populism grows and in tackling antitrust populism. Moreover, scholars need to better apprehend the antitrust challenges brought about by digital platforms without fueling political antitrust populism—let alone using the rhetoric of political antitrust populism. Therefore, the taxonomy proposed in this Article not only better represent the rise of antitrust populism but also implies greater responsibility for scholars in the current debates of applying antitrust laws to new challenges.