

DOJ/FTC Joint Hearings on Sec. 2 of the Sherman Act

Equitable Remedies In the Face of
Technological Change

by
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General introductory thought

- Remedies often treated as an afterthought.
 - Unfortunately, proof of liability does not predict success in crafting remedy.
 - Vision of remedy should be woven into case development.

Antitrust and Fast-Changing High-Tech Markets

- Nature of high-tech markets:
 - Reason for greater antitrust vigilance, or hands-off antitrust approach?
- Those who say less intervention argue:
 - Rapid innovation creates short product cycles;
 - Thus, durable dominance unlikely;
 - Continuous opportunities for other firms to topple dominant firm.
 - Dominant firm must constantly innovate to stay dominant
 - Serial races for dominance.

Arguments for greater antitrust vigilance

- But nature of high-tech markets can cut the other way
 - Network effects
 - Significant entry barriers;
 - More susceptible to monopolization
 - Case in point: *Microsoft*.

Network Effects

- Consumers attracted to product with largest market share;
- Network “tips” to that product;
- Consumers become locked in.
- Entry or expansion by competitors very difficult.
 - Cannot reach critical mass of customers.
- Technology or product is entrenched.

Computer Platforms

- Economies of scale in production (generally true for products w/ IP as major input);
- Economies of scale in development of applications.
- Compatibility w/ other users valued;
- Strong path dependence due to large installed base.

Implications of Network Effects?

- Dominant firm can much more easily exclude even superior technologies,
 - if it can ensure that rival technologies remain incompatible.
- Because of natural benefits of network effects, dominant firms can more easily use tying and other predatory techniques to preserve dominance.
- Can control research avenues, up to a point.

With respect to remedies --

- Fast moving technology market:
 - What is more appropriate?
 - Milder remedies?
 - Broader remedies?
- My conclusion:
 - Broader remedies warranted, esp. where entrenched monopolist enjoys substantial network effects.
 - Needed to restore competition

Those favoring mild remedies in rapidly changing markets

- Self-correcting market rationale:
 - Bad effects from monopolists' conduct will be dissipated by market forces without antitrust intervention.
- Possibility of unintended detrimental consequences on market:
 - Remedies adopted today may not be sensible a few years hence.
- Chill innovation and competition from dominant firms.

Are high-tech markets more likely to self-correct?

- No; if network externalities exist
 - Self-correcting market requires ease of entry.
 - But network effects raises entry barriers and reduces access to network.
 - Dominant firm can set path of tech change, even if superior alternative path is available.
 - Innovation, both in that market and in complementary markets, might follow DF's technology, even if it is not optimal ex post.

Uncertainty about future market conditions

- Argument that remedies imposed today may not be sensible tomorrow
 - Means more care should be taken in defining future boundaries of relevant market, identifying potential market participants, and in crafting remedy.
 - Or continuing jurisdiction clause so that either party can return to court for modification.
 - Doing too little, too late carries risks too.

Potential chilling effects?

- Often said that compulsory license of IP rights and other affirmative remedies, in particular, may diminish dominant firm's incentives to innovate and compete.
 - E.g. *Trinko* language
- But remedy can unleash innovation from fringe firms.
 - E.g. the AT&T divestiture experience: unprecedented innovation, enhanced service

Note: issue is *remedy*, not liability

- Plaintiff has *already* satisfied demanding burdens of proof concerning market power, conduct, and anticompetitive effects called for in sec. 2 litigation.
- Question is what remedial actions would
 - “terminate the illegal monopoly”
 - “ensure that there remain no practices likely to result in monopolization in the future.”

United Shoe.

Some problem areas for markets with fast moving technologies

- Extremely difficult to revive competition after its loss.
 - E.g. Netscape unlikely to ever regain market momentum.
- Convergence of factors conducive to an earlier viable challenge to dominant firm may not reappear.
 - E.g. new demand for internet access (browsers) no long exploding;
 - Bundling of Microsoft substantial inherent benefits: higher transaction costs for consumers to use non-Microsoft complementary products.

- Narrowly focusing remedy on specific conduct found to be unlawful may not return competition to status quo ante.
- Difficulty of fashioning forward-looking remedies, which may be needed.
- Conduct remedies do not by themselves unravel accumulated market power.

Crafting forward looking remedies

- Must analyze :
 - Likely evolution of market;
 - Innovations most likely to emerge, and how they will change market path.
- Unless we can reasonably predict above,
 - Difficult to determine what remedial actions would break down barriers to entry and facilitate competition, and what would not.

Implications

- Injunction might constrain conduct that defendant no longer needs to engage in;
- Injunction may fail to do anything to erode defendant's monopoly power.
- E.g. first *Microsoft* consent decree
 - Prohibits “per processor” licensing
 - But Microsoft no longer needed strategy to exclude competing OS: IBM's OS/2 and DR-DOS were already defunct.

Potential to circumvent decree

- Must anticipate how dominant firm may circumvent constraints imposed and still achieve anticompetitive ends.
 - Then block alternate paths as well
- But DF enjoys information asymmetry over govt.
- E.g. first Microsoft consent decree:
 - Ban on tying imposed;
 - Microsoft sidestepped ban by commingling code of browser to Windows.

- Block alternate paths toward the same anticompetitive objective, and not merely specific acts that may turn out to be non-essential for anticompetitive ends.
- Doesn't require anticipating every permutation of anticompetitive practice.
 - The challenge: drafting remedy with appropriate level of abstraction, and yet w/ requisite degree of specificity.

Information asymmetries problem

- Solution:
 - Be educated by dominant firm's customers, and competitors or potential competitors.
 - Relying on competitors for information is not equivalent to "capture."
 - Consistent with "protecting competition, not competitors" principle.

Importance of creative affirmative obligations

- Simply stopping exclusionary practices and preventing their recurrence does not unravel market power.
- If rivals and potential rivals have already been excluded, banning the bad acts alone may not resuscitate competition.
- Helpful: affirmative duties effectively ***lowering*** rivals' costs.

Some examples of affirmative duties

- Compulsory licensing of IP rights w/ or w/o royalty fees
 - E.g. FTC v. Xerox, in 1975
 - Microsoft: disclosure of APIs and communications protocol.
- Obligation to sell to all customers on non-discriminatory basis.
 - Kodak, 9th Cir. 1997

More examples --

- Unbundling of products
 - United Shoe (machinery and repair service)
- Requiring creation of products to comply with industry standards, not proprietary standard.

Compulsory Licensing of IP

- Quasi-structural in that it can potentially change structure of market.
- Distinguishable from refusal to license IP as an antitrust offense.
- Similar in principle to compelled divestiture of physical/productive assets used in more traditional markets.

- Objective:
 - Facilitate competition in market impaired by anticompetitive acts.
 - Open up system to make it conducive to competition
- Be creative in efforts to erode barriers to entry, and facilitate competition.

Korean Microsoft case

- Microsoft market or monopoly power found in:
 - Server Operating System (78% market share)
 - PC Operating System (90% market share)
- Violations found:
 - Tying Windows Media Service to Windows Operating OS
 - Tying Windows Media Player to Windows PC OS
 - Tying instant messaging program to Windows PC OS

KFTC remedies

- Tying media service to Service OS:
 - Unbundle products
- Tying Microsoft Media Player and instant messaging program to Windows PC OS:
 - Provide stripped-down version of Windows
 - Provide version of Windows that includes “Media Player Center” and “Messenger Center”
 - Links to webpages to facilitate consumer downloads of media player and messenger products

What “centers” accomplish

- Allows consumers to easily select media player or instant messenger of their choice.
 - Select link to the product’s website, and download.
 - Microsoft’s products included among the selections.
- Neutralizes any inherent benefit Microsoft has in complementary markets due to its control of Windows PC OS.

Assessment of remedy

- “Centers” serve as portal to different complementary offerings.
 - Facilitates consumers’ downloading of media player and instant messaging program of their choice.
- Facilitates choice based on merit, not on ease of physical adoption.
- Proportionality?
- Administrability?

“protect competition, not competitors”

- Protecting competitors is often intertwined with protecting competition in new economy markets.
 - Without protecting competitors with nascent technologies, new technologies may not have a chance to emerge.
 - Without competitors, no way to know if DF’s product is the best that technology can produce, or better alternatives are capable of being developed were it not for DF’s actions.

Compared to comparable U.S. remedial term

- U.S.
 - no unbundling.
 - Simply permits OEMs to remove end-user access to IE (hide functionality)
 - But Microsoft allowed to provide mechanism for consumers to easily re-enable access.
 - Does not remove disincentive to OEM installing competing middleware, because increase in support costs would still be present.

- Korean:
 - More aggressive than consent provision.
 - But milder than “must carry” remedy originally sought by govt.
 - Initial interim conduct term: Microsoft must distribute Netscape Navigator with Windows for 3years.

Compared to comparable EC remedy

- EC:
 - Unbundling ordered.
 - But, no requirement that stripped version be licensed at lower price.
 - Priced equally, there is no real choice.
 - Still raises rivals' costs to gain access to Windows.
- Korean:
 - Seems more creative and tailored to problem.

Importance of continuing jurisdiction in fast moving markets

- Allows court to assess future development
- Purpose:
 - Not to simply ensure compliance with decree itself;
 - But to ensure movement toward ultimate objective set by court.
- Have benchmarks in decree to evaluate effects, i.e. measure success.

- Definition of success of remedy:
 - Not simply whether defendant has complied with specific terms of decree, though that is also important
 - But whether decree is doing anything to make market more competitive.

With continuing jurisdiction --

- If decree is not having market effect within a reasonable time,
 - Court can pursue other avenues.

Final Note

- There is value to section 2 enforcement, even if no effective judicially-imposed remedy.
 - Defendant may at least temporarily moderate its behavior toward entry or expansion by rivals or potential rivals.
 - Or even voluntarily discontinue some of the challenged practices, thus
 - Provide fringe firms opportunity to gain foothold.

- E.g., Microsoft relaxed enforcement of exclusive dealing contractual agreements with OEMs during course of litigation.
- Might temper its conduct in response to the next generation competition (search engine market perhaps?)

Public policy reason

- Even if “irremedial,” it is bad policy to take no action if conduct harms consumer welfare; sends wrong signal.
- Taking action can deter the Microsofts of the future, e.g. Google.