WHO SHOULD TRUST-BUST? HIPPOCRATES, NOT HIPSTERS (feat. evidence-led suggestions for how authorities could be more "progressive")

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I. INTRODUCTION

The hipster antitrust movement is not new, but it is pressing and comes with powerful political allies. As such, competition authorities should engage with it to ensure, first, that it does no harm but also to see where it could do some good. Antitrust authorities could be more "progressive" but the way forward is not by making non-evidence based decisions condemning market structures. Progress could come through authorities better communicating the relevance of their existing theories of harm to assessing alleged problems of bigness, concentration or unfairness. If authorities want to better identify whether hipster complaints raise real problems that antitrust or other regulatory authorities could or should address, they could increase their evidence base starting with, for example, trust in online markets and consumer vulnerability. Authorities should hold the line however and never let non-evidenced claims influence antitrust law enforcement itself.

II. HIPSTERS AT THE GATE (AGAIN)

If the hipster antitrust debate concerns the relative role of efficiency and consumer welfare, vs. fairness and total societal welfare, then the debate isn't new. It surfaces every few years within the antitrust community, and is a worthy challenge and reminder of the populist roots of competition law.

The issues at the heart of hipster antitrust are made more pressing because they are spurred on by technological developments and accompanied by loud calls for static one-shot remedies. So, complaints about bigness, concentration, undue bargaining power, political influence, income inequality, and high profits – all come with obvious and self-referential solutions like ordering breakups and price caps. No one mentions increased economies of scale and scope, widespread innovation and lower prices – or even free services.

What seems to be new this time is the involvement of powerful forces outside the antitrust community, their vocal disappointment in competition policy, law and economics, and their call for faster – and ideally structural – intervention. Break up monopolies and oligopolies, block more mergers, get platforms to open, release more data or restrict its collection and do it now, before it is all too late. Hipsters want competition authorities to "move fast and break things."

Their disappointment in competition policy blends with traditional concerns about "trusts." Hipsters call for presumptions that "big is bad" and that concentration, cross-shareholdings and too much vertical integration are *a priori* a bad thing too. Added to this are similar-sounding concerns that in the online world, big data is bad, algorithms are too manipulative, and both are creating imbalances in power that competition law is powerless to address. A key target is antitrust's "consumer welfare" standard – which hipsters argue is too narrow to capture any of these problems, and is making authorities less and less credible with ministries, consumer groups and disruptive entrants.

As a result, there is less and less trust in markets and more and more dissatisfaction with the most economically-literate developments in competition policy. Competition authorities pour fuel on the hipster fire when they find – as the CMA has in most of its market investigations – that in many problem markets a contributing factor is a lack of consumer engagement. Hipsters want more paternalistic intervention to protect even disengaged and inert consumers, or to act even when no consumer harm is even likely. When authorities respond that the consumer welfare standard can evolve – and that they already assess non-price issues like quality (including privacy) and innovation, hipsters say that is not enough. They say a forced awakening is needed for competition policy to adapt to assess and address harms, old and new. Without it, antitrust is becoming politically irrelevant, and will be replaced with direct intervention, including sterner break up powers, price caps or more – to ensure markets are fair.

III. ANTITRUST RISING

The fact that there is a debate at all – including in this issue of the CPI Chronicle – shows that the competition community is listening and engaging. Just as hipsters are calling for change, competition authorities are doing more to communicate how their core mission actually achieves many of the same objectives. When competition works, a market treats everyone more fairly. When consumers exercise choice, suppliers have to offer better products. When consumers are deprived of choice – or have it skewed – offline or online, then the competitive dynamic is distorted or freezes. Competition or, if needed, competition law interventions can thus serve to address related societal needs. That said, "more antitrust" isn't always the answer. Sometimes the market provides the solution. Sometimes more direct regulatory mechanisms are required. Even then though, competition authorities can help advise ministries on how they may best tailor their interventions to achieve the desired result, but do

so with the least harm to dynamic markets. Though not their primary mission, competition authorities are also addressing conduct that exploits regulatory failures, for example, through excessive pricing decisions.

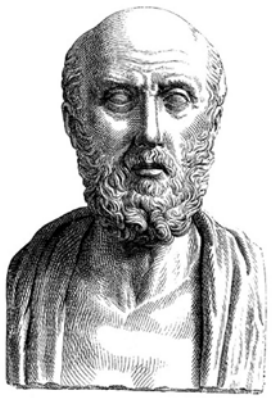
Nevertheless, the consumer welfare standard the hipsters are attacking as too narrow does seem to be a bit of a straw man. Competition law isn't just about price/cost tests and looking out for Homo Economicus – if it were, we'd just need competition law algorithms rather than teams of investigators, lawyers, economists and remedies experts. Of course, competition authorities are recognized experts on assessing static markets and price effects – perhaps because they are easier to measure. Nevertheless, as the nature of markets and business changes, competition authorities recognize that their approach must evolve. Officials are humble enough to admit that they need to be more open to dynamic non-price theories of harm, relating to quality (including privacy) and innovation, as well as ensuring that their work does not chill innovation incentives, essential to dynamic markets in the first place. They are alive to the need to place more emphasis on potential competition in merger review, and take greater account of the potential cost of entry and the ability of firms to expand. Authorities are increasingly ensuring that markets remain open to entrants, and that disruptive innovators in particular are not "embraced and extinguished." As one would expect in any healthy competition of competition policies, some authorities are more concerned than others about restraints in the online world and are intervening accordingly. This "natural enforcement experiment" will help us all better assess when intervention is required, for the good of the entire online and offline ecosystem. Behavioral insights are also helping authorities work out more comprehensive assessments of consumer harm – including consumer vulnerability – and thus design remedies that are more targeted and more effective.

The balance between too much intervention and not enough is a fine one though. In the online world in particular, authorities have to be careful that their interventions are necessary, effective and do not chill dynamic markets. To consider the hipster rhetoric to move fast and break things, what authorities need most of all is evidence: evidence to back up the complaints that competition policy is never enough, and evidence that more intervention is needed and wouldn't lead to worse outcomes.

VI. THE BATTLE OF THE BEARDS

Some guiding principles might help in identifying what evidence and what approaches would be helpful. Obviously, if the base line is "evidence," then this calls for more than the self-referential and circular demands of the hipsters. Whether selfie-seeking millennials, or grey-haired progressives, the hipster antitrust movement cannot just assert that the problem defines the solution, not when the former hasn't been proven to exist nor the latter to be necessary. "Banning bigness because bigness is bad" is a mission, not a theory of harm, let alone a presumption. There are already controls – starting with merger control itself, and the "special responsibility" on dominant firms and monopolization provisions. Ordering breakups because "concentration is bad" is equally facile and not obviously an improvement. Similarly, linking concentration and profit margins and demanding price caps is a convenient flipbook of hipster snapshots … but isn't the whole picture, not if we care about accounting for efficiencies, not chilling pro-competitive conduct or structures, and ensuring dynamic markets. So, evidence of some likely harm is going to remain at the core of competition law, and if the definition of "harm" is to be expanded to include areas expressly and repeatedly excluded, then a cogent argument *with evidence* needs to be made for why it is necessary and would not be worse, let alone how it would even be administrable.

So, what principles might help us? Rather than blindly accept the hype of the hipsters or reject it without consideration, one famous first principle might serve as a guide. In their core role, competition authorities "do good" by "stopping or preventing bad" – whether conduct or transactions. However, before even intervening, the best follow a Precept laid down centuries ago by Hippocrates: first, do no harm.



As with medicine, it is important to keep in mind that the most important interventions often can't be undone. This is why evidence of all sides of an argument is so crucial. This is why procedural fairness guarantees that authorities assess all the relevant evidence. This is why authorities have remedies teams to design tailored interventions that will not distort market dynamics or innovation incentives. Sometimes mistakes will be made, and sometimes *ex-post* assessments may reveal that a remedy did not make a difference – perhaps it was ineffective, or more likely the market moved on around it. But at least we have some assurance that the authority didn't make things worse.

V. MAKING MARKETS WORK

Competition authorities also "do good," directly, not simply from prohibiting bad conduct. Some have market inquiry mechanisms that allow deeper and wider investigations unrelated even to whether competition law has been violated. Here the task at hand is to respond directly to complaints – often populist, political or even hipster – that a market is not functioning well. Many of these complaints won't be drafted in terms of a consumer welfare harm or price effect. The market may just be alleged to be acting not as well as it could – whether through concentration, lazy monopoly or cozy oligopoly, consumer inertia, regulatory incoherence, or all of the above.

VI. OPENING RATHER THAN BREAKING UP

In such inquiries, since there is no allegation of illegal conduct, competition authorities have to be particularly careful to "first, do no harm." Yet it is in these market references that self-referential hipster arguments are made most loudly. In the UK, this is also because structural remedy powers are available. As a result, companies are alleged to have too much power, and demands are made to break them up – and any eventual remedy other than breakup is loudly proclaimed "a damp squib." Break ups are rare though, and for very good evidence-based reasons. In the recent Retail Banking market investigation for example, we found that breaking up the big banks just to add one or more rivals would do nothing but exacerbate the real problems – of a lack of innovation and choice in the market. We chose to open up the banks instead. We found various reasons why they were sitting on customer data that could be usefully employed by them, by entrants and by financial intermediaries and then consumers. Releasing that data would result in more innovation, more engaged consumers and more responsive competition.

A paternalistic break up or price cap would have caused an immediate change, but with long term damage to what we wanted to be a much more dynamic responsive market. We were thus making it easier for consumers to access, assess and act on more information – but still depend on them engaging and exercising effective choice. Of course, much depends on what kinds of financial tools are developed and whether consumers use them, but at least both sides of the supply/demand dynamic are engaged and have a real chance to operate, rather than be superseded entirely by static and too blunt regulation.

There is often no silver bullet anyway, but in our banking investigation we tried to move the role of the competition authority on from designing the consumer interface (e.g. a price comparison tool) – which officials are admittedly not great at – to facilitating the development of a new, better market, one which still left room for and indeed depended on evolving technologies to ensure the system works and is safe to use, and maximizes the opportunities for consumers to engage actively. After all, consumers do have to take responsibility for their purchasing decisions, and exercise choice where they can. Demand side responses to the supply side is an important part of the competitive dynamic. The static short-term fixes of politicians and hipsters harm that dynamic competition.

So, in their own way, competition authorities are actually going a little bit "hipster" – but genuinely hipster (if that is not too painfully oxymoronic a term): authorities are riding new trends and they are experimenting. They are down with the kids on data, AI and APIs. They are designing novel remedies to address novel problems – but all on an evidence-based basis. Data release and data portability remedies; building "compliance by design" into algorithms and "disclosure by default" into data collection are all on the table. To me, going with the grain of technological developments and accelerating innovation – like we did in retail banking – is the most truly hipster thing to do in antitrust.

VII. JOINING UP

In many fast-moving and high tech markets, consumer engagement and data are key. It thus makes sense to divert loud but vague populist calls for action into joined-up assessments of how these markets work. Consumer law plays a crucial role here. So often we see consumer enforcement complementing competition enforcement, and vice versa. The complement is natural, since in both we are making sure that consumers can trust markets and helping them know that what they're seeing is what they're getting. Online reviews, for example, bolster competition as people can make more informed choices, but this only works if reviews are trustworthy. Making sure that businesses abide by consumer protection law, that they treat their customers fairly, and in ways that engender trust, helps to create a more competitive marketplace. Firms have to work harder to offer better products, across all the competitive variables.

VIII. OPENING UP THE DISCUSSION – A CALL FOR EVIDENCE

Competition authorities can adapt further too. Competition laws are designed to adapt – but this doesn't necessarily mean entirely new rules are required. The evolutionary process starts with deepening our understanding of how markets work.

Can authorities stimulate this understanding, rather than always being on the back foot, or being presumed to be defending our corner from hipster and political intrusion? As evidence-based authorities, is there not something blindingly obvious we could contribute to the calls for us to do more?

Two things come to mind: a call for evidence, and at the same time, an enhancement of the tools we have to analyze evidence. This year, at the CMA, we are encouraging more fundamental research into trust in markets. This would likely be highly interdisciplinary in nature and would seek to identify which market practices are most likely to be considered unfair and to undermine trust in markets. We could, for example, test perceptions of the fairness of a range of practices, including those that are not transparent or where the consumer does not feel in control; practices that require undue effort or transactions costs to secure a good deal or practices that involve extreme forms of price discrimination. We want to understand the drivers of trust and mistrust in markets and improve our understanding of the challenges facing vulnerable groups of customers who are at high risk of experiencing poor outcomes in markets. This could all be with a view to informing case selection, diagnosis of problems and the development of remedies.

At the same time, we need to improve our ability to assess the evidence we will receive. All competition authorities need highly skilled economics and remedies teams to understand and examine markets and business models. To address the knowledge gaps regarding the use of data, though the CMA is creating a Data and Digital Insights team to help us understand better how online markets work, the importance of data in these markets, what are the barriers to entry, what drives consumer behavior, and when the transparent nature of the Internet might increase the scope for dominance to become entrenched. This should enhance our understanding of the digital economy and make sure our interventions and capabilities keep pace with the evolution of business models and practices.

This welcoming of new evidence and the ability to assess it will of course influence a range of thinking within authorities, on markets, consumer work, mergers or even antitrust. Until then though, I will close with some arguments about why I feel it is incredibly important to *hold the line* and not let wooly, non-evidence based, populist influences affect *antitrust law enforcement* itself.

IX. ANTITRUST CASES: DON'T SHOOT FROM THE HIP – EVIDENCE MATTERS

The big is bad movement has no place in antitrust law enforcement. Nor do calls for removing economics (or wildly expanding its scope to include wider societal issues directly). Antitrust after all is law enforcement. It concerns conduct, not structure, and involves specific and serious allegations about likely or actual harm to competition. Alleging bigness doesn't cut it nor should it. What matters is deeds not size, let alone words.

To focus only on big companies would miss many harms. Taking on infringements in small markets matters in itself, and as a read-across and compliance and deterrence message more broadly. Removing economic evidence or diluting it significantly with non-consumer based concerns would undermine the theories of harm on which investigations are based. This applies also to object-based approaches by authorities, because in those cases the likely or inevitable economic harm is baked into the offence itself. Economic analysis is obviously crucial for effects cases, but even then does not result in reliance solely on price cost tests. Qualitative evidence matters too. Fairness itself is even a constituent element of some offences but it is not in itself a standalone theory of harm. The concept of fairness is too amorphous to be administrable, and risks skewing decision making and creating false positives or remedies that would distort market dynamics, and thus be unfair. Successful firms should not be attacked just because they have succeeded, even in obtaining a dominant or even monopoly position. What we try to do is investigate very specific conduct harming consumers or the competitive process. Presumptions operate in antitrust, but they are based on well-founded economic or legal experience. In all cases, though, what matters most is the evidence. Investigations and hearings depend more on facts than theories and this is why it is crucial to ensure due process, full consideration of the evidence and an appropriate balancing of the assessment of competitive harm and any pleaded efficiencies or other justifications.

X. IN CLOSING

Greater study of how markets work and how consumers engage with them – in our case, focusing on consumer vulnerability and trust in markets – could contribute to populist, progressive and political calls for change. So, hipsters can count on authorities' engagement – but they'd better be ready to come half way at least, with evidence, not rhetoric. When we get to law enforcement itself, it is the evidence that matters most, and legal presumptions should not be tweaked to accommodate hipster anecdotes and priors that are not well-founded on economics and experience. Otherwise we risk upending the rule of law, as well as competitive markets.

My final call is to make sure that antitrust hipsters know what they are talking about when they say our consumer welfare standard isn't fit for purpose. They need to think about the kind of consumer that needs protecting. We think it is consumers who are vulnerable or likely to be deprived of more advanced, cheaper, quality goods and services. That entails some engagement by consumers, to contribute to the competitive dynamic. So many of the hipster suggestions for break ups and price caps would sacrifice beneficial economies, harm dynamic competition, and be paternalistic rather than empowering. Isn't it dangerous to protect and thus foster inert, unengaged consumers? Isn't it preferable to find ways to motivate them to be more active and engaged, to lean in more, and contribute to the competitive dynamic? The market may not be everything, but it is a very large thing, and it seems better to me to have citizens involved and contributing what they can to the forces within it, rather than sitting back even more, staring glass-eyed and slack-jawed, swiping at their little hipster screens, and waiting for the next regulatory intervention.