ANTITRUST AGENCIES: WATCHDOGS OR REGULATORS?

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Abstract:
In the U.S. from eighty to ninety percent of civil antitrust lawsuits are settled through consent decrees—a settlement in which the investigated company agrees to take specific actions without admitting fault or guilt for the situation that led to the lawsuit. A similar trend toward the adoption of this antitrust tool appears also in Europe where this tool is called commitment decision. Through consent decrees or commitment decisions antitrust agencies establish behavior rules to the markets; the same rules that limit the so-called "freedom of market." By doing so, antitrust agencies not only monitor competition enforcing antitrust law, but also regulates markets assuming the role recognized to regulators—here explored. But, is it appropriate to give regulatory powers to antitrust agencies? Markets sometimes fail and need a government intervention. Perhaps in dynamic markets (like telecommunications markets) a flexible tool as the consent decree, which allows a rapid and tailored solution of antitrust agency, is preferable.

I. INTRODUCTION

As of 2014, approximately 90 percent of civil antitrust lawsuits filed by the U.S. government are settled by means of consent decrees.[1] The consent decree represents a settlement between the U.S. antitrust agency and investigated companies in an ongoing antitrust proceedings executed in a decision by a judge—the so-called *decree*.

Over the years in both the USA and Europe the consent decree became an invaluable tool in enforcing antitrust law. In Europe a similar settlement to resolve antitrust cases is

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[1] Douglas Ginsburg & Joshua Wright, *Antitrust Settlements: The Culture of Consent*, Speech at Bill Kovacic: An Antitrust Tribute-Liber Amicorum, Federal Trade Commission (Feb. 28, 2013), *available at* http://www.ftc.gov/public-statements/2013/02/antitrust-settlements-culture-consent ("By the 1950s, 87 percent of all civil antitrust cases brought by the Division were settled by consent decrees. By the 1980s, 97 percent of civil cases filed by the Division resulted in a consent decree, and that percentage remained relatively constant at 93 percent in the 1990s. This trend has continued, with the Division resolving nearly its entire antitrust civil enforcement docket by consent decree from 2004 to present. The Federal Trade Commission has experienced a similar increase in the use of consent decrees as a proportion of enforcement activity. FTC consent decrees more than tripled in number from 1992 to 1995. Since 1995, the FTC has settled 93 percent of its competition cases."). *See also* Andrea Berger Kalodner, *Consent Decrees as an Antitrust Enforcement Device*, 23 ANTITRUST BULL. 277, 277 (1978); Steven Salop & Lawrence White, *Economic Analysis of Private Antitrust Litigation*, 26 J. REPRINTS ANTITRUST L. & ECON. 11 (1966).

called *commitment decision*.[2] Under article 9(1) of Reg. 1/2003 "[w]here the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings."[3]

Through consent decrees or commitment decisions antitrust agencies can impose behavior or structural remedies to the investigated firms, which are usually leaders of markets or firms with significant market power, to contrast or prevent possible antitrust conducts. The effects of such remedies on markets are critical and similar to the rules imposed by regulatory agencies. Thus, antitrust agencies and regulators' role could overlap. Further, the eventual regulator's role assumed by antitrust agencies questions the ability and legitimacy of antitrust agencies to define the appropriate rules of markets, and whether antitrust agencies are the best subjects to regulate markets.

Although in the U.S. the regulation effect of consent decrees is undisputed, in Europe this matter is still controversial. In particular, in each Member State antitrust agencies are typically distinguished from regulators, and each one has a specific and different task and powers. Antitrust agencies monitor competition in markets enforcing antitrust law, while the regulator oversees a specific industry providing the suitable rules to increase the industry's efficiency. Therefore, the regulation effects of consent decrees and commitment decisions—here explored—are especially questionable in Europe.

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[2] Richard Whish, *Commitment decisions under article 9 of the EC Modernization: some unanswered questions*, in LIBER AMICORUM IN HONOUR OF SVEN NORBERG 555 (Bruylant, 2006). The previous EU regulation n. 17/62 did not provide the chance to settle an antitrust case on the grounds of commitments proposed by investigated companies. Whish noted that "[d]espite this there were a number of cases in which the Commission did close its file on the basis of commitments which the Commission did close its file on the basis of commitments offered by the parties, some of which were clearly of great significance: among the best-known were IBM, Microsoft (licensing agreements); Interbrew, IRI/ Nielsen, and Digital. A competition authority must decide how to make the best use of the intervention that leads to the termination of conduct that appears to be anti-competitive, couplet with commitments by undertakings as to future behavior that are placed in the public domain and that are given effective publicity, can be very (cost) effective way of establishing important points of principle and educative the broader business and legal communities."

[3] Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of Rules on Competition Laid Down in Article 81 and 82 of the Treaty, O.J., 4.1.2003, at 1-25.

In Part II of the article, I describe the US and European antitrust agencies identifying structure, powers and competences of each agency. In Part III, I analyze consent decrees and commitment decisions. I show the ability of those decrees or decisions to regulate markets and the main issues involved—among which the regulatory role assumed by antitrust agencies. I also analyze a well-know antitrust case settle by a consent decree—the AT&T case—to show actual effects of this antitrust tool in telecommunication industry. Through the analysis of AT&T case I examine the regulation effects of consent decrees and the role of antitrust agencies in regulated industries. Finally, in Part IV I draw conclusions on the "the regulation effects of the consent decrees,"[4] and the ability and legitimacy of antitrust agencies or judges to identify the correct rules of markets. I also analyze whether antitrust agencies represent the best subjects to regulate markets and whether they have appropriate knowledge to carry out this task. In sum, I analyze the new role assumed by antitrust agencies that from watchdog becomes regulator of markets evaluating whether a widespread use of consent decrees or commitment decisions in enforcing antitrust law is appropriate.

II. ANTITRUST AGENCIES – EU AND THE US ANTITRUST BODIES

Historically, antitrust agencies enforce antitrust law and are called watchdogs. However, in the United States the Federal Trade Commission Act (**FTC Act**)[5] recognize regulatory powers to the Federal Trade Commission, one of the US antitrust agencies. Conversely, in Europe antitrust agencies oversee markets to protect competition among firms and increase consumer welfare. Regulatory powers are left to regulators. But what happen whether antitrust cases are settled by consent decrees, which impose behavior remedies to leaders of markets? Before dealing with this issue, I briefly explain the history, structure,

[4] A. Douglas Melamed, *Antitrust: The New Regulation*, 10 ANTITRUST 13, 15 (1996). ("[A]ntitrust has evolved in recent years, subtly and almost imperceptible, toward a new form of regulation.") *See also*, Michael L. Weiner, *Antitrust and the Rise of the Regulatory Consent Decree,* 10 ANTITRUST 4, 4 (1996). ("Today, recent consent decrees can be categorized into three groups: those that explain core legal rulings, those that actually establish new legal standards, and those that regulate the competitive behavior of parties that come under their scrutiny.") *Id*.

[5] Federal Trade Commission Act, 15 U.S.C. §§ 41-58, *available* at http://www.law.cornell.edu/uscode/text/15/41http://www.law.cornell.edu/uscode/text/15/41.

powers and competences of the US and European antitrust agencies—the protagonists of this study.

A. US Antitrust Agencies – DOJ and FTC

In 1890 was issued in the United States the first antitrust law—the Sherman Act.[6] In 1903, under President Theodore Roosevelt and Attorney General Philander Knox, there was only an Assistant of the Attorney General in charge of all antitrust lawsuits.[7] In 1933, under President Franklin D. Roosevelt and Attorney General Homer S. Cummings, the Department of Justice Antitrust Division (**DOJ**) was founded to deal with the increasing issues and complications of antitrust enforcement.[8] The Antitrust Division of the DOJ includes an Assistant to the Attorney General appointed by the President of the United States and confirmed by the Senate, who supervises the whole Division, and five Deputy Assistants. These latters have equal qualifications and are in charge of managing and supervising the five departments of the DOJ, which include: Civil Enforcement, Regulatory Matters, International Enforcement, Economy Analysis and Criminal Enforcement.

The Antitrust Division is mainly in charge of enforcing federal civil and criminal antitrust law and the further regulations that protect competition by preventing restrictions and the so-called market monopolization. Further, in the antitrust field the DOJ drafts and submits regulatory proposals to the Congress for improving antitrust regulation and competition.[9] In the United States another antitrust agency in charge of protecting

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[6] In 1890, the United States enacted the Sherman Antitrust Act, namely the first antitrust law of not only the United States, but also of all over the world. The republican senator of Ohio John Sherman, his author, gave the name of that Act, which was signed by the former President Benjamin Harrison. *See, e.g.,* THOMAS K. MCCRAW, CREATING MODERN CAPITALISM, HOW ENTREPRENEURS, COMPANIES, AND COUNTRIES TRIUMPHED IN THREE INDUSTRIAL REVOLUTIONS 328 (Harvard Univ. Press, 1997).

[7] *See, e.g.*, U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, ANTITRUST DIVISION MANUAL 2 (5th ed. 2014). The role of the *Assistant Attorney General for Antitrust* (AAG-AT) still exists, and it leads the entire Antitrust Division, namely the DOJ Antitrust Division. This Assistant Attorney is pointed by the President of the United States and it has to report about antitrust cases to *Associate Attorney General*.

[8] *See, e.g.,* The United States Department of Justice, Mission, www.justice.gov/atr/about/mission.html; YMKE HOFHUIS, USA ORGANIZATION AND FUNCTIONS OF THE ANTITRUST DIVISION, UNITED STATES DEPARTMENT OF JUSTICE, COMPETITION LAW IN WESTERN EUROPE AND THE USA (Kluwer Law Int'l, Dec. 2008). *See also* THE UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST DIVISION MANUAL (2014), *available at* http://www.justice.gov/atr/public/divisionmanual/index.html.

[9] *See* AMERICAN BAR ASSOCIATION, DOJ CIVIL ANTITRUST PRACTICE AND PROCEDURE MANUAL, 2 (Am. Bar Ass'n, 2012).

competition—the Federal Trade Commission ("**FTC**") exists. While the Antitrust Division of the DOJ constitutes a judicial department, the FTC is an independent administrative authority endowed with regulatory functions[10] and subjected to the Congress's control.

The Federal Trade Commission was established by the Federal Trade Commission act in 1914,[11] the same act that such agency is in charge of monitoring.

Section 5 of the Federal Trade Commission Act establishes that this authority must prevent the "unfair or deceptive acts or practices in or affecting commerce"[12] preventing and imposing remedies to consumers' damages.[13] Moreover, the FTC enforces the Clayton and the Robinson-Patman Acts, and has jurisdiction competing with DOJ also in relation to merger issues.[14]

Five commissioners, appointed by the President of the United States for a period of seven years, constitute the FTC. The President of the United States appoints among these five commissioners the FTC's Chairman, who has the widest powers. The FTC is organized in three bureaus—the *Bureus of Competition*, the *Bureus of Consumer*, and the *Bureus of Economics* dealing with economic issues. The FTC "is a bipartisan federal agency with a unique dual mission to protect consumers and promote competition."[15] The FTC monitors firms and their business practices to ensure a workable competition in markets and protect consumers from unfair and anticompetitive practices. The FTC challenges anticompetitive conducts and mergers. The FTC has also regulatory powers. Under

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[10] The FCC has the following powers: (i) issuing rules to regulate commerce; (ii) suing companies that seem to violate civil and antitrust law monitored by the FTC; (iii) to compensate consumers by suing who violated antitrust and consumer regulation; (iv) the agency can issue and impose restricted orders or injunctions to violators. *See, e.g.*, AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS, U.S.A., 655 and ss. (ABA Publisher, 7th ed., 2012); D. BRODER, U.S. ANTITRUST LAW AND ENFORCEMENT, A PRACTICE INTRODUTION (Oxford University Press, second ed., 2012); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY - THE LAW OF COMPETITION AND ITS PRACTICE 536 (West Publishing Company, 1980); Federal Trade Commission, http://www.ftc.gov/ftc/about.shtm.

[11] Federal Trade Commission Act, 15 U.S.C. §§ 41-58, *available* at http://www.law.cornell.edu/uscode/text/15/41http://www.law.cornell.edu/uscode/text/15/41.

[12] *Id*. at § 45 (a).

[13] *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239-44 (1972); FTC v. R.F. Keppel & Bro., 291 U.S. 304, 310-12 (1934). In particular, FTC Act amendments of 1994, 15 U.S.C. § 41.

[14] FTC and DOJ are also responsible for enacting and applicable rules on the mergers notifications provided by HSR Act. *See* D. BRODER, *supra* note 10.

[15] Federal Trade Commission, What we do, http://www.ftc.gov/about-ftc/what-we-do (last visited 22 Aug. 2014).

Section 18 of the FTC Act, the FTC can promulgate trade regulation's rules applying to "unfair or deceptive acts or practices."[16] Several competing jurisdictions between the DOJ and FTC exist and a constant communication and collaboration between the DOJ and FTC is crucial to protect competition and consumer welfare. For example, when the DOJ and FTC investigate the same case, they decide on a common basis, which one shall precede in investigations on the grounds of examination of experts and the staff available.

B. EU Antitrust Agencies – The European Commission and NCAs

In Europe two different levels of jurisdiction exists: national and supra-national. In 1957 the Treaty of Rome[17] provided the first European antitrust provisions to contrast cartels (art. 85) and abuse of dominant position (art. 86). Under article 87 of the Treaty, to implement the antitrust provisions of the Treaty "[w]ithin three years of the entry into force of this Treaty the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, adopt any appropriate regulations or directives to give effect to the principles set out in Arts. 85 and 86."[18] In 1962, Regulation 17/62 was the reply of article 87 of the Treaty. The Regulation 17/62 implemented the principles stated in articles 85 and 86, establishing a system to ensure "that competition shall not be distorted in the common market"[19] and securing a uniform application of Articles 85 and 86 in the Member States.[20] Specifically, the Regulation empowered the European Commission ("**Commission**") to apply articles 85 and 86 and established that "upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an

[16] *Id*.
[17] Treaty of Rome (March 25, 1957). Under article 3 of the Treaty "competition shall not be distorted in the common market."
[18] *Id*. at Article 87.
[19] EC Regulation No. 17, First Regulation implementing Articles 85 and 86 of the Treaty, 87 O.J.E.C. 21.02.62.
[20] Application of Articles 101 and 102 TFEU (formerly Articles 81 and 82 of the EC Treaty), http://europa.eu/legislation_summaries/competition/firms/l26092_en.htm (last visited Aug. 25, 2014).

end."[21] Thus, the Commission was the body responsible for the application of the European competition provisions.

In 2003, with the enactment of Regulation (EC) 1/2003, Regulation 17/62 has been repeal. One of the main pillars of Regulation 1/2003 is the set of provisions that empowered National Competition Authorities (NCAs) and courts to apply Articles 101 and 102 of the Treaty to protect competition.[22] National courts, indeed, in addition to NCAs can apply these provisions to protect the individual rights that the Treaty recognized to citizens.[23]

Regulation 1/2003 also increased Commission's powers. It enables the Commission to adopt behavior and structural remedies in the context of infringement decisions (art. 7). Moreover, article 9 grants the Commission power to adopt a commitment decision—namely a settlement that includes legally binding commitments—to resolve an antitrust proceeding. Conversely, Article 3(3) of Regulation 17/62 enabled the Commission only to terminate antitrust violations by recommendations, which were not legally binding and it was rarely used.[24]

In sum, although the Commission has not direct regulatory powers, indirectly commitment decisions (art. 9) or the remedies (art. 7) enable the Commission to regulate markets.

III. THE REGULATION EFFECTS OF CONSENT DECREES AND COMMITMENT DECISIONS—THE CHANGED ROLE OF ANTITRUST AGENCIES

Through consent decrees or commitment decisions the U.S. or European antitrust agencies settle several antitrust cases, becoming this antitrust decision a critical tool in enforcing antitrust law. By doing so, the role of antitrust agencies became less clear. The

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[21] EC Regulation No. 17/62, art. 3.

[22] Céline Gauer, Lars Kjolbye, Dorothe Dalheimer, Eddy De Smijter, Dominik Schnichels, & Maija Laurila, *Regulation 1/2003 and the Modernization Package fully applicable since 1 May 2004,* 2 Competition Policy Newsletter 1, 2 (2004).

[23] Antitrust, European Commission, Overview (Aug. 16, 2012), *available at* http://ec.europa.eu/competition/antitrust/overview_en.html.

[24] Alan Riley, *EC Antitrust Modernization: The Commission Does Very Nicely—Thank you! Part One: Regulation 1 and the Notification Burden*, E.C.L.R. 604, 607, (2003).

widespread use of consent decrees or commitment decisions enable antitrust agencies to regulate the parties' day-to-day business conduct creating more standards. Antitrust agencies do not only apply or simply interpret the law, but also provide rules and standards behavior.

Justice Breyer explained that regulation and antitrust aim at similar goals—low and economically efficient prices, innovation, and efficient production methods.[25] Historically regulation seeks to achieve these goals directly, while antitrust law seeks to achieve them indirectly. By settling antitrust cases through consent decrees, antitrust agencies assume the typical role of regulator imposing behavior or structural remedies and, antitrust law seems as an alternative to regulation. In sum, antitrust agencies through consent decrees appear to achieve both directly and indirectly the above-mentioned goals. Harry First recognized that due to the increasing use of consent decrees, "[a]ntitrust has come to be seen more as policy and less as law."[26] Here the Legislature, "invades the territory of another"[27]—the Judiciary.

Having recognized regulation effects of consent decrees and commitment decisions the task at hand is to address the following questions. Are antitrust agencies legitimate to regulate markets through consent decrees or commitment decisions? If they are, are such indirect regulatory powers appropriate?

By analyzing the well-known AT&T case, I reflect on the regulatory role assumed by the DOJ and judge Greene in this case weighting its positive and negative effects on markets.

A. AT&T Case

I explain the AT&T case that involves three different agreements enshrined in judgments over the past hundred years.[28] The most important one was the 1982 consent decree[29] that

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[25] Philp J. Weiser, *The Relationship of Antitrust and Regulation in a Deregulatory Era*, 50 ANTITRUST BULL. 549, 550-51 (2005). ("Traditionally, regulation and antitrust served distinct functions on a series of doctrines primary jurisdiction, implied immunity, state action to maintain largely separate sphere of authority. In the wake of recent deregulatory initiatives, however, regulation has begun to serve a parallel function to antitrust (i.e., facilitating competition as opposed to replacing it), raising the question of whether the traditional policy of separation should continue.")

[26] Harry First, *Is Antitrust Law?,* 10 ANTITRUST 9, 9 (1996).

[27] *Id*.

[28] RICHARD A. EPSTEIN, ANTITRUST CONSENT DECREES, IN THEORY AND PRACTICE, 54 (The AEI Press, 2007). ("The most important set of consent decrees ever concluded dealt with regulation and eventual breakup of the former Bell System").

I examine in detail. The antitrust lawsuit began in 1974 and was settled by the consent decree, which was the first of two major regulatory interventions in the U.S. telecommunication industry.[30]

By analyzing the AT&T consent decree of 1982, I show both the regulation effect and efficiency of this antitrust device. I assess if the social costs of this regulation decision, designed by judge, DOJ and AT&T in 1982, exceed its benefits, and whether the terms of that decree achieved the greatest possible net increase in economic welfare. Through this analysis I evaluate whether or not regulatory powers of antitrust agencies is appropriate and should be promoted or restricted.

1. AT&T – The Facts

In February 1885, in the United States the American Telephone and Telegraph Company was born to provide electric telegraph lines connecting "each and every city, town, or place in said state, and each and every other of the United States, and in Canada and Mexico."[31] An American Bell Telephone Company's subsidiary—the AT&T—provided long-distance telephone lines to interconnect local exchange areas of the Bell companies.

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[29] *See, e.g.*, BARRY G COLE, AFTER THE BREAKUP: ASSESSING THE NEW POST-AT&T DIVESTITURE ERA, 59 (Columbia Univ. Press, 1991). ("The lawsuit survived through two judges, three national administrations, four Congresses, and five Attorneys General before it was finally settled in 1982.") *Id*.

[30] *See, e.g.*, Damien Geradin e J. Greg Sidak, *European and American Approaches to Antitrust Remedies and the Institutional Design of Regulation in Telecommunications*, in HANDBOOK OF TELECOMMUNICATIONS ECONOMICS: TECHNOLOGY EVOLUTION AND THE INTERNET, edited by M.Cave, S. K. Majumdar & I. Vogelsang, 517-553 (Amsterdam: North-Holland, 2005). ("If a single firm is the object of the antitrust case, and if it is prominent enough in its industry (we will avoid using the loaded term "dominant"), then the consent decree becomes the de facto asymmetric regulation of the entire industry. The most obvious example is the Modification of Final Judgment, 17 by which the federal judiciary governed the telecommunications industry after the antitrust breakup of the Bell System in January 1982 until Congress enacted the Telecommunications Act in February 1996. A more recent example, of course, is the Microsoft case.") *See also* Brian M. Hoffstadt, *Retaking the Field: The Constitutional Constraints on Federal Legislation that Displaces Consent Decrees*, 77 WASH. U. L. Q. 53 (1999). ("[A]t the time Telecommunication Act became law, the major participants in the telephone industry were already governed by a series of consent decree administered by the District Court of the District of Columbia: the AT&T Consent Decree regulated the participation of AT&T's and its Bell operating companies in various telecommunications markets.") *Id*.; Christopher S. Yoo, *The enduring lessons of the Breakup of AT&T: a twenty-five Year retrospective*, 61 FED. COMM. L.J. 1, (2009). ("The breakup of AT&T represents an ideal starting point for examining the major threads of telecommunications policy that have emerged over the past quarter century.") *Id*. *See also* Kenneth A Nickolai, *The AT&T Divestiture: for Whom will the Bell Tool?*, 10 WM. MITCHELL L. REV. 507 (1984). ("The breakup of The American Telephone & Telegraph Company (AT&T) has caused a revolution in the structures used of provide telecommunications service to American families and business.") *Id*.

[31] HARRY M. SHOOSHAN III, DISCONNECTING BELL-THE IMPACT OF THE AT&T DIVESTITURE 9 (Pergamon Press, 1984).

The U.S. telecommunications industry context is composed of three related markets: long distance, local distance, and telecommunications equipment.[32]

Historically, AT&T operates in all three markets. Until 1984, AT&T's Bell System included: AT&T Long Lines; local subsidiaries (22 Bell System Operating Companies); and Western Electric, Bell Laboratories and American Bell, which provided telecommunications equipment for AT&T's local and long-distance companies.[33]

AT&T Relevant Markets in 1984

Long Lines
Local Subsidiaries
End Devices and Equipment

The well-known antitrust case—*US v. AT&T* (1982)—was based on the assumption that the local loop (the telephone local access line) constituted a *bottleneck facility*.

According to the complaint, the defendants: [were] violating the antitrust laws by various monopolistic practices . . . [and] as a consequence of these practices (1) defendants have achieved and . . . maintain[ed] a monopoly of telecommunications service and equipment; (2) competition in these areas ha[d] been restrained; and (3) purchasers of telecommunications service and equipment ha[d] been denied the benefits of a free and competitive market.[34]

On January 1, 1984, the Bell System died. A new AT&T and seven regional Bell operating companies (collectively, the RBOCs) replaced the Bell System.[35] The decree—known as the Modification of Final Judgment (**MFJ**)—ordered AT&T to divest its local

[32] FEDERAL TRADE COMMISSION, MEASUREMENTS OF MARKET POWER IN LONG DISTANCE TELECOMMUNICATIONS, April 1995, *available* at http://www.ftc.gov/be/econrpt/232316.pdf.

[33] *See, e.g.*, KEVIN G. WILSON, DEREGULATING TELECOMMUNICATIONS: U.S. AND CANADIAN TELECOMMUNICATIONS, 1840-1997 145 (Rowman & Littlefield Publishers, 2000).

[34] United States v. AT&T, 461 F. Supp. 1314, 1318 (1978).

[35] AT&T, A Brief History: The Bell System, http://www.corp.att.com/history/history3.html.

entities.[36] Specifically, AT&T divested itself of the wholly owned Bell operating companies (BOCs), which were regrouped within seven new regional companies, each with its own geographic base (RBOCs).[37] The MFJ precluded the new RBOCs from providing long-distance service. By doing so, AT&T continued to be active in the long-distance and manufacturing units from its remaining BOCs.

2. Effects of MFJ on Telecommunication Industry

The AT&T case divided scholars over the procompetitive effects of the antitrust and regulatory intervention of the MFJ. According to Robert W. Crandall, for example, AT&T's divestiture was not necessary creating "a vertically fragmented industry structure that is not sustainable today."[38] Therefore, the mandate of sharing local telephone network required by the MFN would not promote competition in telecommunication services. Similarly, Gregory J. Sidak observed that in the telecommunication industry technologies continuously and rapidly change, and the structure relief would be not only unnecessary, but also unworkable.[39] Richard A. Epstein considered the AT&T case "the most vivid illustration of a consent decree gone wrong."[40]

However, positive effects of the MFJ over telecommunication industry are undisputed. The breakup of AT&T marked the end of the regulated *de facto* monopoly era in telecommunication industry.[41] AT&T's market share significantly decreased.

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[36] Modification of Final Judgment, reprinted in United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 226-34 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983). The settlement was a "modification" of an earlier "final judgment" in the sense that it modified a consent decree into which AT&T and the government had entered in 1956.

[37] *See e.g.,* HARRY M. SHOOSHAN III, DISCONNECTING BELL-THE IMPACT OF THE AT&T DIVESTITURE 5 (Pergamon Press,1984); Paul W. MacAvoy & Kenneth Robinson, *Winning By Losing: The AT&T Settlement and its Impact on Telecommunications*, 1 YALE J. ON REG. 1, 3 (1983).

[38] Crandall, Robert W., *The Remedy for the 'Bottleneck Monopoly' in Telecom: Isolate It, Share It, or Ignore It?*, Regulatory Policy Program Working Paper RPP-2005-02. Cambridge, MA: Center for Business and Government, John F. Kennedy School of Government, Harvard University, 2 (2005).

[39] Gregory J. Sidak, *The failure of Good Intentions: The WorldCom Fraud and the Collapse of American Telecommunications After Deregulation*, 20 YALE J. ON REG. 207 (2003).

[40] Richard A. Epstein, *The AT&T Consent Decree: In Pray of Interconnection Only*, 61 FED. COMM. L.J. 149 (2009).

[41] Regulation of the U.S. telecommunications market was marked by two important antitrust lawsuit that the U.S. Department of Justice brought against AT&T. The AT&T case filed in 1949, and second one started in 1974.

The Federal Communications Commission (**FCC**) recognized that in a dynamic industry like the telecommunication industry competition is more suitable than natural monopoly. Competition increases both the size of telecommunication markets, and consumer welfare encouraging firms to develop better quality products at lower prices.

The primary role of regulators, like the FCC in telecommunication industry, is to promote and increase competition of markets. This role of regulator appears similar to antitrust agencies' role. Therefore, an overlap of competences between regulator and antitrust agencies in regulated industry is undisputed.

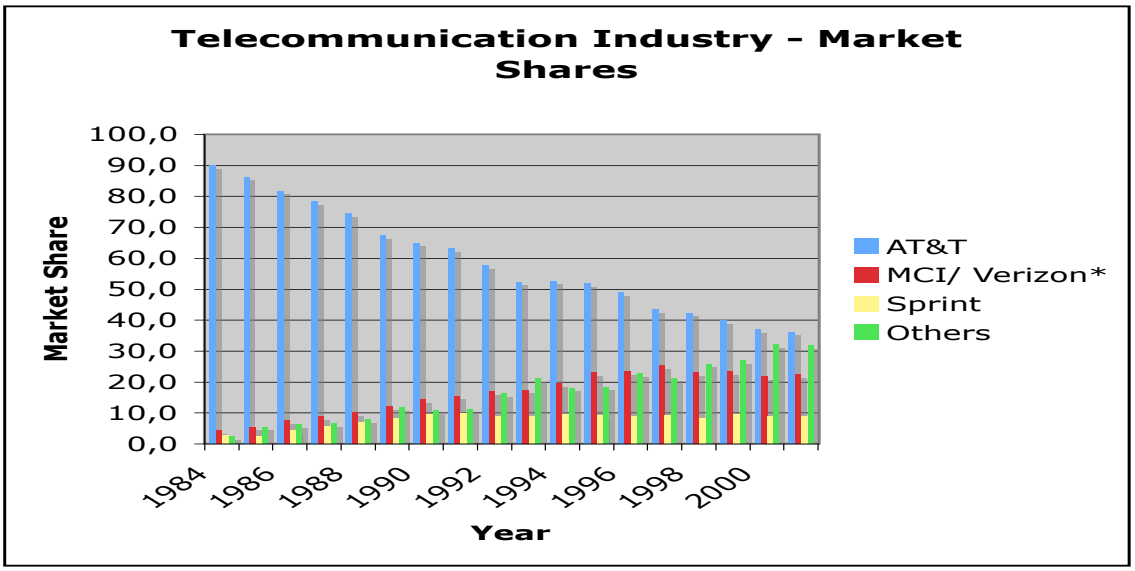
The direct effect of the AT&T divestiture was competition in long distance, and information services.[42] Prices of long distance calls decreased significantly.

Between 1984 and 1996, the average revenue per minute of AT&T's switched services has been reduced by 62%. Until 1984, AT&T held a market share of approximately 90%, whereas since 1982 AT&T's share has declined to 60 %. In 1996 the market share (in minutes of use) of AT&T was 53%.[43]

The Figure below shows the AT&T and its main competitors' market shares.

[42] Nicholas Economides, *The Telecommunications Act of 1996 and its Impact*, JAPAN AND THE WORLD ECONOMY 455, 456 (1999).

[43] FEDERAL TRADE COMMISSION, STATISTICS OF COMMUNICATIONS COMMON CARRIERS, *available at* http://www.fcc.gov/reports/statistics-communications-common-carriers-1996 (1996). Indeed, the Commission after the 1984 break-up of AT&T started to reduce long-distance rates and make cost recovery more efficient. Jerry Hausmant and Howard Shelanskij, *Economic Welfare and Telecommunications Regulation: The E-Rate Policy for Universal-Service Subsidies*, 16 YALE J. ON REG. 19, 23 (1999).



Source: FCC Report 2003[44]. * MCI: It was founded in 1963 and it was purchased by WordCom in 2000 and in 2006 the company was bought by Verizon

Although AT&T's market share decreased, FCC's studies recognized that AT&T's "output has increased by two-thirds over 1984 levels."[45] Thus, since the AT&T's divestiture industry output, measured by the number of calling minutes, has nearly tripled. Further, Roger G. Noll and Susan R. Smart, analyzed the annual rate of Change for Various Price ("CPI") for telephone services.[46] Noll and Smart observed that "[t]he primary effect of divestiture and federal deregulation was reduced prices for customer equipment and for services that were becoming competitive."[47]

In short, the most important factors of competition—*e.g.* price and market share—show that the antitrust intervention increased competition of long distance market.[48] Conversely, AT&T's local telephone companies provided about three-quarters of the

[44] *See* FCC data. FEDERAL COMMUNICATION COMMISSION, STATISTICS OF COMMUNICATIONS COMMON CARRIERS (2001 Ed.), *available at* http://www.fcc.gov/reports/statistics-communications-common-carriers-2006-2007 (October 2004), *Table 1.5 Shares of Total Toll Service Revenues - Long Distance Carriers Only*.

[45] FEDERAL TRADE COMMISSION, MEASUREMENTS OF MARKET POWER IN LONG DISTANCE TELECOMMUNICATIONS 4 (April 1995) *available* at http://www.ftc.gov/be/econrpt/232316.pdf.

[46] G. Noll & Susan R. Smart, *Pricing of Telephone Services*, in BARRY G COLE, supra note 29 at 187-88.

[47] *Id.*

[48] J. GREGORY SIDAK & DANIEL F. SPULBER, DEREGULATORY TAKINGS AND REGULATORY CONTRACT, THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES, 37 (Cambridge University Press, 1997).

nation's local telephone service and almost all-interstate long distance service. The transition of local market to effective competition will not be as easy or as quick as in the long distance market, due to the nature of the product and the associated economics. As Hovenkamp recognized there was "still a great deal of regulation of local service."[49] Since the MFJ, the FCC intervened to increase competition in local telephone market especially enacting the Telecommunication Act of 1996.

B. Antitrust Agencies, Regulatory Agencies or Both?

Analyzing from AT&T case we can reflect on the consequences of similar structural consent decrees and the regulatory role assumed by antitrust agencies in regulated markets. The benefits of MFJ seems overwhelmed its costs. However, markets constantly change and repeating the same remedies make no sense. In the telecommunications industry the current trend is toward consolidation.[50] Market remedies need to be adapted to the particular needs of market, which are never the same. But, is the antitrust intervention appropriate in regulated markets?

Regulation is complementary to competition. As Glen O. Robinson observed, competition and regulation are like bread and butter.[51] The regulator or legislator's intervention sometimes might be slower than the antitrust intervention. The latter is able to change the futures of markets through a structural or a behavior consent decree, while the FCC or others regulators need to impose a regulation that involves the entire market and implies more steps and a longer procedure.

Time in markets, like telecommunication markets that are dynamic markets, is critical. Perhaps a rapid and focused intervention to contrast a market failure is preferred than a late regulation or a set of law provisions. The European Commission recognized the

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[49] Herbert Hovenkamp, *Antitrust and Regulatory Enterprise*, COLUM. BUS. L. REV. 335, 355 (2004). Traditionally the FCC and state regulatory agencies regulated local access prices on a rate-of-return basis.

[50] *See, e.g.*, Jim Chen, *The Echoes of Forgotten Footfalls: Telecommunications Mergers at the Dawn of the Digital Millennium*, 43 HOUS. L. REV. 1311 (2007).

[51] *See also*, Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, *supra* note 49, at 336. ("This cyclical history inclines people to view antitrust and regulation as competing models for determining the appropriate scope of state intervention in the micro- economy. At the margin they certainly are competing, because we are never certain about where the boundary lies. However, a better way to view the two enterprises is as complementary products. We live in a world in which the great majority of markets clear at efficient, or something close to efficient, levels of output.")

ability of commitment decisions to ensure a flexible alternative to rapid restore competition, especially in fast-moving digital markets.[52]

In the antitrust enforcement, two possible scenarios exist. In the first scenario, antitrust agencies have not regulatory powers; thus, they can impose only sanctions to contrast antitrust violations. In this case the antitrust intervention seems static and repetitive. In the second scenario, antitrust agencies can find a compromise with investigated companies gaining in efficiency terms (hence saving time and money). This second scenario seems more flexible and respectful of market's changes.

In sum, efficiency and consumer welfare seem better preserved by increasing the collaboration among antitrust and regulator agencies. The antitrust agency can impose a quick structural or behavior remedy in regulated markets benefiting from the critical expertise of regulators in the regulated markets. By putting together the expertise of both bodies we can achieve the best result in procompetitive terms. Competition is important, but between two agencies that strive to strike same goals it make no sense.

IV. CONCLUSIONS

The AT&T case is only an example of how antitrust agency can compete or better collaborate with the regulator in imposing rules to markets.

In sum, this important antitrust device competes with fine in drafting antitrust policy, and in defining antitrust agency role. Thus, is it better having antitrust agencies with or without regulatory powers?

The consent decree represents a flexible and regulatory tool to quickly repair a market failure. Probably, the alternative regulatory intervention would reply late to the needs of market, and a quicker antitrust intervention is in many circumstances recommended. In Europe, the role of this antitrust tool is not yet well defined. It is neither an exact regulatory device nor penalty one.

[52] European Commission, *Report on Competition Policy*, 12 COM(2013) 257 final 12. ("Commitment decisions such as the one used in the e-books case [] can obviate the need for lengthy proceedings and enable the Commission to obtain concrete results for consumers.") *Id*.

The Commission is the European watchdog of markets, and it can only propose and not impose new rules to markets. The European Parliament and Council exam the Commission's proposals and eventually enact a law.

Hence, the question is: should the European Commission and generally antitrust agencies have regulatory powers? And, if the answer is yes, are commitment decisions the best way to provide those powers?

Competition concerns markets, and markets continuously change. Sometimes they fail, requiring government's intervention. But, are antitrust agencies the best authorities for improving competitive and market's dynamics? In the U.S., judges and antitrust bodies seem so.

Antitrust agencies as well as regulators protect and oversee markets. Endowing antitrust agencies with a flexible antitrust tool appears appropriate and consistent with antitrust purposes and market's needs—flexibility, efficiency, and consumer welfare. Flexibility is a key word in competitive markets. The changed role of antitrust agencies from watchdogs to regulators reflects exactly the flexibility required by dynamic markets. However, the law is equal for everyone. Flexibility in remedies does not mean discrimination among firms. Antitrust remedies should constitute, as well as infringement decisions, case law.