…with Eleanor M. Fox

In this month's edition of CPI Talks we have the pleasure of speaking with Professor Eleanor Fox, the Walter J. Derenberg Professor of Trade Regulation at the New York University School of Law.

Thank you, Professor Fox, for sharing your time for this interview with CPI.

1. **"Consumer welfare" is a loaded term. Even for its advocates, it can refer to myriad concepts: overall economic surplus, consumer surplus specifically, and can even encompass "dynamic" considerations like incentivizing innovation. Given this ambiguity, is the debate over whether "consumer welfare" should be the "grand unifying theory" of antitrust a rhetorical red herring? Are we obscuring the real debate, which is *how* competition rules should achieve better outcomes, rather than what those outcomes should be?**

Yes, when people say "Antitrust is for consumer welfare," they are obscuring the real debate. I am constantly bemused by the ardent defense of "The Consumer Welfare Standard." There is no such thing as "THE" Consumer Welfare Standard. It is not a unified theory. It is a range of standards, and they all devolve from a principal goal of protecting and facilitating the competition process.

I am in favor of truth in vocabulary. The March Hare and the Mad Hatter were right when they chastised Alice for her verbal imprecision (as she contemplated the riddle of why a raven is like a writing desk).

> "Then you should say what you mean," the March Hare went on.
>
> "I do," Alice hastily replied; "at least—at least I mean what I say— that's the same thing, you know."
>
> "Not the same thing a bit," said the Hatter.[1]

The advocates of the consumer welfare epithet do not say what they mean.

Antitrust is vibrant and dynamic. Its goal is to create or maintain robust markets. The words "consumer welfare" are static, passive and reductive, and they represent only one side of the market. They give no clue that the law is concerned with innovation and incentives, that it protects sellers harmed by buyer cartels, or that it may protect workers harmed by restraints in labor markets and sellers harmed by mergers that increase buyer power. The word "consumer" needs a lot of stretching to connote the dynamic process of competition, which benefits all market players except those who seek protection or privilege.

The fact that "consumer welfare" is an incomplete phrase should not obscure the critical importance of consumer welfare and consumers' interests in antitrust analysis. Consumer welfare does a lot of work, and coming to grips with the limits of the language does not and should not change this. Impact of conduct or transactions on people in their capacity of consumers is the first line of analysis, and often but not always the last line of analysis; and if a proposed enforcement should harm consumers, that should usually disqualify the enforcement.

1 Lewis Carroll, Alice in Wonderland (1865), excerpt from chapter VII, "A Mad Tea-party."

2. On the other hand, does the current discussion not, however clumsily, at least present an opportunity to sharpen thinking on the scope of "competition" rules? The "Hipsters" openly contend that antitrust enforcement should not be guided solely by economic efficiency, but should also take into account other goals, be they industrial policy, privacy, the environment, and even the protection of democracy itself. Might it be more honest to debate whether antitrust enforcement should also protect these interests, and to do so in straightforward language, rather than shoehorning more and more disparate goals under the rubric of "consumer welfare"?

Since we are talking semantics, do you mind if I take this opportunity to say: I do not use the term "hipster" in the antitrust policy context. It is a pejorative term to put down people who believe that the market system is not working for the people and that antitrust can do a better job in constraining power. I just searched for a definition of the word "hipster." Here is the first entry that came up: "Members of the subculture typically do not self-identify as hipsters, and the word hipster is often used as a pejorative for someone who is pretentious or overly trendy …."[2]

To answer your question, yes, precisely. We want vocabulary that helps us sharpen thinking on the scope of competition rules. "Consumer welfare" does not do the job because it is either too narrow or it does not mean what it says. It never was the limiting principle of antitrust.

I have practiced antitrust law since 1962. I can testify that the term "consumer welfare" was not used in US antitrust conversation or jurisprudence before the Reagan Revolution of 1981.[3] The Reagan Revolution came on the heels of changes in the membership of the US Supreme Court in the late 1970s resulting in a business-friendly Court. By the late 1970s, regulation in general had become overbroad and was handicapping US business as it confronted new global competition. Reagan ran on a ticket of getting government off the back of business. The question was: How do you cut back antitrust law as far as it could go? The answer was: Mandating that there should be no antitrust enforcement unless firms' conduct or transactions impaired allocative efficiency – a position that had been urged for two decades by the Chicago School. The first merger guidelines under Reagan shifted the focus of antitrust merger analysis from keeping rivalry dynamic and stemming the tide of increasing business concentration, to staying out of the way unless allocative efficiency was impaired. The 1982 merger guidelines not only backed away from the dynamic rivalry concept, but were more concerned with the triangle than the rectangle, which is, as economists say, "only a wealth transfer." It was apparently hard to sell the allocative efficiency abstraction to the people. There was no logical constituency, although the metric still has its ardent supporters. Gradually, consumers became the constituency. This, incidentally, was very helpful in regaining popular support for the antitrust laws; although a popular perception in the United States today that the law is not delivering for consumers and the people is weakening that support.

Do we need "consumer welfare" lingo to sharpen thinking on what antitrust covers? Not at all. To sharpen thinking we need to take two tacks. One, unbundling the big tent[4] of consumer welfare, and two, considering (if the jurisdiction wants to) whether non-market factors such as jobs, small business, and national champions should be relevant factors.

When we unbundle the consumer welfare rubric, we observe that those who identify as proponents range from those who are very skeptical about antitrust enforcement and would withhold it except where conduct increases the triangle of dead weight loss and has no good business purpose (the Federalist Society), to those concerned that significant market power blights the economy and would use antitrust aggressively to contain it. (American Antitrust Institute). Incidentally, probably none of the experts advocates use of antitrust to *maximize* consumer well-being, although a critical mass of people claim that that is the goal of antitrust.

What do these diverse groups under the big tent have in common? This leads to the second tack. They oppose non-market factors in antitrust. Not jobs, not environment, not national champions. As for democracy and freedom, that is another story, for many of the occupants of the big consumer welfare tent claim that their vision of the appropriate degree of market intervention or non-intervention is the one that promotes democracy and freedom.

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2 Wikipedia.

3 One famous case invoked consumer welfare even before Reagan's presidency. In *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), the Supreme Court declared that antitrust was meant to serve consumers, and cited Robert Bork's famous conclusion that antitrust was for consumer welfare (although equally famously, Bork used the phrase to mean total welfare). Stunningly, *Reiter* was a case in which price-fixers of hearing aids asked the court to dismiss the case against them on grounds that the plaintiffs were only consumers; therefore, they could not have been "injured in their business or property" as required by Section 4 of the Clayton Act. I remember when this point of statutory interpretation was urged, accepted by the appellate court, supported by much of the bar, and finally rejected by the Supreme Court. *Reiter* proved only that consumers were not excluded from antitrust enforcement.

4 See Daniel Crane, A Premature Postmortem for the Chicago School of Antitrust, Business History Review, in publication (describing the big tent of consumer welfare, in which everyone from the laissez faire right to the break-them-up left claims a spot).

3. **Antitrust is political. For example, in the EU, Commissioner Vestager has recently been re-nominated as the Commissioner for Competition, with, unprecedently, a combined role in charge of the EU's "digital policy." On the one hand, this could be seen as an implicit rejection by a leading enforcement body of the notion that competition rules exclusively protect "consumer welfare" (in a narrow sense). On the other hand, could such developments risk muddying the waters even further, by enticing enforcers to brand more and more conduct as contrary to "consumer welfare" (in an ever-broadening sense)? The term is already loaded. Is it at risk of collapsing under its own weight?**

First, neither the Competition Directorate-General of the European Union nor the EU Courts declare consumer welfare to be the sole goal of competition law. Although their word usage varies from time to time and from judgment to judgment, they often say that the law is for all market players, consumers and efficient or potentially efficient entrepreneurs (but not for anyone who wants special privilege or protection). They often identify the goal as protecting the market process; the process, undistorted by uses and abuses of power, will protect consumers.

The objective of a single digital market fits nicely, not antagonistically, with the paradigm of competition as a healthy, dynamic process. There may be questions as to how consumer protection and data protection fit with the competition mandate, but raising these questions does not muddy waters. To the extent that we can usefully integrate competition, consumer protection and data protection, that will be progress in shoring up the legitimacy of the market system.

4. **From a purely practical perspective, competition rules need to be administrable, enforceable, and predictable. But antitrust laws (notably Section 2 of the Sherman Act and Article 102 TFEU) are notoriously vague. To many stakeholders (particularly companies likely to be on the receiving end of enforcement, and their lawyers), the "consumer welfare standard" is a placeholder for a limiting principle on the specific rules that enforcers and courts can permissibly derive from such open-ended legal provisions. In this sense is (some version of) the "consumer welfare standard" at least useful as a heuristic? Or should we be looking for other methods to define the outer limits of antitrust rules and their enforcement?**

I like administrability and predictability. But your question assumes that there is a consumer welfare standard and that it is meaningful and predictable; that it is the best descriptor of what courts do and what various players in the antitrust community mean when they say: This is the standard for antitrust. Whether you call this enterprise "consumer welfare" or "protecting competition" or "protecting the market process," you still have the same question: How to define the inner core and the outer limits. In fact, the consumer welfare rubric muddies the waters because of its imprecision and the fact that it lends itself to wrong inferences. It implies that protecting sellers from a buyers' cartel is industrial policy and that protecting consumers from platforms' deceptions is competition policy. It obfuscates the real existential debate in competition law today, which is the debate for the soul of antitrust within the big tent.

I think you are really asking, Is the neo-Brandeisian perspective (which rejects "consumer welfare" as a silo) ill-advised because it brings non-market discourse into the analysis and therefore challenges both the limits and the predictability of antitrust rules? This is a very different question from whether "consumer welfare" is the best descriptor of the market discourse.

We do have to confront the question of the relevance of non-market factors. We can confront it more cleanly if we don't insist: "stick with consumer welfare, or lose the legitimacy of antitrust."

In the aftermath of the prohibition of the *Siemens/Alstom* merger, Europe is debating industrial policy in antitrust. In the wake of climate change, Europe is debating sustainability in antitrust. South Africa, still recovering the ravages of apartheid, is in the process of implementing amendments to its Competition Act that mandate greater inclusiveness. To the extent that the competition laws of various nations incorporate non-market goals, the systems will have to work hard to make the laws administrable and predictable. South Africa has just published proposed regulations in an effort to do just that.

5. **Finally, since this interview is about words, what is your final word on consumer welfare?**

I stand with the Mad Hatter. The best we can do with words is to say what we mean. Competition law protects competition.

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