Consumer Federation of America

STATEMENT OF DR MARK N. COOPER, DIRECTOR OF RESEARCH
AS PREPARED FOR DELIVERY,
HILL BRIEFING, WEDNESDAY, JANUARY 26, 2022

Twenty-five years ago, long before the case was filed, The Consumer Federation of America took an aggressive position against Microsoft's abuse of its market power. Twenty years ago, after Judge Jackson found them liable, I wrote a Hastngs Law Review article entitled, Antitrust as Consumer Protection in the New Economy: Lessons from the Microsoft Case.[1] I concluded that

> The trial undermines the claim that the monopoly persists because of the unique natural forces of the software market. The cause of its durability is to be found in the plain old anti-competitive business practices of Microsoft. Real competition, even in this new economy industry, is not likely to impose the costs that its critics claim; it is likely to deliver the benefits consumers have come to expect from truly competitive markets. Thus, the lesson for consumers and antitrust policy makers to be drawn from the successful prosecution of the Microsoft case is clear – antitrust properly focused on competition should be a powerful form of consumer protection in the new economy, as it was in the old.[2]

Last week, I submitted an issue brief to the Senate Judiciary Committee that reached the same conclusion about the anti-competitive and abuse practices of Big Data Platforms.

> although there are unique features of the digital economy that make it challenging for competition policy, there never was a case in which the "dominance" of digital firms was purely a function of those "new" characteristics. In every case, dominance emerged from abusive practices, which were litigated in the Microsoft case, and identified in the other empirical analyses, most explicitly Khan. Bad acts and actors were at least as much to blame as underlying economic characteristics. A return to an approach that eliminates or controls these bad acts is in order.[3]

Tomorrow, CFA will sign on an *amicus brief* in Epic Games v. Apple, that stresses the harm that abuse of market power by Big Data Platforms impose on consumers and app developers. We make no bones about declaring that the best form of consumer protection is competition, and, in this space, our best allies are the independent developers of applications, the true competitors who would, if they could, compete for the sale of complementary services that ride on the platforms. That is what I want to focus your attention on today.

[1] Hastings Law Journal, 52: 4, April 2001, first presented at Conference on Antitrust Law in The 21st Century Hasting Law School, February 10, 2000
[2] Cooper. 2001. P. 879.
[3] Rebooting and Recalibrating Competition Policy: Applying the Tradition of Louis Brandeis to the 21st Century Digital Economy, Recapturing the Uniquely American Success of Pragmatic, Progressive, Capitalist, Decentralized Markets

You will hear all manner of arguments that a benevolent dictator, a benign monopolist is best for consumers. These are special pleadings intended to excuse the abuse of market power. Don't believe it for one minute; competition is the best form of consumer protect. As the following Table shows, I identify six broad categories of anticompetitive abuse made up of Two dozen specific harms.

HARMS RESULTING FROM ABUSE OF MARKET POWER TO STIFLING COMPETITION

Consumer Harms.
I. Services are not "free"
1, Cost in Billions $
II. All transactions are tainted
2. Price
Direct,
Indirect
Uncompensated
3. Consumer Lock-in (captivity)
4. Reduced Choice
5. Inconvenient purchase
6. Poor quality of service

Application Developer Harms
III. Foreclosure of competition
7. Denial of resources 15-20% overcharge
8. Closing of alternative distribution
9. Raising rivals' costs
10. Reduced apps strategies
11. IPhone and Peripherals (large sunk costs =>Customer lock-in)
12. Reduced innovation
13. Eliminated, delayed, and distorted

Harm to the Economy
IV. Monopolization: maintaining dominance & extend monopolization
14. Barriers to Entry,
15. Exclusives
16. Ban on mixing physical and digital product
V. Inefficiency
17, Waste
18. Better uses
VI. Wealth Transfers
19, Transfer of wealth to owners, managers, and senior staff.
20. Excess Profits
21. Rents
VII. Hypothetical (pretextual) benefits, e.g., privacy, security, and IP protection do not outweigh the harms:
22. they are undocumented and not estimated
23. irrelevant as an excuse for the abuse of market power
24. there ae other, much less destructive tools, to achieve these goals
25. ultimately the consumer would be far better off if we can get competition sort out the best approach to protect privacy, security, and IP.

To begin at the beginning, these service "ain't" free by any stretch of the imagination. Frist, the companies charge, and consumers pay directly for billions of dollars for subscriptions, premium services, or equipment tied to the services. Second, to the extent that additional services are bundled into the package, without billing the consumer, platforms charge those costs to third party developer and advertisers, wo recover the costs from consumers in the goods and service they provide. There is no tooth fairy in the capitalist economy. Consumers pay every penny. Third, consumer privacy is compromised, and consumer data is exploited by the platforms, with not compensation for the harmful effects or value of the data.

Lock-in, on which the platforms depend for their dominance and market power, is painful for consumers and raises the cost of switching. There are other "intangible" costs imposed on consumers, including lack of choice, reduced quality and reduced innovation. Big Data Platforms can impose these costs because of the artificially high switching costs and lock-ins.

The harms that consumers suffer is largely a function of the severe constraints on independent development of competing applications. The anticompetitive effect begins with the denial of resources in the form of fixed charges taken by the platform that the developer is not allowed to reduce. Needless to say, these overcharges could be reduced and/or put to much better use by consumer and/or developers. By denying them resources, foreclosing (and sometimes stealing or imitating) independent developers, the marketplace (and ultimately the consumer) is denied innovation, which may be distorted, delayed or foregone.

The antitrust literature has long recognized the broad harm to the economy of abuse of market power by dominant firms. The abusive conduct is protected by barriers to entry, exclusive deals and by banning of specific types of transactions that threaten the market power of the dominant incumbents. It is transfers wealth, enriching owners and senior management, at the expense of the average consumer.

CFA has always maintained that the traditional values of antitrust are central to our uniquely successful, capitalist economy.[4]. I included in my April 2021 Senate testimony the key conditions are interconnection and carriage on nondiscriminatory rates terms and conditions, (FRAND, fair, reasonable, and nondiscriminatory), that ensure comparably efficient access to consumers. It is interesting to note that the original conditions were established in one of the first consent decrees signed by the Department of Justice under the Sherman Act.[5] Thus, this is an approach to non-discrimination, that has withstood the text of time. [6]

[4] Almost a year ago, in testimony to the Senate Judiciary Committee, *Testimony of Dr. Mark Cooper, Antitrust Applied: Examining Competition in App Stores*, Subcommittee on Competition Policy, Antitrust, and Consumer Rights, April 21, 2021, I outlined the changes that were needed to address the abuse of market power by Big Data Platforms: "It seeks to construct guardrails and guidance to promote competition and innovation in decentralized markets and orient capitalism in a direction that promotes and furthers the fundamental economic, social and political values of society, while ensuring consumer benefits and providing consumer protection. The process must be pragmatic and flexible to accommodate the dynamic economy, based on analysis of the real-world functioning and impact of each sector, implemented by experts who have not only the skill, but the authority and resources to implement policy to pursue the goals. Political developments should be democratic and participatory, endeavoring to have political development support the evolving economic structure. The details must be worked out through antitrust and regulatory practice, but clear statements of goal, reform of processes and identification of the factors to be - considered will speed and direct the development of oversight to protect consumers, while-e preserving the dynamic, digital economy. Common law is the basis for Antitrust; it should be the basis for regulation. Clear obligations should be imposed, e.g., a duty to deal (nondiscrimination). Statutory and precedential obstacles to vigorous enforcement by antitrust and regulatory agencies should be removed. Statutory mandates should be avoided, but oversight authorities should be allowed to impose "strict" prohibitions where evidence justifies such actions. As a starting point, utility-like regulation is too restrictive on entrepreneurial activity, while horse and buggy competition misunderstands the nature of the technology and minimum efficient scale. The discussion of regulation also suggests a "new" form of participatory governance, to enhance the involvement of citizens in rulemaking, which is a clear update of Brandeis' support for industrial democracy.

[5] William J. Donovan and Breck P. McAllister, *Consent Decrees in the Enforcement of Federal Antitrust Laws*, 46 HARV. L. REV. 885, 927 (1933) (discussing a 1914 consent decree approved by the United States District Court for the District of Oregon in *United States v. American Telephone & Telegraph Co.*, 1 Decrees & Judgments in Civil Federal Antitrust Cases 554 (D. Or. 1914)).

[6] Big Data Platforms, A New Chokepoint in the Digital Communications Sector, Meeting New Challenges with Successful Progressive Principles, Consumer Federation of America, September.

AREAS TO BE ADDRESSED BY POLICY

Interconnection

(1) Comparably Efficient Interconnection: the principle of providing competitors with access to the broadband network on terms that are technically and economically equivalent to those provided by the broadcast carrier to itself.

(2) A prohibition on preferred agency or exclusive arrangements between vertically integrated broadband access providers and integrated or affiliated information service providers which contain discriminatory access provision, either in terms of price or quality of access.

(3) Access: the ability to make a physical connection to cable company facilities, at any place where a cable company exchanges consumer data with any Internet service provider, or at any other technically feasible point selected by the requesting Internet service provider, so as to enable consumers to exchange data over such facilities with their chosen Internet service provider.

Pricing

- safeguards in order to prevent instances of anti-competitive behavior… implementation of a cost-based price floor to protect against below-cost pricing of broadband access services.
- implementation of a cost-based price ceiling with a limited mark-up to prevent excessive pricing of access services in uncontested markets.
- implementation of a third-party access tariff, allowing for non-discriminatory and unbundled access to broadband bottleneck facilities, as well as comparably efficient interconnection and associated non-price safeguards.
- implementation of price caps, accounting separations and other safeguards against anti-competitive cross-subsidization.
- imputation of appropriate third-party access tariffs to value added information services providers by broadcast carriers.

Non-price safeguards

- competitors able to gain comparable access to network bottlenecks.
- competitors protected against abuse of confidential information which is provided to the bottleneck access provider.
- competitors not otherwise disadvantaged in the market by the bottleneck access provider through, for example, the negotiation of exclusive or preferential agreements with other service providers.

Bundling

- the bundled service must cover its cost, where the cost for the bundled service includes
- the bottleneck component(s) "costed" at the tariffed rate(s) (including, as applicable, start-up cost recovery and contribution charges).
- competitors are able to offer their own bundled service through the use of stand-alone tariffed bottleneck components in combination with their own competitive elements.
- resale of the bundled service permitted…

Sources: This list of conditions was contained in our recent analysis Mark Cooper and Amina Abdu, 2020, Big Data Platforms, A New Chokepoint in the Digital Communications Sector, Meeting New Challenges with Successful Progressive Principles, Consumer Federation of America, September. It was originally developed in a 2000 paper entitled. Cooper, Mark, 2000b, *Who Do You Trust? AOL And AT&T … When They Challenge the Cable Monopoly or AOL and AT&T. When They Become the Cable Monopoly?* (Consumer Federation of America, Consumers Union and Media Access Project, February 2000), based on AT&T Canada Long Distance Services, "Comments of AT&T Canada Long Distance Services Company," before the Canadian Radio-television and Telecommunications Commission, Telecom Public Notice CRTC 96-36: Regulation of Certain Telecommunications Service Offered by Broadcast Carriers, February 4, 1997. At the federal level, AOL's most explicit analysis of the need for open access can be found in "Comments of America Online, Inc.," In the Matter of Transfer of Control of FCC Licenses of MediaOne Group, Inc. to AT&T Corporation, Federal Communications Commission, CS Docket No. 99-251, August 23, 1999 (hereafter, AOL, FCC). America Online Inc., "Open Access Comments of America Online, Inc.," before the Department of Telecommunications and Information Services, San Francisco, October 27, 1999.

Thus, the specific approach to nondiscrimination advocated by CFA fits squarely within the hundred-year long tradition of antitrust in American capitalism. We have identified a dozen key principles to guide the reform antitrust that is under active consideration today. The first five principles govern the general approach of antitrust, the remained deal with rebalancing the practice.

1. Regulated competition (Brandeis' term) is very much a capitalist undertaking with the goal of restoring and promoting a decentralized market economy.
2. Efficiency is important (as Brandeis emphasized in this support for scientific management), because it yields economic progress for all involved in the production process.
3. But, significant progress occurs only if economic market power is not abused (as demonstrated by the Microsoft case) and political power does not multiply the advantage of dominant firms, their owners and highly skilled labor. Competition is the disciplining force, but it is not likely to occur or endure on its own,
4. The pragmatic, progressive capitalist solution strikes a balance between innovation and entrepreneurship, on the one hand, and the guardrails and guidance of antitrust and regulation, on the other.
5. The key constraints require checks and balances to prevent the creation of artificial barriers to entry and abuse of economic and political power [horizontally (across the branches of government), vertically (across the levels of government (i.e., federalism), and internally (through industrial democracy within productive enterprises)].

Unfortunately, a great deal of "unsound" precedent must be overcome, and that is where legislation may be necessary to recalibrate the practice of competition policy, but the practitioners of competition policy (federal and state antitrust and regulatory agencies, and private actors) have moved swiftly to challenge those erroneous precedents. Moreover, it is possible to rebalance competition policy without abandoning the fundamental principles that served the U.S. economy well. The rebalancing enjoying widespread support and remaining within antitrust tradition includes:

6. shifting burdens of proof,
7. adopting narrow definitions of relevant markets,
8. adopting broad definitions of harm,
9. focusing on competition and inequality,
10. resurrecting structural solutions,
11. putting efficiency and consumer welfare in its proper, long-term place by including quality, consumer choice, and innovation, and
12. directing courts to place competition at the center of antitrust policy, stop giving dominant firms the "benefit or the doubt," and treat anticompetitive conducts as the serious threat to consumer interests that it is.