

1

Towards a Broader View of Competition Policy

*Joseph E Stiglitz**

I. Brief History of Competition Policy (Antitrust)

Competition policy (antitrust) began in the United States as a *political* agenda, to limit the market and *political* power of trusts (monopolies and oligopolies). Of course, long before that, economists had recognized that competition was necessary if the market economy was to achieve efficient outcomes,¹ and that firms on their own strive to limit competition. As Adam Smith put it: ‘People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.’²

Market power has, of course, distributive effects as well. The monopolist’s rents come at the expense of consumers: As monopolies raise their prices, their profits increase, while the well-being of consumers and workers decreases. An increase in market power is associated with an increase in inequality.

* University Professor, Columbia University. This is a revised draft of a lecture originally presented at the Fourth BRICS International Competition Conference in Durban, November 2015. I am indebted to Laurence Wilse-Samson for helpful comments on an earlier draft, to Steven Salop and Michael Cragg for discussions over the years on the broader issues of antitrust, and to Eleanor Fox for extremely helpful comments on an earlier version. I am also thankful for research and editorial assistance from Matthieu Teachout and Debarati Ghosh. Financial support to the Ford Foundation Inequality Project at Roosevelt Institute and Columbia University is gratefully acknowledged.

¹ Although it was not until the 1950s, with the work of Arrow and Debreu, that the efficiency of competitive markets was established (K J Arrow and G Debreu, ‘Existence of an Equilibrium for a Competitive Economy’ (1954) 22 *Econometrica* 290). An essential assumption was that every firm and household was a price taker, ie was so small that nothing that it did could affect market prices. In the real world, there are few instances in which this is true. Agriculture is one—but then there is massive government intervention, because markets on their own lead to high volatility in prices and farmers typically couldn’t manage the risks well on their own, and the economy, on its own, didn’t develop the institutions and markets to help individuals do so. And even in agriculture, there is heavy concentration in marketing. Some sectors are characterized by monopolistic competition—many firms, but still, each faces a downward sloping demand curve. (See E Chamberlain, *The Theory of Monopolistic Competition* (Harvard University Press 1933); A Dixit and J E Stiglitz, ‘Monopolistic Competition and Optimum Product Diversity’ (1977) 67(3) *American Economic Review* 308; J E Stiglitz, ‘Technological Change, Sunk Costs, and Competition’ (1987) 3 *Brookings Papers on Economic Activity* 947 (hereafter Stiglitz, ‘Technological Change’).) Antitrust typically has not taken an active role in such sectors.

² A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (W Strahan and T Cadell 1776) (hereafter Smith, *The Wealth of Nations*).

This is even more the case for monopsony power, that is, when a firm has market power over its ‘suppliers’. This is especially so when a firm has market power in a labour market (eg in a company town). It is costly for workers to move, and thus a monopsonist can lower wages significantly below the competitive level without losing all or even a significant fraction of his workers.

Workers sometimes try to band together to provide some balance of power. Historically, employers have often countered through physical violence. When that is frowned upon, they turn to political action—to try to ban unions (as a ‘conspiracy in restraint of trade’).

Adam Smith talked about these efforts of workers for collective action, the attempt by employers to suppress such efforts, and how appropriate government regulation of the market—as we would put it today, *writing the right rules of the game in the right way*³—can improve matters:

Masters are always and everywhere in a sort of tacit, but constant and uniform, combination, not to raise the wages of labour above their actual rate . . . Masters, too, sometimes enter into particular combinations to sink the wages of labour even below this rate. These are always conducted with the utmost silence and secrecy.⁴

When workers combine, ‘the masters . . . never cease to call aloud for the assistance of the civil magistrate, and the rigorous execution of those laws which have been enacted with so much severity against the combination of servants, labourers, and journey-men’.⁵ ‘When the regulation, therefore, is in support of the workman, it is always just and equitable; but it is sometimes otherwise when in favour of the masters.’⁶

Thus, from the earliest days of capitalism, there has been a political battle over the rules of the game—with employers seeking to make it more difficult for workers to engage in collective bargaining/unionization, but with firms resisting efforts to restrain themselves and their anticompetitive behaviour.

All of this makes it clear that politics and economics cannot be separated. The early ‘trust-busters’ were concerned about the agglomeration of economic power; but they were also concerned about the associated agglomeration of political power. An agglomeration of economic power almost inevitably results in an agglomeration of political power—which can and typically does reinforce the agglomeration of economic power.

A. The Chicago School

In the United States (and elsewhere), courts have been captured by a particular view of the economy, sometimes referred to as the Chicago School (named after the University of Chicago, where many of its prominent members taught). The Chicago School postulates that markets are naturally competitive. In this view, there was in fact relatively little need for government to intervene to ensure competition. The

³ See J E Stiglitz (with N Abernathy, A Hersh, S Holmberg, and M Konczal), *Rewriting the Rules of the American Economy: An Agenda for Growth and Shared Prosperity* (W W Norton 2015).

⁴ Smith, *The Wealth of Nations* (n 3) ch 8.

⁵ *Ibid* ch 8.

⁶ *Ibid* ch 10 (emphasis added).

consequences of the Chicago School were broader: Competition policy shifted to a narrow economic focus, away from the broader societal consequences of concentrations of *power*. And within economics, doctrines that markets were naturally competitive and efficient meant a strong presumption that any observed behaviour, as strange as it might seem, was really efficiency enhancing and supportive of competition. The attractiveness of this shift from the perspective of the judiciary was perhaps understandable: They were given a well-defined question to examine. Was there evidence, in a particular market, of market power? Was there evidence that firms were acting in an anticompetitive way, unfairly using their market power?

Over time, as the influence of the Chicago School grew, so did the presumption that markets were competitive. Even when there was some evidence that there were actions which were anticompetitive, courts looked for offsetting efficiency-enhancing benefits.⁷ While in the United States, there was a 'rule of reason' in balancing the efficiency and anticompetitive effects, there increasingly developed a presumption that firms' actions are efficiency-enhancing. Similarly, in assessing whether a firm was engaged in predatory behaviour, there developed a presumption that it was not: After all, firms were rational, entry barriers were low, and so even if a firm was successful in driving out competitors, there would be new entrants. Thus, no rational firm would engage in selling below costs to drive out others; ergo, predation did not exist. Courts held this view even when there was overwhelming evidence that firms were engaged in loss-making activities in order to establish a more dominant position in the future.⁸

There was also the presumption that distribution does not matter. This presumption is reflected in the use of a total welfare standard, where adverse impacts on consumers could be set against positive benefits to the corporate sector.⁹ Such a perspective is particularly perverse both from an economic and moral point of view in South Africa and other emerging markets. Equally importantly, these perspectives are also increasingly out of sync with developments in modern economics.

B. Developments in modern economics

Modern economic theory (including advances associated with information asymmetries and game theory) has rejected all of the central tenets of Chicago School theory. In particular:

⁷ The competition framework of different countries has evolved differently. Not surprisingly, the Chicago School had less influence in many countries, such as South Africa and the European Union, than it did in the United States. Eleanor Fox notes that: 'The European Union competition law, for example, rejects the Chicago School free market assumptions and privileges openness of markets and access to them by firms without power.' See E Fox, 'The Efficiency Paradox' in R Pitofsky (ed), *How Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on US Antitrust* (Oxford University Press 2008); and E Fox, 'Monopolization and Abuse of Dominance: Why Europe Is Different' (2014) 59 *Antitrust Bulletin* 152.

⁸ Notice that even if firms did so *irrationally*, with the costs of predation exceeding the benefits, there can be significant anticompetitive effects, eg in discouraging entry.

⁹ As Eleanor Fox has pointed out, 'the US mantra IS that distribution does not matter, but perhaps surprisingly uses a consumer welfare standard and does not consider it distributive. The animus is against distribution to small business'.

- Even competitive markets are not, in general, efficient. As Greenwald and Stiglitz explain,¹⁰ Adam Smith's invisible hand is invisible because it is not there. This is true whenever there are imperfections of information and risk markets, or endogenous knowledge (innovation)—that is, always.
- Markets are not, in general, competitive: Even small deviations from *perfect* competition and *perfect information* matter.¹¹ Recent advances have shown that there is a wide range of mechanisms by which market power is acquired, maintained, and enhanced.
- Inequality matters. Recent studies¹² have shown that distribution does matter for economic performance. Moreover, the Second Welfare Theorem (suggesting that issues of efficiency and distribution can be separated, so that economics should only focus on efficiency) does not in general hold.¹³ In addition, there is increasing evidence that significant parts of inequality are a result of market power.¹⁴

The fact that there are so many instances of anticompetitive behaviour means that the key issue now is selectivity, identifying the most important abuses to prosecute.

II. New Presumptions

The most important implication of this new view is that it changes presumptions. Under the old presumptions, those challenging a seemingly anticompetitive practice had a heavy burden to show that it could not be or was not likely to be or might not be in reality efficiency-enhancing, in which case intervening in the natural workings of the market would lead to a decrease in welfare. Under the new view, there is a much stronger presumption that firms are engaged in some form of exploitive activity—trying to garner for themselves profits at the expense of rivals or consumers.

More successful firms, then, may not be those who are more able to produce products that consumers love and to do so at lower costs; but rather firms that are better

¹⁰ B Greenwald and J E Stiglitz, 'Externalities in Economics with Imperfect Information and Incomplete Markets' (1986) 101 *Quarterly Journal of Economics* 264.

¹¹ P A Diamond, 'A Model of Price Adjustment' (1971) 3(2) *Journal of Economic Theory* 168; M Rothschild and J E Stiglitz, 'Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information' (1976) 90(4) *Quarterly Journal of Economics* 629; Stiglitz, 'Technological Change' (n 2).

¹² OECD, 'Focus on Inequality and Growth' (December 2014), available at <<http://www.oecd.org/social/Focus-Inequality-and-Growth-2014.pdf>> accessed 3 July 2017; J Ostry, A Berg, and C G Tsangarides, 'Redistribution, Inequality, and Growth', IMF Staff Discussion Note (February 2014), available at <<http://www.imf.org/external/pubs/ft/sdn/2014/sdn1402.pdf>> accessed 3 July 2017; J E Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (W W Norton 2012).

¹³ See eg J E Stiglitz, 'Information and the Change in the Paradigm in Economics', abbreviated version of Nobel lecture, (2002) 92 *American Economic Review* 501.

¹⁴ See eg J Furman and P Orszag, 'A Firm-Level Perspective on the Role of Rents in the Rise in Inequality', October, presentation at 'A Just Society', Centennial Event in Honor of Joseph Stiglitz, forthcoming in *Festschrift* (Columbia University Press 2015).

able to create and exploit market power, including taking advantage of consumers. In this view, for instance, Microsoft¹⁵ may have been so successful only to a limited extent because of its technological innovations; more important were its business innovations, which created new barriers to entry and allowed it to entrench its power and fend off emerging competition that threatened its monopoly.¹⁶ Akerlof and Shiller¹⁷ describe the success of firms based on ‘phishing for phools’ and, elsewhere,¹⁸ I have described how globalization opened up a global market place of fools that American financial firms could exploit. This kind of ‘competition’ can be even more distorting than monopoly, because of the efforts/practices aimed at *increasing* market power, with consequences that go well beyond simply raising prices.¹⁹ The intent of these practices is to create entry barriers and to foreclose and reduce competition; the effect is often to stifle innovation and to enhance the ability of the monopolist to exploit its customers and suppliers.²⁰

Competition should be viewed as a process. Open competitive markets provide opportunity. The standard approach undervalues the value of freedom to participate in markets. It typically pays short shrift to the broader societal cost, by which the allegedly efficiency-inducing practices can tie up distribution and routes to market, creating entry barriers and reducing opportunity.

All of this implies that competition authorities should focus *not* just on mergers that reduce competition, or explicit agreements that lead to cartel or cartel-like behaviour or other plain vanilla antitrust violations, but rather on *any* conduct that is likely to prevent, lessen, or distort competition, for instance by: (a) facilitating raising prices (eg by changing elasticities of demand for those setting prices—eg vertical restraints);²¹ (b) creating entry barriers; or (c) raising rivals’ costs.²² Such conduct should be proscribed even if there *might* be some ‘public good’ justification. Use should be made of a public interest test, not just in mergers, but in conduct.

¹⁵ Remarkably, the court alleging that Microsoft used leverage in operating systems (OS) to get dominance in an applications market, browsers, failed. In the interest of full disclosure, I served as an expert witness against Microsoft in antitrust actions undertaken in the United States, Europe, Korea, and Canada.

¹⁶ See below for a brief description of some of these business practices.

¹⁷ G A Akerlof and R J Shiller, *Phishing for Phools: The Economics of Manipulation and Deception* (Princeton University Press 2015).

¹⁸ J E Stiglitz, *Freefall: America, Free Markets, and the Sinking of the Global Economy* (W W Norton 2010) (hereafter Stiglitz, *Freefall*).

¹⁹ See P Rey and J E Stiglitz, ‘Vertical Restraints and Producers’ Competition’ (1988) 32 *European Economic Review* 568 (hereafter Rey and Stiglitz, ‘Vertical Restraints’); P Rey and J E Stiglitz, ‘The Role of Exclusive Territories in Producers’ Competition’ (1995) 26 *Rand Journal of Economics* 451 (hereafter Rey and Stiglitz, ‘Exclusive Territories’).

²⁰ Indeed, Stiglitz showed that in the presence of imperfect information, the major market distortions associated with monopoly were those connected with enhancing its ability to extract rents out of its customers. See J E Stiglitz, ‘Monopoly, Non-Linear Pricing and Imperfect Information: The Insurance Market’ (1977) 44 *Review of Economic Studies* 430. Reprinted in *Selected Works of Joseph E. Stiglitz*, vol I: *Information and Economic Analysis* (Oxford University Press 2009).

²¹ Rey and Stiglitz, ‘Vertical Restraints’ (n 20); Rey and Stiglitz, ‘Exclusive Territories’ (n 20).

²² T G Krattenmaker and S C Salop, ‘Competition and Cooperation in the Market for Exclusionary Rights’ (1986) 76 *American Economic Review* 113; S C Salop and D T Scheffman, ‘Raising Rivals’ Costs’ (1983) 73 *American Economic Review* 271.

More generally, competition policy should be concerned not just with the *existence* of competition, but with the nature of competition. It should work to ensure a competitive market place with reasonable ease of entry. In reality, the market itself creates some barriers to entry (eg in access to credit or technology). Competition authorities should be concerned about any practice that augments these natural barriers, thus increasing the market power that would, in any case, exist. Moreover, there should be a simple test of whether there is market power—the ability to raise prices or lower wages or impose anticompetitive constraints.

III. New Issues Within More Standard Framework

Among the important abuses of market power today are several that are markedly different from those of the past.²³ In particular, there are several instances of monopoly power (eg Amazon, Walmart), where a common test for acceptable behaviour, whether consumers are advantaged, may fail to provide an accurate assessment of the consequences of the policy for societal well-being. In the short run, these monopolists may advantage consumers, driving down the prices they pay and passing on a fraction of those gains. Of course, these gains are at the expense of producers. The gains to consumers are less than the losses of producers. This is a general implication of the fact that market power is distorting, lowering societal welfare.

In the long run, matters may be even worse. Thus, as Amazon drove down what authors received, there was, in effect, a transfer of resources from the creators of intellectual property to the merchants. While intellectual property is designed to encourage such creative activity, the impact of Amazon has been just the opposite.

Network externalities also present a new set of issues. (In such networks, the benefits that one member of the network has from being in the network depend on who else is in the network. A phone network is valuable if and only if there are people on the network that I want to talk to.) Network externalities may arise in an increasingly large number of sectors, such as personal computer operating systems, airline reservation systems, and financial networks. When they exist, they generate new sources of market power, market power that is sustained and enhanced by contract restrictions, such as those that restrict the ability of those participating in the network to pass on charges imposed on them to end-users of the network. For instance, credit card companies charged merchants large fees (called interchange fees, typically 1 to 3 per cent of the value of the transactions), but did not allow merchants to pass on those charges to those who used the credit card—or even to tell their customers how much they were paying in interchange fees. Thus, credit card users had no incentives to use a more efficient payments mechanism. The abuse of this market power

²³ See Council of Economic Advisers, 'Benefits of Competition and Indicators of Market Power' (April 2016), available at <https://www.whitehouse.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf> accessed 3 July 2017, for an insightful discussion of the increases in market power in the United States, the potential adverse effects, including on inequality, and the new issues confronting antitrust and antitrust enforcement in the United States.

has generated for banks and airline reservation systems billions of dollars in profits, led to inefficiency in choices (eg of payments mechanisms), and stifled innovation.

Of particular concern is the attempt by members of the Chicago School and others to defend the abuses of this market power by their usual argument that markets are naturally competitive and efficient, in this case using the theory of two-sided markets. In that theory, the network operator may lower the price of some participants in the network to induce more to participate, enhancing the value of the network to others. Credit and debit card companies use this argument to justify, for instance, the exorbitant charges imposed on merchants, even when there is no analysis of (a) whether there really exist network externalities on both sides of the market, and (b) whether these network externalities could possibly justify or explain the charges imposed. The contract restrictions are defended as efficiency-enhancing—although I have never seen a persuasive argument that this is so.²⁴

The increasing importance of network externalities, at least in certain industries, implies, to the contrary, that we should be increasingly concerned about abuses of market power: Firms will take advantage of the often inherent market power that results, attempting to amplify and extend its magnitude, durability, and scope.

There are other reasons that competition authorities should be increasingly on guard: As we move to a knowledge economy, fixed, sunk costs become relatively more important, and even small such costs can serve as a large barrier to entry, enabling an incumbent to sustain large profits without the threat of entry (in the knowledge that should there be entry, competition will drive down prices to the point where the entrant will lose money).²⁵ While it may be impossible to eradicate this natural barrier to entry, competition authorities should do what they can to make sure that incumbents do not amplify and extend their market power.

²⁴ In the interests of full disclosure: I have served as an expert witness in several cases (both credit card and airline reservation systems) where these issues have been litigated. For a court ruling that came down strongly with views consistent with those expressed here, see the case against American Express, where the US District Court ruled that the company violated antitrust laws (see <<https://www.justice.gov/opa/pr/us-district-court-rules-american-express-violated-antitrust-laws>> accessed 3 July 2017). The Appellate Court reversed the decision (see ‘DoJ Loses American Express Appeal on Multi-sided Grounds’, Global Competition Review, by Pallavi Guniganti, 27 September 2016), and as at the time of this writing, the Justice Department has not decided on its response. The Appellate Court’s decision showed clearly (in my judgment) the difficulties courts have in dealing with anticompetitive actions in the new digital economy. The court’s decision raised the bar for plaintiffs; if it is sustained, it will force them to address whether a market is a two-sided market, and if it is, to incorporate consumer benefit as an offset to producer harm. It did not itself address the key question of competition among platforms. Other ongoing cases in allegedly two-sided markets (including against American Express) were already addressing all three issues. There has also been a settlement in cases against Visa and Mastercard. In the United States, the Durbin Amendment to Dodd-Frank curtailed the abuses of debit card companies. European and Australian regulatory authorities have also taken actions attempting to limit the restrictive practices. Distributors have also often used similar contract restrictions to enhance their natural market power.

²⁵ See Stiglitz, ‘Technological Change’ (n 2); P Dasgupta and J E Stiglitz, ‘Potential Competition, Actual Competition and Economic Welfare’ (1988) 32 *European Economic Review* 569–77; J E Stiglitz and B Greenwald, *Creating a Learning Society: A New Approach to Growth, Development, and Social Progress* (Columbia University Press 2014).

Similarly, there is a worry that as we move to a service sector economy, many services are local in nature, with reputation for quality an especially important factor in choices. Imperfect information concerning quality can result in important barriers to competition. (More generally, we often underestimate the importance of the non-traded component in the goods we buy. Even if they are tradeable goods, they have to be delivered to the consumer and serviced; the fraction of the lifetime value added arising from these services as a fraction of the total expenditure on the product may be large.) It will be important to understand the ways in which firms in this sector maintain and enhance their market power, and to develop effective remedies.

A. New technique for exercising market power even when naturally acquired

Antitrust has focused on preventing the creation of market power through mergers and anticompetitive practices, and the abuse of market power, however created. But, as the contractual arrangements used by the airline reservation systems and the credit and debit card systems illustrate, there has been innovation in creating, maintaining, and enhancing market power. Moreover, antitrust authorities will have to be increasingly aware of and innovative in responding to these ‘innovations’. Microsoft’s use of Fear, Uncertainty, and Doubt (FUD), threats of lack of interoperability, and bundling of its browser with its operating system—effectively pricing the browser at zero—illustrate advances in anticompetitive practices. The market power created through the use of these anticompetitive practices has persisted,²⁶ presenting antitrust authorities with still another challenge—how best to reverse market power once created, especially when it has been created through anticompetitive practices.

These issues are likely to become even more important as we move to a knowledge-based economy, with intellectual property rights (IPR) playing an increasingly important role. IPR gives firms monopoly power over their knowledge, and changes in IPR have provided corporations with increasing market power. Still, as the example of Microsoft illustrates, even when firms legitimately acquire market power through IPR, they do not have free licence to abuse that market power through the use of anticompetitive practices.

Antitrust authorities should be sensitive to attempts by those in the corporate sector who amplify their market power through changes in our system of IPR. IPR is supposed to balance the dynamic benefits of innovation with the static costs of monopoly and restrictions in the use of knowledge.²⁷ In fact, many in the corporate sector are arguing for strengthening IPR in ways which cannot be defended in

²⁶ The court’s rulings on Microsoft’s rampant anticompetitive practices have been remarkably narrow. The Department of Justice did not win its FUD, bundling, or zero price/predatory pricing counts. The DoJ did not appeal the zero pricing loss in the District Court. It lost in the Appellate Court on the claim that bundling was per se illegal, and the DoJ opted not to retry that part of the case under a rule of reason.

²⁷ J E Stiglitz, ‘The Economic Foundations of Intellectual Property’ (2008) 57 *Duke Law Journal* 1693.

any appropriate balancing of the benefits of innovative incentives versus the costs of monopoly. An obvious example is the extension of the life of copyright. There is no evidence of any innovative benefit of recent extensions (to seventy years beyond the death of the author).

Historically, antitrust authorities have been sensitive to the power of patents to create, amplify, and increase the duration of market power. They forced AT&T to put its patents into a pool, accessible by others. One of the proposals put forward to curb Microsoft's monopoly power was to limit the life of its patents. It was argued that these actions not only increase competition, but also innovation.²⁸

The most egregious abuses perhaps occur in the drug industry, especially in trade agreements. For instance, Big Pharma has attempted to get provisions that allow it to 'evergreen' its patents and to advantage itself at the expense of generics—often obtaining benefits that it could not have obtained in open public debate. (Data exclusivity is an example of one of the mechanisms by which they have attempted to extend the effective life of their patents.) Some of the practices—such as paying off generic firms not to enter—have already been attacked by antitrust authorities; but again, the industry has shown enormous ingenuity in creating market power, often in subtle ways, again often with the assistance of trade ministries. The United States, for instance, has pushed for restrictions on the use of formularies, one way of encouraging competition among drugs with similar benefits. Even worse was the provision in the United States establishing a drug benefit for the elderly (called Medicare Part D), which restricted the ability of the US government to bargain with the drug companies over price. The voice of antitrust authorities needs to be heard more loudly in response to proposed provisions in trade agreements and public legislation.

B. New approaches to antitrust

Over the years, antitrust authorities have developed a set of approaches to establishing antitrust violations. Having such regular procedures provides clarity to firms and seemingly reduces the burden on the judiciary. Plaintiffs alleging an antitrust violation, for instance, have to define a market in which the firm engaged in the alleged market abuse has a critical share. The presumption is that in the absence of a large market share (in some relevant market), it would be impossible for any firm to engage in anticompetitive abuses.

But increasingly, it is being recognized that this standard approach may be inadequate for dealing with some of the important anticompetitive abuses today; for instance, when the relevant market is affected by market-imposed constraints. In the absence of these constraints, for instance, American Express, it might be argued, would not have market power in the credit card market; but with the anticompetitive constraints (eg that its merchants cannot use the price system, passing on some

²⁸ J Furman and J E Stiglitz, 'U.S. versus Microsoft, Declaration as Part of the Tunney Act Proceeding', commissioned by the Computer & Communications Industry Association (28 January 2002) (hereafter Furman and Stiglitz, 'U.S. versus Microsoft').

or all of the costs of different payment systems to its customers), it has enormous market power. That is, it has the ability to raise its price above the competitive level by a significant amount, with a small loss of usage. Indeed, even a firm with a very small market share (like Discover) has market power.²⁹

I would argue that the lesson of these recent examples is that the key issue is actually simpler than that entailed in the standard approach: It is simply whether the firm, with its contract restrictions, has the power to raise prices—and whether it has the power to effectively force firms to agree to anticompetitive contract provisions. The question then is how did it get that market power and is it sustainable. In some cases, that market power resulted from a simple contract restriction, which amplified some natural market power; the prohibition of that contract might, in such circumstances, significantly enhance competition in the market place.

IV. Broadening the Antitrust Agenda

We began this chapter by explaining how the antitrust agenda had been narrowed from a broader concern about *power* to a more narrow focus on certain ‘illegitimate’ ways of creating market power and certain abuses of market power, once obtained. In this section, I want to argue that rather than narrowing the remit of competition policy, we should be broadening it to reflect not only new risks associated with market power, but a broader realization of the limitations on the *natural* forces for competition and the broader uses to which competition policy may be put.

A. New risks associated with market power

There are in fact at least four *new risks associated with market power*, risks that were beyond anything conceivable to the progressives of the era in which antitrust legislation was first passed.

1. *Using market power to induce individuals to give up rights of privacy*

Some Internet firms provide small discounts to individuals who agree to turn over their data to the firm. It is not clear that the individuals in doing so fully recognize the risks to themselves. Besides, there are societal consequences that go beyond the individual: Putting broad databases together can result in those who control such data having power over individuals, and that power could be abused. There has long been a concern about government intrusion into privacy on precisely such grounds. However, any private sector firm having such data could sell or be forced to turn over

²⁹ The underlying theory is called the theory of insistence. The Appellate Court in the decision referred to in n 26 seems to have rejected the general theory of insistence, which had been supported by the District Court. This is likely to remain an unsettled area for years, unless legislation is passed to clarify that if a firm has the power to raise prices significantly without losing significant sales, it has market power.

that data to the government. While there is no sure way of preventing abuses, not allowing firms to bribe their customers into turning over their data may be helpful. In any case, the collection of such data can give the Internet firm a distinct advantage over rivals, and act as a barrier to entry. Thus, while what is at stake is more than the remit of standard competition authorities, there can be competition effects.³⁰

2. *Using market power to induce individuals to give up rights to use the public legal system for dispute resolution*

This is another example where firms with market power use that market power to enhance their market power; and/or firms are taking advantage of ill-informed consumers to get an advantage over their consumers. Firms with market power can exploit their customers, eg with switch and bait techniques or not performing as promised; but when the customer seeks redress, he is forced to use private arbitration.

Dispute adjudication is a basic public function. There are certain basic rights that individuals should not be able to give up, even for a price. The previous section illustrated one set, rights to privacy. It has long been recognized that an individual should not be allowed either to sell his vote or himself. So too, I believe, for the use of fair courts. By now, there is ample evidence on the lack of fairness of private arbitration.

3. *Too-big-to-fail banks*

These represent a quite different kind of risk of ‘bigness’ than those on which the trust-busters were focused. Too-big-to-fail banks have an incentive to engage in excessive risk taking because they know the government will rescue them. In fact, their plight gives them political power—and it was the abuse of political power with which the progressives were concerned. But the too-big-to-fail banks have proved their political power in another way: It has been virtually impossible to curb their power. As I pointed out,³¹ there was a rough political balance in the United States, between 350 million Americans and ten banks, such that some legislation curbing the worst excesses was passed, but clearly, far less than the vast majority of Americans thought was desirable or necessary.

4. *Inadequate competition in the market place of ideas*

The last illustrates well the limitations of current approaches, where the effect of media concentration is simply measured by market power in often narrowly defined advertising markets. Mergers across media (between television stations

³⁰ Of particular concern is that these Internet providers may already have market power; and they are using that market power to get agreements to transfer information to them, thus enhancing their market power. And this is especially of concern in societies where there is great inequality and large fractions of the population may not be well educated.

³¹ Stiglitz, *Freefall* (n 19).

and newspapers) leading to markedly reduced access to different views have been allowed to go forth, simply because there is competition in the ‘relevant’ market for advertising.

B. Competition policy can and should be broadened further

Until recently, the competitive equilibrium model was the benchmark model used by economists. It was argued, especially by economists from the Chicago School, that competition was the natural state towards which the economy tended, and deviations from this benchmark were limited. It was these limited deviations that were the subject of competition policy. Since the economy tended towards the competitive ideal on its own, only *unnatural* actions—like cartels—should be of concern. But today, there is a growing consensus that the real world entails extensive departures from this competitive benchmark model, with limitations of competition playing a key role in labour, capital, and most product markets. Indeed, there is a growing view that one cannot understand the functioning of most economies today without understanding these *pervasive* limitations in competition; a new benchmark model is emerging, one in which departures from competition are the norm rather than the exception. In this world, antitrust authorities seek not to restore the economy to some perfect competition ideal, but simply seek to prevent excessive and abusive concentrations of market power and the use of anticompetitive practices, particularly when they extend, augment, and deepen market power.

Within most countries, monopoly and monopsony power play an important role in explaining inequality; the growth in monopoly and monopsony power can play an important role in explaining the growth in inequality; and policies aimed at reducing market power can accordingly play some role in the reduction of inequality.³² The extent to which inequality reduction should be an *explicit* objective of competition policy remains a subject of debate.³³ However, in its very nature of checking abuses of power, competition policy is about reducing inequalities in some fundamental sense.³⁴

V. Globalization

The nature and intensity of competition depends on who is in the game. Many have argued with the growth of globalization, there are more firms competing in

³² J E Stiglitz, ‘New Theoretical Perspectives on the Distribution of Income and Wealth Among Individuals: Parts I–IV’, NBER Working Papers 21189–92 (May 2015); J E Stiglitz (with N Abernathy, A Hersh, S Holmberg, and M Konczal), *Rewriting the Rules of the American Economy: An Agenda for Growth and Shared Prosperity* (W W Norton May 2015), available at <<http://www.rewritetherules.org>> accessed 3 July 2017.

³³ See J B Baker and S C Salop, ‘Antitrust, Competition Policy, and Inequality’ mimeo (Georgetown University Law Center 2015).

³⁴ See also E Fox, ‘Making Markets Work for the People’, paper presented to BRICS Competition Conference, Durban (November 2015), published in proceedings in 2016.

any marketplace, and, therefore, there is a stronger presumption in favour of competition (that is, that markets are in fact competitive, so long as trade barriers are kept low). Earlier, we explained that, in fact, even in the case of traded goods, there is often a large non-tradable component, associated with delivery and servicing. Hence, local market power can still matter.

Developing countries face an inherent and historic asymmetry of power. There is a broad philosophical issue: What does 'fair' competition mean, in the context of a developing and emerging market, where small local firms have to compete with foreign behemoths? Is it fair to limit oneself to ensuring that the behemoth does not engage in certain exclusionary practices? Is it true that even some of its competitive advantage arises out of monopsony power in some third market (as described earlier)?

New approaches to development focus on 'helping infant economies grow',³⁵ recognizing the externalities generated by new firms and industries, eg in the manufacturing sector, which in turn imply that a 'free' market solution will not lead to (adequate) development. This provides a legitimate argument for protection—tilting the balance towards domestic firms by, for instance, maintaining a stable, real competitive exchange rate. But it is also an argument for more aggressive enforcement for antitrust. Antitrust policy, like any other policy arena, entails a balancing act, the risks of under and over enforcement. How that balance should play out depends on the circumstances of each individual country.

Thus, just like there should not be a single intellectual property regime for all countries,³⁶ there should not be a single competition policy for all countries. Just as there should be a development-oriented trade regime and a development-oriented intellectual property regime, there should be a developmentally oriented competition regime and antitrust policy.

This is especially so because colonialism and imperialism were based on an asymmetry of political power; and the colonial/imperial countries used that power to entrench themselves economically and to disempower and exploit the countries that they subjugated. In economics, there are often large hysteresis effects: Power, once established, extends and amplifies itself.

The ex-colonial powers were not content to rely simply on market forces to extend and amplify their market power. They embedded within the rules governing the post-colonial era measures that helped perpetuate these imbalances. Thus, escalating tariffs within the World Trade Organization (WTO) rules-based system had the effect of leaving the developing countries to continue exporting low value-added raw materials, and ensuring that the higher value-added activities occurred in the more developed countries.³⁷

³⁵ B Greenwald and J E Stiglitz, 'Helping Infant Economies Grow: Foundations of Trade Policies for Developing Countries' (2006) 96 *American Economic Review* 141 (hereafter Greenwald and Stiglitz, 'Helping Infant Economies Grow'); Stiglitz and Greenwald, *Creating a Learning Society* (n 25).

³⁶ J E Stiglitz, *Making Globalization Work* (W W Norton 2006) and references cited therein; and M Cimoli, D Dosi, K E Maskus et al, *Intellectual Property Rights: Legal and Economic Challenges for Development* (Oxford University Press 2014).

³⁷ See A Charlton and J E Stiglitz, *Fair Trade for All* (Oxford University Press 2005).

Competition policy has an important role to play in *undoing* these historical legacies, enhancing the ability of developing and emerging countries to compete and promote development more broadly.

In international trade agreements—ironically, sometimes under the guise of provisions labelled ‘competition’—developed countries, including both the United States and those in the European Union, have attempted to restrict the ability of developing countries to compete. For instance, they have argued that domestic content regulations are anticompetitive. In other fora, at the International Monetary Fund (IMF) and the World Bank, the advanced countries have discouraged developing countries from using industrial policies (including active exchange rate management) to become more competitive, in spite of the theory and evidence that such policies, when well managed, can be very effective.³⁸ Without industrial policy supporting the development of capabilities and learning by doing and helping firms overcome barriers to entry (such as finance), countries will have low levels of domestic rivalry. Under such circumstances, trade opening can increase the disadvantages of domestic firms and thus decrease effective competition.

The fact that the elimination of *formal* trade barriers does not create a level playing field has finally been recognized in the aid-for-trade movement. Without aid for trade, removing tariffs and other ‘artificial’ trade barriers actually disadvantages developing countries. But the earlier literature on aid-for-trade did not recognize its full implications for the extent of competition within the country.³⁹

At the same time, domestic policies need to be wary of supporting national champions. Dominant firms in many developing countries try to use the ‘national champion’ argument to give them freedom to suppress competition at home and use and abuse their market power.

VI. Market Power, Inequality, and Development

While market power has long been front and centre in competition policy, recent advances have, as we have noted, provided new arguments for the importance of attacking it. It leads to inequality, and inequality leads to poorer economic performance, including lower growth and more instability.

³⁸ See eg Greenwald and Stiglitz, ‘Helping Infant Economies Grow’; and Stiglitz and Greenwald, *Creating a Learning Society* (n 25). More recently, the World Bank has changed its position, and has been actively promoting industrial policies. See J E Stiglitz and Y V Lin, *The Industrial Policy Revolution I: The Role of Government beyond Ideology* (Palgrave Macmillan 2014); and J Y Lin, ‘Industrial Policy Revisited: A New Structural Economics Perspective’ (2014) 22(HS01) *Revue d’économie du développement* 70.

³⁹ See A Charlton and J E Stiglitz, ‘Aid for Trade’ (2006) 5 *International Journal of Development Issues* 41; A Charlton and J E Stiglitz, ‘Aid for Trade’, Keynote Address, *Annual World Bank Conference on Development Economics 2007*, in F Bourguignon and B Pleskovic (eds), *Rethinking Infrastructure for Development* (World Bank 2008); A Charlton and J E Stiglitz, ‘The Right to Trade: Rethinking the Aid for Trade Agenda’ in Mohammad A Razzaque and Dirk Willem te Velde (eds), *Assessing Aid for Trade: Effectiveness, Current Issues and Future Directions* (Commonwealth Secretariat 2013) 386.

Market power is often associated with creating barriers to entry, and inequality means fewer people have resources to enter markets.

These problems can be particularly serious when foreign firms have market power. For them the resulting profits mean that resources are redistributed out of country—depriving the country of needed foreign exchange and undermining demand for domestic non-traded goods, making it more difficult for the country to achieve a competitive market in these goods (including more difficult to achieve economies of scale).

VII. Broadening the Menu of Possible Antitrust Policies

Earlier sections of this chapter have emphasized the importance of broadening the scope of competition policy from the narrow remit to which the Chicago School attempted to condemn it. This section argues that there is, in fact, a broad menu of antitrust policies that competition authorities should employ.⁴⁰

Earlier, we referred to the ‘public interest test’. Within that, there can and should be explicit reference to some of the concerns raised in this chapter: inequality, development, and the marketplace for ideas. We also referred to the necessity of changing *presumptions*.

Of course, those who are engaged in anticompetitive practices, or who believe that markets are naturally competitive, have worked to weaken antitrust enforcement. Therefore, there is a need to increase and focus agency enforcement, with increased antitrust agency budgets. There should be prosecutorial discretion to prioritize cases that benefit less advantaged consumers and to design remedies to benefit less advantaged consumers.⁴¹

Moreover, under the influence of ‘Chicago economics’, there has been a hesitancy to take strong actions. This is seen most clearly in the Microsoft case, where the initial actions failed even to curtail the company from engaging in anticompetitive practices, and subsequent actions did little to curtail the market power that had already been established. There is a need for a rebalance towards more interventionist

⁴⁰ This section has benefitted particularly from Baker and Salop (n 33). A refrain of much of my policy work in development over the past twenty years has been that there was a need for ‘broader goals, more instruments’ than had been suggested by the Washington Consensus, itself largely based on neo-liberal/Chicago School economic perspectives. See J E Stiglitz, ‘More Instruments and Broader Goals: Moving Toward the Post-Washington Consensus’ in G Kochendorfer-Lucius and B Pleskovic (eds), *Development Issues in the 21st Century* (German Foundation for International Development 1999) 11–39; J E Stiglitz, ‘The Economics behind Law in a Market Economy: Alternatives to the Neoliberal Orthodoxy’ in J E Stiglitz and D Kennedy (eds), *Law and Economic Development with Chinese Characteristics: Institutions for the 21st Century* (Oxford University Press 2013a); J E Stiglitz, ‘Creating the Institutional Foundations for a Market Economy’ in *ibid*; J E Stiglitz, ‘The State, the Market, and Development’, WIDER Working Paper 1/2016 (February 2016), originally presented at a conference celebrating WIDER’s 30th anniversary (18 September 2015); and various chapters in *ibid* for a discussion of the relationship between Chicago School economics and the evolution of doctrines related to law and economics.

⁴¹ Thus, under current US law, the Federal Trade Commission (FTC) could conclude that monopoly pricing or price discrimination targeting less advantaged consumers violates the FTC Act.

antitrust and regulatory actions and standards. For instance, one of the proposed actions in the Microsoft case was to limit the term of its intellectual property. While such an action would have both stimulated innovation and curbed market power, this and similarly strong actions were rejected.⁴²

Another example of how antitrust authorities could take stronger actions to promote competition is recognizing excessive pricing by dominant firms as an antitrust offence. EU Competition Law recognizes excessive pricing by a dominant firm as an abuse of dominance (as exploitative conduct). However, there have been very few cases.⁴³ The US Sherman Act is narrower. A monopolist with legitimately obtained and maintained monopoly power is permitted to charge high prices. A 'conduct element' is required, such as an agreement or an act of exclusion. (Interestingly, the United States sets prices through antitrust in at least one area—rates for music publishing rights.) The US and other competition authorities could and should adopt the EU approach.⁴⁴

Any jurisdiction will, of course, worry about the dangers and costs of under- versus over-enforcement. But in setting the rules, account should be taken of economies' different characteristics and histories. Because of sunk costs, history matters. But when that history is coloured by colonialism and oppression, that history cannot be ignored. There is an obligation on competition authorities to take a more proactive stance in rectifying these imbalances.

Among the differences in circumstances facing different economies is size: Smaller economies may face greater problems of entrenched dominant firms. By the same token, natural entry barriers at earlier stages of development imply greater costs associated with exclusionary behaviour, with effects that may be more persistent, outweighing risks of a 'chilling effect' of stronger antitrust enforcement.

I would argue that there is a broad role of government to actively encourage competition, recognizing that competition does not simply and naturally arise in the absence of cartels, contrary to the Chicago School presumptions noted earlier. The industrial policies referred to earlier are one important instrument for encouraging entry and competition. A *public option* is another relevant one, at least for some sectors, where the government provides an alternative to the private sector, thereby checking the extent to which it can engage in exploitation. Therefore, the public option in health insurance in the United States might have played an important role in breaking anticompetitive behaviours that were hard to prosecute under existing laws. A public option in annuities might have led to more competitive insurance markets; and the public option in student loans has led to access at a more competitive rate. A public option in the market for conventional mortgages would almost surely bring down the cost of borrowing.

Competition authorities should recognize too that strong competition policy encourages entry. Microsoft's predatory actions have almost surely had a chilling

⁴² See Furman and Stiglitz, 'U.S. versus Microsoft' (n 29).

⁴³ Somewhat disturbing, my understanding is that a recent decision by the Competition Appeal Court in South Africa may make a finding of excessive pricing difficult.

⁴⁴ To implement this standard in the United States, legislation would be needed.

effect on entry in that sector; had there been more confidence that antitrust authorities would have taken actions against those actions, there might have been more entry.

A. Competition and public interest

Earlier, I argued that public interest should be the overriding concern of competition policy. However, this broad mandate may be difficult to incorporate easily within a rules-based competition framework, and the burden imposed on competition policy must take into account the existence of other instruments.

One principle, though, seems clear: Mandates on domestic firms (like lending to underserved communities or participation of historically disadvantaged persons) should be imposed on foreign firms, even if it is more difficult for them to fulfil such a mandate. No country should sign trade or investment agreements that make this difficult or impossible.

VIII. Global Perspectives

Competition (when firms are active across borders) is a global public good. As in so many areas within global economics, there is a need for more global cooperation. Globalization implies that what happens in one jurisdiction has effects on those living in others. There is a need for collective action—which is not the same thing as saying that there is the need for the same rules, and especially if those rules are written by the developed countries.

There should be cooperation in international enforcement—in the arena of mergers and cartels, as well as conduct.⁴⁵ The hypocrisy of almost studiously ignoring export cartels (like oil and potash)—which the international community has done—needs to be addressed.

What is clear, though, is that there is a need for a broader regulatory environment for multinationals, including taxation.⁴⁶ Competition policy should be seen as part of establishing this broader global cooperative framework.

Unfortunately, competition policy is increasingly seen as a weapon of national economic policy. Moreover, there are economic as well as political reasons for being easier on domestic firms that engage in anticompetitive practices. Some of the profits they glean are at the expense of citizens and firms in foreign countries. Their exclusionary practices may benefit domestic employment at the expense of foreign employment; and some of the increased profits will rebound to the benefit of the government.

⁴⁵ This does not, however, mean that there should be the same policies in all countries, as noted earlier.

⁴⁶ The failure of the UN conference on Finance for Development (in Addis Abba, July 2015) to establish even the beginnings of such a framework within the United Nations highlights the difficulties. The advanced countries are used to making the rules by themselves, for the benefit of themselves.

Thus, it is perhaps not a surprise that the United States is now accusing Europe of unfairly using competition policy against American firms. The US government is more susceptible to pressure from US firms, and it may well be that the US government sees not only political but economic benefits arising from the success of American firms, even if that success is partially based on anticompetitive practices (or practices of avoiding taxes within Europe). Conversely, Europe worries that companies like Google and Facebook will not only open up the possibility of the misuse of the information that they are gathering, eg by some governmental body, but that these firms will also use their privileged access to information to entrench themselves.

A. BRICS cooperation

Cooperation among BRICS can be an important step in creating that global framework. These countries are working together to understand better and create ‘a developmentally oriented competition regime’, one of the objectives of which is promoting ‘inclusive growth’.

This developmentally oriented competition regime must be based on the recognition that many of the central economic doctrines that have dominated Western competition policy have been discredited, or at least have more limited reach than previously realized.

Cooperation among the BRICS competition authorities can be helpful in sharing insights, and perhaps with more explicit cooperation, in ensuring more competition in areas where in the past competition has been limited.

Implementing this broader agenda that I have laid out here will not be easy. On the contrary, non-implementation of this broader agenda risks losing important opportunities for promoting inclusive development.