



Consumer Federation of America

**Summary: Statement of
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Before the Federal Trade Commission Public Workshop on E-Commerce
On Possible Anticompetitive Efforts to Restrict Competition on the Internet
October 8, 2002**

PRO-CONSUMER POLICIES MUST PROTECT THE INTERNET FROM ANTICOMPETITIVE ABUSES

The Internet is a revolutionary means of communication and commerce that can dramatically enhance consumer sovereignty and empower citizens. It can promote robust competition. It can also make it cheaper, quicker and easier for businesses to illegally collude. The benefits of the Internet are only available if access is kept open, unfettered, and unbiased. Public policy can hinder competitive pro-consumer e-commerce or be the crux of its growth.

This workshop provides the opportunity to highlight very familiar old-economy problems and their implications for the new economy of the Internet. Traditional commercial restraints on trade can rob consumers of the benefits of the Internet, just as closed proprietary networks, incompatible operating systems, or balkanized applications do. Classic restraints on trade—unilateral, parallel, or collusive conduct—can limit the availability of products, control price competition, or stifle the beneficial effects of the Internet in enhancing consumer search capabilities.

The ability to gather and process information, which is greatly facilitated by the Internet, is a two-edged sword. It can strengthen the ability of producers to control and manipulate the markets—through parallel pricing, for example—just as easily as it can open distribution channels that increase competition and enhance the ability of consumers to shop.

We must be vigilant, but more importantly, we must be pro-active in identifying and preventing these sordid old business practices from migrating into cyberspace, if we are to preserve the pro-competitive, consumer-friendly promise of the Internet.

It is our hope to see the Internet create an environment that strengthens market forces on both the supply and demand side: reducing the middleman, enhancing consumers' ability to search, shop, and find information, and reducing barriers to entry into business. It is our hope that the Internet creates an environment that undermines companies' ability to exercise market power and to engage in anti-competitive practices.

However, generally, whenever entrenched companies are confronted with significant economic or technological change, they arduously defend their business models and market niches, with costs to the consumer. They form cartels, employ anti-competitive practices, or enlist the aide of the government in their defense to impede change.

THREATS TO COMPETITION ON THE INTERNET ABOUND

It would be a critical mistake for policymakers to believe that the power of technology alone will ensure a consumer friendly and pro-competitive environment. For over a decade, the Consumer Federation of America (CFA) has been battling anticompetitive strategies to control the network itself, or the flow of commerce over it.

In the late 1980s and early 1990s, we resisted the efforts of the Baby Bells to convince policymakers to allow them to impose their centralized telecommunications model on the emerging commercial Internet. Since the late 1990s, we have opposed attempts by the cable companies to exclude competing Internet Service Providers from their high-speed telecommunications networks. Unfortunately, policymakers have not required them to allow

nondiscriminatory access. As a result, the public has suffered continually rising prices for high-speed Internet service.

Throughout the 1990s, CFA opposed the effort of Microsoft to monopolize the software that controls the PC and web browsers. The stunning finding of antitrust liability in Federal District Court has yet to pay off for consumers, although we hope that the remedy phase of the trial will free the computer software industry from a stifling monopoly.

We are also deeply concerned about efforts by 'old economy' industries to prevent the Internet from injecting more competition and greater consumer sovereignty into their industries. We are concerned about joint ventures between businesses that may control the availability of products sold over the Internet. We participated in the Federal Trade Commission's conference on business-to-business ventures and have commented on the chilling effect that joint web sites, like Orbitz, can have on the e-commerce marketplace.

We have also focused a great deal of attention on trade restraints on the sale of new automobiles over the Internet. Antiquated state laws that protect automobile dealers from competition have been used to turn the Internet against free competition. Not only are direct sales of automobiles banned in most states, but even the effective use and distribution of certain types of information are banned. For example, Consumer Checkbook, which provides a shopping service for a fee to the public, was run out of Texas because it was deemed to be in violation of the state's auto dealer law. Automobile manufacturers have been precluded from sending consumers to their best dealers by state laws, because dealers fear this could stimulate competition.

THE NEW INFORMATION ECONOMY REQUIRES EVEN MORE VIGOROUS ANTITRUST ENFORCEMENT THAN THE OLD INDUSTRIAL ECONOMY

In the late 19th century, it became clear to captains of industry— who later came to be known as ‘robber barons’— that controlling the flow of primary inputs into the industrial process was the way to gain control over the newly emerging industrial economy. They sought, and in too many instances, did monopolize railroads, pipelines, and steel mills. Our society responded with a series of laws and legal actions that rejected the centralized, controlled model in favor of an open, competitive economy. Claims that preventing the concentration of economic resources would hurt the economy were raised at the start of the last century and they proved wrong for exactly the same reasons they are wrong today. Competition is the wellspring of economic progress and technical innovation in our capitalist economy. Keeping our economy open and competitive also plays an important role in promoting our democracy.

Today, a new industrial economy is being born and we observe a strikingly parallel process. The captains of industry threaten to become ‘robber barons’ by foreclosing entry and controlling the flow of the key inputs in our e-economy: data, and information. Our concern about the Internet should be even greater because it is not only the emerging highway of commerce, but also a critical means of communication.

It is up to us here today to identify the past and present anticompetitive efforts that aim to restrict competition. It is up to the FTC to regulate aggressively and enforce Internet public policy that embraces unfettered access, robust competition, and most importantly, policy that embraces the consumer, not big businesses.

For example, with business-to-business transactions, clear measures must prevent anticompetitive arrangements before they are executed. An ounce of prevention is worth a

pound of cure. A rule of reason should be applied, with heightened scrutiny and consent decrees, which ban specific practices.

Market Share Threshold- Arrangements that account for a significant share of the suppliers in a market should be subject to specific investigation.

Ownership Matters- Profit sharing between firms should be discouraged, since this diminishes the incentive to compete. Firms should not generally appear on both sides of a transaction, since this aids in the manipulation of the availability of a product or its price.

Restriction of Supply- Restriction of supply, either by requiring certain quantities to be offered or preventing participants from selling outside of the arrangement at attractive prices, may restrict supply to the market and have the effect of undermining rivals or reducing competition for consumers. Such arrangements should not be allowed.

Participation Rules- If the ventures invite the public to participate, as buyers or sellers, then rules about who can make product available to or purchase product from the venture should not be unduly discriminatory or exclusionary.

Information Exchange- Joint venture participants should not gain access to information on competitors' input costs or quantities and prices of output sold through the venture. This requires anonymous transactions executed by a site administrator.

Oversight of Informal Behavior and Compliance with Conditions- Joint venture operations provide significant opportunity for exchange of competitively sensitive information in informal ways. These joint ventures should be required to have an Ombudsman present at all official functions and to monitor operations. A finding by the Ombudsman that anticompetitive activity has occurred should become a rebuttable presumption of a violation of the antitrust law.

For more information, go to www.consumerfed.org/b2bdeals.pdf

www.consumerfed.org/cheapseats.pdf