Professional paper
Received: 2022-05-12
Accepted: 2022-05-10

THE LONG FIGHT AGAINST MONOPOLIES

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In 2001 Microsoft went to court, the very existence of the company at stake. The prosecutor, the US Department of Justice. The defendant, Microsoft themselves. The charge, that the software giant was monopolizing the market. In the US, as in many other countries, there exist laws meant to protect the market and consumers from monopolistic practices. Known as anti-trust laws, it was these regulations that the prosecution based their case on. Some 21 years later the same laws are still in effect, but cases such as this one are a rare sight in the US. While in other nations the fight against monopolies is seemingly fought with more vigor. This has led some to suggest that US monopoly regulations are no longer up to the task. Unfortunately, there is some truth to this, as while US anti-trust laws are being enforced, they have been massively weakened by new challenges.

To understand the charge Microsoft faced we must first understand what a monopoly is. The standard economic definition of a monopoly is a firm that controls the entire market. A more illuminating definition is provided by Hartmann (2020) as he states that: “[a] monopoly is broadly defined as a single part of a larger system that takes over or dominates, controls, and consumes all the energy and functions of the entire system”. One other term often associated with monopolies is exploitation, as their dominance over the market leaves those involved at their mercy.

This exploitation can take on several forms and reveals the dangers of an unregulated monopoly. The main criticism is that exploitation leads to higher prices. For example, in the US average monthly broadband internet costs amount to $70 while in Germany they are $36, a direct result of a monopolized market in the US (Hartmann, 2020). When there are no alternatives, consumers must buy what is on offer at any price. As a consumer you are actively hurt by high monopolization as you are forced to spend more of your disposable income on necessities. A monopoly is also the sole recruiter for a specific industry. This means workers in that industry receive lower wages as the monopoly is under no pressure to pay them more.

But it is the last great con of a monopoly, actions against the competition, that landed Microsoft in court. For them, the charge was that they were abusing the power they held as the dominant software developer to force windows programs onto consumers. The scheme was simple, if you bought a windows product, you would receive Internet Explorer pre-installed, but have a suspiciously difficult time downloading rival search engines.

In the 1800s this behavior would have gone unchallenged, but in 2001 formidable laws were in place to stop them. The Sherman Antitrust Act of 1890 is the cornerstone of American anti-trust law, that spelled the death of many monopolies. In congruency with The Federal Trade Commission Act and The Clayton Antitrust Act, it forms the trifecta of anti-trust legislation. The Sherman Antitrust Act and The Federal Trade Commission Act prohibit monopolization and conspiracy between firms while the Clayton Act focuses on other practices not covered by the previous two (Federal Trade Commission, n.d.). Today it is the Federal Trade Commission (FTC) and the Department of Justice (DOJ) that handle US antitrust prosecutions. These agencies directly protect you from high prices and secure your freedom of choice. To see if the trust-busting spirit of 1890 is still alive, we must look at the state of the US today, the new challenges facing the FTC, and finally compare the US to the similarly sized EU to contextualize the success or failure of US antitrust.

In the early days of anti-trust regulation, monopolies were fought with remarkable fervor that would fade with the great depression in the 1930s. A similar event played out in the 1960s and the 1970s, but with much larger repercussions. The 1960s have now become seen as the strongest period of enforcement (Rogers, 2013). This came to an end in the 1970s as the poor economic conditions focused government and public attention elsewhere. The result of this change was a shift from regulation by the US Supreme court to regulation by government agencies, whose careful conduct massively slowed down anti-trust regulation, a state of affairs that continues to this day (Rogers, 2013). At the same time, a differing school of thought was converting regulators to a different view of monopolies and their role in the economy.

The “Chicago School” believes that monopolies should be judged as “good” or “bad” based on how they affected consumers (Dow & Abernathy, 1963). Previously monopolies were judged on their size, with the idea being that since a company is big enough to endanger the market it should be prosecuted regardless of if it actually harms consumers (Lamoreaux, 2019). This narrowed the scope of antitrust legislation and forced the FTC to be reactive rather than proactive. The combination of these factors, the change from court to regulatory oversight and the switch of mentality described above, were responsible for a decrease in anti-trust prosecution in the 1980s and further (Lamoreaux, 2019).

The state of the US in the 2000’s only exacerbated the problem. In the last two decades, the US has seen increasing concentration (fewer firms existing in one industry) and mergers, while prices have increased, and workers have not seen proper wage increases (Melamed, 2020). If you observed a decrease in the number of unique store brands this is the reason. Evidence of increasing monopolization can be seen in 72% of all US warehouse clubs being owned by one corporation, Walmart (Open Markets, n.d.).

It is these notions and statistics that give rise to doubts about the enforcement of US anti-trust laws. But the reality of the situation is somewhat different. The influence of the “Chicago School” veined over time and today the FTC is taking a new and more liberal approach influenced by the concerns over market concentration and inequality (Levine & Garrison, 2021).

Concerning the effectiveness of the FTC, while the levels of trust-busting are not as high as they were in the 1960s and 1970’s, many actions are still being undertaken by the agency. In Figure 1 we can see merger enforcement actions in 2018 were higher than in most years

in the 1980s and early 1990s, but lower than in the late 1990s and some of the 2000s (Scott Morton, 2019). Additionally, while last year's case filings were 20% lower than in 2020, they were still higher than in most of the 2000s (Asimow et al., 2022). This data indicates that the state of the US and the FTC is somewhat hindering the anti-trust activity in the country, but that significant progress is still being made. While the state of the country and the agency are important, the specific challenges facing the FTC need to be examined to provide the full picture.

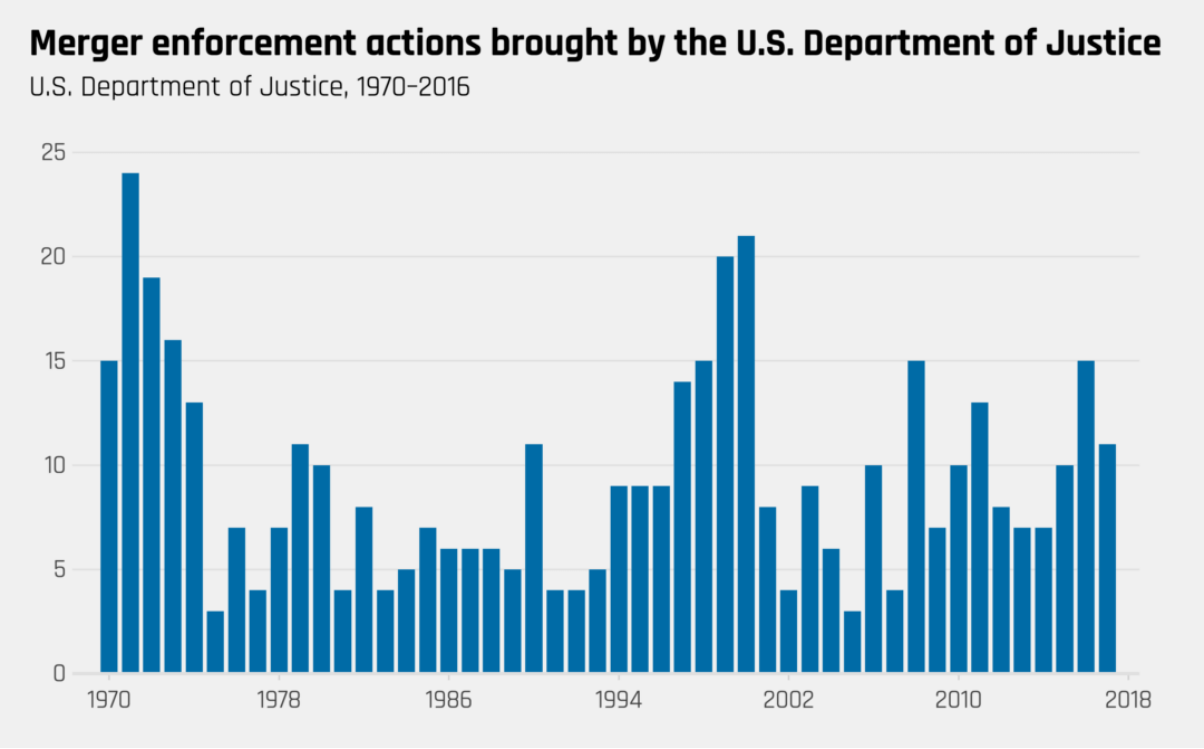

Figure 1. Merger enforcement actions brought by the US Department of Justice 1970-2016 (Source: The United States Department of Justice, n.d.).

Many challenges old and new have troubled the FTC and can broadly be divided into internal and external challenges. Internal challenges concern the limitations and obstacles in the agency's internal conduct. External challenges represent the obstacles outside the agency, such as the rise of the "Big Tech".

The FTC faces several internal issues. The largest issue is its limited funding. The agency has $300 million for its entire operation and 1100 staff to carry the operation out (Hoofnagle et al., 2019). This is a very low budget for an agency that has to protect the entire country from monopolistic behavior. Furthermore, the budget and staff numbers have actually declined since 2010 with a 30% decrease in discretionary budget from 2010 to 2019 while the case numbers have nearly doubled (Beaty & Burke, 2021).

Politics represents another internal issue. Since antitrust operations became political in the 1970s the government and the agency have not always seen eye to eye. In fact, in the 1980's congress decided to penalize the FTC which it could do given its vast control over the agency. This penalization led to the agency shutting down twice (Hoofnagle et al., 2019). It should then be no surprise then that the 1980s saw the lowest level of antitrust cases as can be seen in Figure 1.

Externally the previously discussed state of the US presents new challenges such as the previously mentioned market concentration. The prime example of this less regulated expansion is “Big Tech” firms such as Google and Amazon. These companies have acquired great market share such as Amazon, which accounts for 74% of e-book sales in the US (Open Markets, n.d.). The FTC launched several lawsuits against major tech companies in 2020 (Ma, 2021). Progress on these lawsuits is slow but it does demonstrate a willingness to take on new threats in the market.

The facts presented suggest that the FTC is not doing a good job handling its internal challenges but is more successful in handling external ones. However, as discussed previously recent years have seen a political shift towards favoring the FTC and antitrust enforcement, with the Biden administration adding $24 million to the agency’s budget (Beaty & Burke, 2021). This fact demonstrates that the FTC is not struggling politicly and is not as weak financially as previous statistics suggest. Finally, we need to compare US antitrust with that of EU nations to put US antitrust enforcement in context.

When comparing US laws to those of other nations we need to start by looking at how different nations enforce their antitrust laws. As mentioned previously it is the FTC and the DOJ that handle US antitrust. In the EU The European Competition Commission (ECC) is the counterpart to the FTC. The ECC works alongside the regulatory agency of all EU members with the goal of protecting competition in the union (Damanpour, 2005).

The main difference between nations is in what goals they aim to achieve with antitrust. The EU is concerned with protecting competition while the US focuses on protecting customers (Damanpour, 2005). The nuance within this seemingly small difference is that the US act when they perceive the action of a company is hurting the customer directly in an extreme way. In the EU, however, any action taken by a company that is not competitively motivated can be perceived as uncompetitive. To illustrate, if only one company in the industry suddenly started charging a higher price it would face no scrutiny in the US because it would be perceived as the normal operations of a company, while in the EU the change would be questioned as the ECC would want to understand exactly why the company had increased prices while others in the industry or other industries had not (Bowman et al., 2021).

The EU has seen much more success recently with antitrust than the US. Several high-profile cases instigated by the ECC demonstrate this. While the FTC just recently started suing tech companies the ECC has already fought many such battles. Google, for example, had to pay $2.8 billion in damages for anti-competitive practices and is facing another fine of $5 billion (Martin, 2021). In terms of cases handled the EU has only handled 139 cases in 2020 (European Commission, n.d.). This is a far smaller number than what the US handled in the same period (Asimow et al., 2022). From this, it is clear that while the EU may be taking on more high-profile cases and is more proactive in doing so, the US handles more cases in total.

In 2001 Microsoft went to court, to hear the final decision on whether the company would live or die. That day the court would give the world not a bang, but a whimper. Microsoft was given a slap on the wrist in the form of a fine and some limitations on their power. In many ways, this case exemplified the state of US antitrust and the FTC and the DOJ.

Determined and willing to challenge even the mightiest entities, but hopelessly underfunded and constantly having to settle for less.

The glory days of the 1960s are gone, but some resurgence can be felt in the fight against monopolies. The state of the country and the FTC is improving, and the FTC is slowly overcoming challenges old and new but is still behind the likes of the EU in enforcement despite the nominally higher digits. Therefore, one can conclude that the state of US antitrust is like a racehorse under wraps, intentionally being held back. But now the rider is slowly letting it loose.

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