

Bob Dylan and consumer welfare

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The challenge put to me in opening today’s event is to explain what we mean by “consumer welfare”. With the European Commission’s Chief Economist sitting by my side, and with all the authority that comes from my O level in economics, that is a challenge I am certainly going to duck. But in framing the issues for a day that sets out to discuss “Competition, Society and Democracy”, and from a background as an antitrust practitioner, I’ve experienced that consumer welfare seems in practice to involve a focus on the price of good and services, and what a particular situation may do to that price. And secondarily, a concern with issues of quality – although with some diffidence, given the difficulty of measuring effect on quality. But quality questions do arise. In an internet context, for example, we may ask whether two service providers compete to offer a superior quality of privacy protection for personal data.¹ The question seems the more interesting in that the services they offer will often be provided for free. Or at least without a *monetary* price that economists could fasten on with their traditional tools of analysis.

It’s no longer seen as fanciful to suggest that we as individuals pay for such supposedly free services by surrendering our personal data.² But the economists whose insights have so enriched antitrust analysis don’t seem to have the tools to measure this dimension. They have hammers, but this problem is not a nail.³

This reflection, and today’s programme, invite a bigger question, namely whether the focus on consumption is too narrow and whether (for example) privacy ought to be looked at as a goal in its own right and not merely as a quality parameter in a traditional assessment of consumer welfare. Peter Roth, our chairman for this panel, referred in his opening remarks to several definitions of welfare. As befits a conference in Oxford, he cited the definition from the Oxford English Dictionary that “welfare” means:

“The health, happiness, and fortunes of a person or group”.

Against that he gave us the definition of “consumer welfare” from the OECD Glossary of Industrial Organisation Economics and competition law:

“Consumer welfare refers to the individual benefits derived from the consumption of goods and services. In theory, individual welfare is defined by an individual’s own assessment of his/her satisfaction, given prices and income...”

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- 1 Alec Burnside, [“No Such Thing as a Free Search: Antitrust and the Pursuit of Privacy Goals”](#), CPI Antitrust Chronicle, May 2015.
 - 2 “Google’s flagship product is the Google search engine, which provides search results to consumers, who pay for the service with their data.” European Commission Press Release, [Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service](#). For a particularly insightful analysis see Gal and Rubinfeld, [“The hidden cost of free goods”](#).
 - 3 The law of the hammer is a cognitive bias that involves an over-reliance on a familiar tool. As Abraham Maslow said in 1966: *“I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail”*. The thought is sometimes attributed to Mark Twain, although it cannot be found in his published writings.

In practice, applied welfare economics uses the notion of consumer surplus to measure consumer welfare...⁴

This OECD definition is plainly the orthodox approach to consumer welfare that we have been familiar with in antitrust practice for many years. But Peter also referred to the following passage from the judgement of the Court of Justice in *TeliaSonera Sverige*⁵ where the Court said:

“The function of [the competition] rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being [*bien-être*] of the European Union.”

Plainly the Court here had its eyes on a broader horizon, invoking “the public interest” and *bien-être* of the European Union. Many societal objectives and values could be imagined as relevant to this broad statement. Privacy would be one, but the protection of democracy, diversity of opinion and a free press would certainly be further candidates. So, for example, *Forbes* recently ran a feature explaining “*Why Fake News is an Antitrust Problem*”.⁶ Fake news here could be a dispute over alternative facts, such as the size of the crowd at a presidential inauguration, but would particularly concern news stories which are wholly invented and simply designed to drive internet traffic and generate advertising revenues. Consider the Macedonian teenagers who supposedly invented the story that the Pope had endorsed candidate Trump – an invention designed to generate clicks and bring traffic to their website where users’ attention could be monetized into advertising revenue.⁷ User behaviour online and the capturing of revenue-generating internet traffic will sound awfully familiar as issues of interest and relevance in antitrust enforcement.⁸

Put at its boldest, the question before us today is whether antitrust took a wrong turn with the Chicago school a few decades back and is failing the original vocation of legislation that set out with much broader policy goals, most fundamentally upholding democracy itself. The idea is not new. Robert Pitofsky, writing in 1979, railed against those who would limit the goals pursued by antitrust:

“It is bad history, bad policy and bad law to exclude certain political values in interpreting the antitrust laws.”⁹

Before him, Friedrich Hayek, when accepting his Nobel prize for economics, criticized those who:

“...happily proceed on the fiction that the factors which they can measure are the only ones that are relevant.”

The fuller passage from which this well-known phrase is taken is worth reading in its entirety:

“We know: of course, with regard to the market and similar social structures, a great many facts which we cannot measure and on which indeed we have only some very imprecise

⁴ [OECD Glossary of Industrial Organisation Economics and Competition Law](#).

⁵ Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* EU:C:2011:83, para 22.

⁶ Sally Hubbard, “[Why Fake News Is An Antitrust Problem](#)”.

⁷ Samantha Subramanian, “[Inside the Macedonian Fake-News Complex](#)”.

⁸ “As a result of Google's illegal practices, traffic to Google's comparison shopping service increased significantly”, European Commission Press Release, [Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service](#).

⁹ Robert Pitofsky, “[The Political Content of Antitrust](#)”, 1979.

and general information. And because the effects of these facts in any particular instance cannot be confirmed by quantitative evidence, they are simply disregarded by those sworn to admit only what they regard as scientific evidence: they thereupon happily proceed on the fiction that the factors which they can measure are the only ones that are relevant.”¹⁰

Another Nobel laureate, of more recent vintage, came at the same thought from another direction when he sang:

“You don’t need a weatherman
To know which way the wind blows.”¹¹

Appeal courts have cited Dylan “to convey that expert testimony is unnecessary to make a point obvious to any layman.”¹² No toolkit needed.

The scholarship on the broader original vocation of antitrust goes back further in time. An obvious source is what Senator Sherman said when launching the legislation that bears his name.¹³ That takes us to the nineteenth century. Maurice Stucke takes us back to 1776 and the Declaration of Independence, identifying the Pursuit of Happiness as an objective of the laws. And Maurice has indeed written about the “happiness economics literature” and how it can inform competition policy.¹⁴

My own reflections on this have taken me back still further in time, to a source older than Pembroke College or Oxford University itself. We read in the Old Testament, in Deuteronomy, that:

“Man does not live by bread alone.”¹⁵

Less often cited is the rest of the sentence, explaining that man also needs the Word of God. So it isn’t enough that we have food for our stomachs - we also need soul food.

Bringing this way up to date, we want a smartphone and internet that provide us with good quality news. Real news and not fake news; and a diversity of opinion to stimulate debate. But we do not want our smartphones or its apps to exact an undue price by invading our privacy and harvesting our personal information. It is reported for example, that Uber not only knows our location, but siphons off information about the remaining battery life in our smartphones. And it has identified that people with low battery power are willing to pay more for their transport.¹⁶ A nice example of an invasion of privacy that also leads to a consumer concern in a simple monetary sense.

¹⁰ Friedrich August von Hayek, Speech on accepting the Nobel Prize for Economics, “[The Pretence of Knowledge](#)”, ¹¹ December 1974.

¹¹ Bob Dylan, “[Subterranean Homesick Blues](#)”, 1965.

¹² Los Angeles Times, Carol J. Williams, “[In some courts, Dylan rules](#)”, 9 May 2011.

¹³ In the passage most frequently cited Sherman makes plain the vocation of his proposed legislation to support democracy: *If the concentrated powers of this combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities. If anything is wrong this is wrong. If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life.*”

¹⁴ Maurice Stucke “[Should Competition Policy Promote Happiness?](#)”, April 2013, 81 Fordham Law Review 2575 (2013).

¹⁵ Deuteronomy, Chapter 8, verse 3

¹⁶ The Independent, Adam Withnall “[Uber knows when your phone is running out of battery](#)”, 22 May 2016.

My call for antitrust to embrace more ambitious goals than the OECD's notion of consumer welfare is not an assertion that antitrust law is a panacea for all ills. But it has a broader vocation than consumption in the narrow Chicago sense, and should play its part in upholding our values beyond price, indeed beyond consumer notions of the quality of goods and services.

There are big questions of definition, and big questions of institutional structure, to be faced. Antitrust authorities require democratic legitimacy, and will – without exception – require some insulation from political pressures. But it is a counsel of despair to imagine that antitrust can do nothing on these broader fronts, or has no mandate to do so.

So I conclude with some questions for our discussions today. With Hayek and Dylan, I ask how we should measure the things that matter, or rather how far we need to measure them. And taking a lead from the Bible, I ask: what are the values that antitrust can help sustain, feeding not just the body but the soul? And from the divine to the merely judicial, how do we articulate and uphold the public interest and the *bien-être* that the Court of Justice identified as the ultimate goals of the EU competition rules?

Ariel Ezrachi framed today's event in terms of *Online Markets and Offline Welfare Effects*. The positive benefits from online markets are all around us. But I for one don't believe that antitrust is incapable of addressing offline effects that work against our values. It's just that we may need other tools than an economist's hammer, because these problems are not nails. Dylan didn't tell us how he knew which way the wind was blowing. But he knew, and so do we. Was he just streetwise, or was he consulting a moral compass? Or both? Maybe we can add a moral compass to our antitrust toolkit, although we will certainly have to work to calibrate it and to agree how to read it. The times are a-changin'¹⁷ and antitrust needs to change with them. Although it may mean going back to the turning before Chicago and getting back on the original track.

¹⁷ Bob Dylan, "[Times they are a-changin'](#)", 1964.

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