DECLARATORIA SULLA TESI DI DOTTORATO

Il/la sottoscritto/a

COGNOME Massarotto

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Matricola di iscrizione al Dottorato 1538131

Titolo della tesi:

A CENTURY OF ANTITRUST AND REGULATION LAW MARKED BY CONSENT DECREES

Dottorato di ricerca in Diritto dell'Impresa

Ciclo 26

Tutor del dottorando Prof. Federico Ghezzi

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DICHIARA

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Data _____30.01.2014_____

COGNOME	Massarotto
NOME	Giovanna

Summary of Contents

I. INTRODUCTION

In 1906, the Department of Justice (DOJ) settled in *United States v. Otis*[1] its first antitrust case through a consent decree—a settlement in which the investigated company agreed to take specific actions without admitting fault or guilt for the situation that led to the lawsuit. Over the years this sort of alternative dispute resolution became an invaluable tool for enforcing antitrust law not only in the USA, but also in Europe. In the latter case a similar settlement to resolve antitrust disputes is well known as a *commitment decision*.[2] Article 9(1) of Reg. 1/2003 establishes that: *"[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]

In contrast to those for whom commitment decisions in Europe and consent decrees in the United States would be rare and unusual,[4] today they represent a crucial enforcement device of antitrust law. In the US about 80 percent of civil antitrust lawsuits are settled through consent decrees, and a similar trend toward the adoption of this antitrust tool appears also in Europe.

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[1] *See United States v. Otis Elevato*r, Civil No. 13884, C. C. Calif., June 1, 1906, reprinted in 1 Decrees &Judgments in Federal Antitrust Cases 107.

[2] R. Whish, *Commitment decisions under article 9 of the EC Modernization: some unanswered questions*, in Liber Amicorum in Honour of Sven Norberg 555 (M. Johansson, N. Wahl, U. Bernitz, Bruylant, 2006). The prior 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.

[4] Temple Lang, *2005 Annual Proceedings of the Fordham Corporate Law Institute* 265, 270 (Barry Hawk ed., 2006).

Based on the United State's century of experience on this topic, I examine consent decrees in attempt to provide a useful guide on consent decrees practice for European decision-makers, scholars, and others interested in this topic.

In particular, in Chapter II, I provide an overview of the US antitrust context to clarify the context, which differs from the European ones, where consent decrees are implemented. I describe the main characteristics and regulations in the US antitrust system—namely antitrust agencies and the main regulatory reference points—going though public and private enforcement. The latter does not exist yet in Europe, and as we will see, this is a matter of concern and is significant for consent decrees practice.

In Chapter III, having outlined the antitrust law system, I move to the heart of my study. I explain the benefits and nature of consent decrees, their procedures and the opportunities to amend consent decrees. I also provide a brief overview of Federal Trade Commission consent orders explaining the main difference between consent decrees and consent orders.

In Chapter IV, I explain the ability of those decrees or decisions to regulate markets and the main issues involved. Whilst in the U.S. the regulation effect of consent decrees is undisputed, in Europe this matter is still controversial. This is especially true in each Member State, where there are both antitrust and regulatory agencies, and each one has a specific and different task and powers. Antitrust agencies monitor competition in markets and apply antitrust law, while the regulator oversees a specific sector, imposing rules that it considers suitable to improve the efficiency of the sector. The powers and competences of each agency are clearly distinguished and boundaries are well defined. Thus, in this chapter, I explain the boundaries that exist in the US between antitrust law and regulation law and those areas where boundaries do not exist. To clarify this issue I provide two examples of consent decrees where the regulatory effects are evident. I then discuss the regulatory powers and limitations of both judges and the Federal Trade Commission (FTC) and remedies in the mergers to find some similarities.

In Chapter V, I analyze the deterrent effect of consent decrees. I clarify the meaning and implications of deterrence and the deterrent effect in general I then explain how consent decrees do or do not compromise the deterrence of antitrust law. I provide the two approaches existing in the US. The first approach is against settlements which use consent decrees and the second one is against trial and an eventual sanction. To clarify the *pros* and *cons* of each approach I compare the US and EU Intel cases. The advantage of looking at the treatment of the Intel cases across different jurisdictions is that the operative facts of the cases are virtually the same in each jurisdiction, but the antitrust solution was different. While the European Commission imposed a fine on Intel, the FTC preferred to enter into a consent decree, which imposed conduct remedy.

Having clarified the deterrent effect of the consent decrees, in Chapter VI, I examine one of the most important consent decree cases, which concerned a regulated industry in order to analyze in practice how this tool is able to change the physiognomy of markets and influence technological innovation. I explain the AT&T case that involves not merely one consent decree, but three different agreements enshrined in judgments over the past hundred years. The most important one was the 1982 consent decree that I examine in detail. By studying the AT&T case, I show in concrete terms both the regulation effect and efficiency of this antitrust device. In conclusion 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.

Finally, Chapter VI briefly compares the US consent decrees with EU commitment decisions practice. I explain how widespread is this practice in both antitrust systems, and I develop some considerations on the EU commitment decisions and US consent decrees in the light of the result of my researches.

This study does not make a choice between sanction and regulatory agreement, rather it reflects on the *pros* and *cons* of opting for the latter, as the US antitrust enforcement seems to do.

Competition translated in the US antitrust law is consumer welfare. In each antitrust decision, as we will see, the US antitrust agencies strive to deliver consumer welfare, rather than focus on power conflicts between different agencies, or loose precious time and money in complex and time consuming litigations. Consent decrees represent an important tool for both antitrust and regulation law that in the US was able to market the history of both laws. Here we will see how and with what effects.

II. ANTITRUST LAW IN THE UNITED STATES: BRIEF OUTLINES

1. Introduction

The United States is the first country that codified an antitrust law. The Sherman Act—the first antitrust law—was issued here in late 1890 and took the name from its promoter—Senator John Sherman.[5]

Since 1890, starts the centuries-old history of this regulation which, despite several critiques,[6] has never stopped spreading all over the world including the most underdeveloped countries[7] and reaching during the years very important goals. With this respect, we bring to mind the famous Standard Oil case,[8] in which the US Antitrust Authority issued a significant warning towards business companies, by

[5] 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,* THOMAS K. MCCRAW, CREATING MODERN CAPITALISM, HOW ENTREPRENEURS, COMPANIES, AND COUNTRIES TRIUMPHED IN THREE INDUSTRIAL REVOLUTIONS, 328, (Harvard Univ. Press, 1997).

[6] *See* EDWIN S. ROCKEFELLER, THE ANTITRUST RELIGION 1 (Cato Inst., 2007). "This book's thesis will be developed first by defining antitrust as a religious faith with an existence independent of the antitrust statutes." G. HULL, THE ABOLITION OF ANTITRUST, TRANSACTION PUBLISHERS, 17 (Transaction Publ., New Brunswick, 2005). "Antitrust is a political cancer, clearly alien to the founding principles of this country." DOMINICK T. ARMENTANO & YALE BROZEN, ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE 11 (Indipendent Inst. 2° ed., 1990) "The antitrust tends to make the economy less competitive and less productive is the ultima irony and myth inherent in antitrust policy;" DOMINICK T. ARMENTANO, ANTITRUST 7 (The Ludwig von Mises Instit. 2° ed, 2001) "[m]y position on antitrust has never been ambiguous: All of the antitrust laws and all of the enforcement agency authority should be summarily repealed. The antitrust apparatus cannot be reformed; it must be abolished."

[7] *See* Pradeep S Mehta e Rijit Sengupta, *Did we make any difference_ Reforming Competition Law Regimes in the Developing World through the 7Up Programme*, CUTS Center for Competition, Investment & Econimic Regulation, 2012. In particular *see* Chapter 2 on the *Relevance of Competition to Developing Countries*, 15 e ss. In 1995 only around 35 Countries had implemented an antitrust law. Conversely, nowadays we account more than 120 countries and this number is increasing by the time. *See also*, KY AT EWING, COMPETITION RULES FOR THE 21ST CENTURY 1 (Kapler Law Int'l, 2° ed., 2003). ("It is remarkable that well over half of the members of the United Nations and over 67% of the members of the WTO have competition laws, and many of the others may be expected to enact them in the decades to come;") MARC FIRESTONE, 20 A QUICK LOOK AT TWO AREAS OF DOCTRINAL DIFFERENCE BETWEEN EU AND U.S. DECISION MAKERS 4 (Tul. J. Int'l & Comat L., n. 1, 2011) ("Modem antitrust law might have been an American invention, but the EU has matched, if not surpassed, the United States' role as the leading "exporter" of antitrust. Today, more than 100 countries have antitrust laws, many of which derive from or reflect EU rather than U.S. law.") *Id*.

[8] One of the most important cases of antitrust law is represented by the break-up of the Standard Oil, the first "trust" occurred in 1882. It included a liber union of forty companies. The leader of this well-known trust was the American business man J. D. Rockfeller. The breakup of the Standard Oil was ordered by the Supreme Court in 1911. *Standard Oil Company of New Jersey, et al v. The United States*, 221 U.S. 1 (1911).

ordering the break-up of Rockfeller's oil giant that constrained it to split in different companies.

Therefore, this country—the pioneer of such regulation—is proud of having the most extensive tradition and culture on this matter that, also with respect to the subject of this study, cannot be neglected.

Conversely, in Europe and EU Member States competition law is quite recent and under many aspects almost premature, above all in the EU Member States like Italy.[9] Thus, having more than a century of history the US antitrust regulation is the perfect candidate to analyze a different way to implement commitment decisions—in the USA called consent decrees or consent orders—the protagonist of this research-work. In Europe the use of commitment decisions, as well as in the USA, is quite widespread in the antitrust context and concerns, as we will see, many issues that it is worth to take into account.

In addition, we have to consider that the country, which had developed the first antitrust law, is also the place that benefits since the Twentieth Century of the first worldwide economy. Mere coincidence? Probably it is. However, we cannot deny that such regulation has significantly contributed the economic growth of the country.[10]

The United States is the first country, which has understood the importance of competition and has protected it, and certainly it represents a possible source of inspiration to improve nearest economic situations.

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[9] The Italian antitrust law was enacted 1990, Law n. 287 of 1990, *Norme per la tutela della concorrenza e del mercato*.

[10] R. Posner*, A statistical study of antitrust enforcement,* 13 J.L. & ECON. 367 (1970). In particular, Posner attempted to clarify the relation between the antitrust intervention and economic growing. Although from the developed analysis does not point out a factual relation between economic growing and an increasing antitrust intervention, that study recognizes the specific justifications and exams for our purposes the main issue. For example, the American professor held that "[i]t reveals a fair correlation between changes in antitrust and in overall economic activity until about 1940. Since that time, however, the number of cases brought by the Department has not increased significantly, despite the tremendous growth of the economy. There are a number of possible explanations for this discrepancy. Cases are not fungible; perhaps the Department is bringing fewer, but bigger, cases today . . . The other is that antitrust activity decreases in periods of war because economic controls are substituted f6r the market, or because of the philosophy that underlies wartime economic controls (a distrust of economic freedom in times of national crisis), or because anti- trust prosecutions are felt to be divisive or distracting at such times."

Before dealing with the core issue of our study—consent decrees—judgments similar to Italian undertakings and their application in the United States, we consider useful to provide a brief overview of their application background. Therefore, we set forth the main features of the antitrust law in the United States and its main characters.

2. Main Characters and Regulations of Antitrust System in the United States

2.1. Introduction

This chapter, without presumption to be thorough, intends to provide for the reader with some concepts about the US antitrust background, which is very different from the Italian and European contexts.

Regulatory reference points and competent authorities, as well as instruments and enforcement procedures provided for by such regulation shall be identified. A study focused on the procedure and application of consent decrees that neglects the general regulation and their application background shall not probably be of any help. Therefore, restricting our study to some brief notes and hoping that it might be useful and interesting to the reader, we will proceed in this direction.

2.2. The US Antitrust Authorities - DOJ and FTC

Antitrust law, as above recalled, was born and has been developing in the United States, experiencing the issuance, during the years, of new instruments and rules aiming at protecting competition in an increasingly effective way.

In fact, since 1890 this regulation has been significantly improving through the issuance, *inter alia*, of consent decrees, as well as the institution of specific authorities such as the Federal Trade Commission (FTC), and the Department of Justice (DOJ), duly appointed to protect competition in the United States.

At the beginning, those agencies were not formerly included in the antitrust law, however because this law rapidly increased in importance, they became necessary with its remarkable and sudden development. In 1903, during Roosevelt administration and Attorney General Philander Knox, a mere office in charge of antitrust issues was operating at the Attorney General Assistant.[11]

Only in 1933, under Roosevelt Presidency and Attorney General Homer S. Cummings, the **Antitrust Division**—better known as Department of Justice ("**DOJ**")—was founded and appointed to promote and maintain competition in the US economy.[12]

Specifically, that Division has the right to: (*i*) enforce federal antitrust law, under civil and criminal law, and those additional laws protecting competition by preventing restrictions and the so-called market monopolization; (*ii*) provide for the so-called business community with information concerning antitrust law*;* (*iii*) and act as supporter and promoter of the protection of competition, trying to promote it also in regulated economy sectors. First of all, the DOJ acts in the antitrust field[13] in drafting and submitting any regulatory proposal to the Congress.

With respect to the structure, DOJ is composed by an Assistant to the Attorney General, appointed by the President of the United States and confirmed by the Senate, supervising the whole Division, and by five Deputy Assistants who, having all the same qualification, manage and supervise their department. These ancillary five departments are: Civil Enforcement, Regulatory Matters, International Enforcement, Economy Analysis and Criminal Enforcement.

In DOJ's workforce there are also several additional offices and staff. For our purpose, it is worth mentioning the **General Counse**l, in charge for the Division's most

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[11] 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*.

[12] For further information on the Antitrust Division and its mission *see e.g.,* 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), and in particular the *Antitrust Division Manual, available at* http://www.justice.gov/atr/public/divisionmanual/index.html.

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

significant doctrinal issues, the **monitoring of remedies and compliance to the consent decrees by the companies.**[14]

The other mentioned authority in charge of protecting competition in the United States is the Federal Trade Commission ("**FTC**"). This latter, unlike DOJ, does not constitute a judicial department, but it is an independent administrative authority endowed with regulatory functions,[15] which is subject to the Congress's control.

The Federal Trade Commission was established by the Federal Trade Commission act in 1914,[16] the same act that such agency is charged of monitoring.

Section 5, amended several times, states that this authority must prevent the "unfair or deceptive acts or practices in or affecting commerce," focusing, as specified in an amendment of 1994, relating to the prevention and remedies to the damages suffered by consumers.[17] In addition, it has the power to enforce the Clayton and the Robinson-Patman Acts mentioned in the following, and has jurisdiction competing with DOJ also in relation to merger issues.[18]

The FTC is composed by five commissioners appointed for a period of seven years by the President, without prior advice and consent by the Senate. Among these, the President appoints the FTC President having the widest powers.[19]

The authority is organized in three bureaus—the *Bureus of Competition*, the *Bureus of Consumer*, and finally the *Bureus of Economics* dealing with economic issues.

Regarding to the relationship between DOJ and FTC, it is important to notice that both

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[14] *Id*. at 3 e ss.

[15] 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. For FTC, *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); and website of the Federal Trade Commission, http://www.ftc.gov/ftc/about.shtm.

[16] Federal Trade Commission Act (15 U.S.C. §§ 41-58). *See* http://www.law.cornell.edu/uscode/text/15/41http://www.law.cornell.edu/uscode/text/15/41.

[17] *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 del 1994, 15 U.S.C. § 41.

[18] FTC and DOJ are also responsible for enacting and applicable rules on the mergers notifications previed by HSR Act. *See* D. Broder, *U.S. Antitrust Law and Enforcement, a practice introdution*, *supra* note___.

[19] *See* the similarities between the FTC's structure and AGCM's structure, Autorità Garante della Concorrenza e del Mercato. *See* http://www.agcm.it/struttura-e-organizzazione.html.

are engaged in protecting competition, often with competing jurisdictional powers, to promote the market development.

Both DOJ and FTC compete indeed in the enforcement of Section 2, 3, 7 and 8 of Clayton Act. In addition, although the right to enforce Sherman Act is formally recognized exclusively to DOJ, courts have considered Section 5 of FTC Act, as an extension of the protection granted also by the administrative authority.

However, the prosecution of antitrust crimes is exclusive competence of the DOJ.[20] In fact, in the United States antitrust law concerns both civil and criminal law, and the latter provides for under such circumstances the imprisonment or a fine.[21]

In light of what I have mentioned above, we can notice many competing fields of jurisdiction between the two entities and therefore it is important to grant, in terms of intervention efficiency and protection of competition, a constant communication and co-operation.

2.3 Main Regulatory Reference Points

Having briefly described the role and organization of the US antitrust authorities, both connected to the institution of consent decrees (or orders), we can indicate the most significant regulatory reference points in relation to antitrust law, mentioned in the following.

The above mentioned Sherman and Clayton Act represents the key texts of the regulation for the protection of the US competition.

The first one includes in Section 1 and 2 provisions similar to the article 101 and 102 of TFUE. In fact, Section 1[22] deals with the prevention of agreements limiting the

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[20] Although the DOJ is exclusively competent for antitrust crimes, we need to take into account that the FTC usually reports to the DOJ on the potential criminal antitrust conducts regarding, among which, price fixing conducts. *See* the ANTITRUST DIVISION MANUAL, *supra* note___, and ABA, *DOJ Civil Antitrust Practice and Procedure Manual*, *supra* note___, at 13.

[21] About antitrust crimes *see e.g.*, RICHARD A. POSNER E FRANK H. EASTRBROOK, ANTITRUST – CASES, ECONOMIC NOTES AND OTHER MATERIALS 320 (West Publish. Co., second ed., 1980); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY - THE LAW OF COMPETITION AND ITS PRACTICE, *supra* note___, at 15-16.

[22] Section 1 of the Sherman Act establishes that "*every contract, combination in the form of trust or otherwise, or conspiracy, in restraint, of trade or commerce among the several States, or with foreign nations, is declared to be illegal.*"

competition, while section 2, the so-called monopolization,[23] a conduct reflecting the abuse of dominant position provided for by the Italian and European antitrust laws.

Conversely, the Clayton Act of 1914 prevents conducts as those bundling and price discrimination by regulating the civil antitrust issues, the claims for damage compensation for competition breaches, the regulation of mergers and acquisitions, the notification before filing of a concentration as well as the regulation on interlocking directorates. For our purpose, as specified in the following, Clayton Act represents the most significant text to be taken into account in relation to consent decrees because Section 5 deals exactly with them.

In addition to these two acts relating to US antitrust law, it is important to consider, *inter alia*, the Hart-Scott-Rodino Act,[24] the Robinson-Patman Act,[25] the Federal Trade Commission Act [26]and the Antitrust Civil Process.[27]

In particular, the first act, similarly to the regulation no. 139/2004, grants to the FTC and DOJ the right to preliminary examines mergers and acquisitions identifying any possible violation of the regulation to protect competition. The Robinson-Patman Act, on the contrary, judges different conducts, among which the conduct of selling identical products in similar circumstances by granting different terms and conditions for prices and discounts to consumers.

The Federal Trade Commission Act sets forth the FTC jurisdictions, *inter alia*, the (a) prevention of unfair or misleading competition procedures; (b) determining a pecuniary compensation or another remedy to the prejudicial conduct suffered by the consumer; (c) issuing rules in relation to trade, by identifying specific actions or procedures which are deemed to be unfair or misleasing and to determine the requirements aimed at preventing such actions and procedures; (d) carrying out

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[23] Section 2 of the Sherman Act statues that *"every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, is declared to be illegal.*"

[24] Hart-Scott-Rodino Act of 1976, Public law 94 – 435, also well-know as HSR Act.

[25] Robinson-Patman Act (o Anti-Price Discrimination Act) of 1936; 15 U.S.C. § 13.

[26] Il Federal Trade Commission Act, 15 U.S.C. §§41-58, as amended.

[27] Antitrust Civil Process Act del 1962, 15 U.S.C. §§ 1311-14.

preliminary investigations concerning the organization, business, procedures and management of the market operators; and (e) drafting reports and regulatory notifications to the Congress.

In the end, the Antitrust Civil Process Act[28] grants DOJ the right to carry out the CDIs or civil investigative demands[29] and to co-operate in the investigation procedures on the antitrust violations. In addition, this act includes a list of procedures including to issuance, enforcement, implementation and application of the CDIs, as well as claims against them.

Having listed the most significant regulatory reference points of the US antitrust law, we can deal with entities that constitute the judicial system in the United States to explain the position of the US case law outlined in the following. This latter has a fundamental role in relation to this matter and it represents one of the judicial system's basis in those countries governed by Common Law, such as the United States.

The United States district court represents the court of the US original jurisdiction over antitrust disputes. There are 94 district courts, at least one in each State. As to the appeal, it is granted by the United States Court of Appeals, and there are thirteen Court of Appeal all over the United States.

Finally, the highest court competence for antitrust issues is the United States Supreme Court, which issues the final judgment. This latter is not forced to issue any decision

[28] United States: Antitrust Civil Process Act, 19.09.1962. This Act was substantially modified by Hart-Scott-Rodino Antitrust Improvements Act del 1976, Public Law 94-435, §§ 101-106, 90 Stat. 1383-84, 1387, 1389-90 and Antitrust Procedural Improvements Act of 1980, Public Law 96-349, §1.

[29] Antitrust Civil process Act (**ACPA**) empowers the DOJ to issue a CDI to entities that the agency believes might have useful information or documents for their antitrust inquires. In particular, at the beginning the ACPA provided that "enable the Department of Justice of obtain documentary evidence during the course of a civil investigation to enforce the antitrust law", and then it was amended providing that the Department would have "all the basic investigate tools necessary for effective and expeditious investigations into all the possible civil violations of the federal antitrust laws". There are three types of CDI: 1) one type of CDI is direct to get documentations useful to a specific case; 2) an other type is used to get written answers to some specific questions; 3) and finally the CDI that concerns the oral testimony. *See*, ABA, DOJ CIVIL ANTITRUST PRACTICE AND PROCEDURE MANUAL, *supra* note, at 61ff.

in relation to a submitted dispute; such choice is subject to its own discretion.[30] In the U.S. the Supreme Court decision is well known as *certiorari* and it constitutes the most important reference points of case-law which we shall necessarily refer to in this study. Although having a subordinate role, the decisions by the Court of Appeals and the District Courts contribute into the development of the antitrust law, and thus they will be mentioned in this study.

3. Enforcement of the US Antitrust Law

3.1 Introduction

Having examined the main regulatory reference points and protagonists of the U.S. antitrust law, it is worth to outline the enforcement procedure relating to such law,[31] which includes both public and private enforcement.[32]

Without pulling out on this matter, which would deserve a separate in-depth analysis, we point out some brief outlines to give a more interesting and helpful perspective to this study.

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[30] *See* United States Courts, *Supreme Court procedures*, http://www.uscourts.gov/educational-resources/get-informed/supreme-court/supreme-court-procedures.aspx. ("Parties who are not satisfied with the decision of a lower court must petition the U.S. Supreme Court to hear their case. The primary means to petition the court for review is to ask it to grant a writ of certiorari. This is a request that the Supreme Court order a lower court to send up the record of the case for review. The Court usually is not under any obligation to hear these cases, and it usually only does so if the case could have national significance, might harmonize conflicting decisions in the federal Circuit courts, and/or could have precedential value. In fact, the Court accepts 100-150 of the more than 7,000 cases that it is asked to review each year. Typically, the Court hears cases that have been decided in either an appropriate U.S. Court of Appeals or the highest Court in a given state (if the state court decided a Constitutional issue.")

[31] For further information on private and public enforcement, *see e.g.*, Robert L. Hubbard and James Yoon, *How the Antitrust Modernization Commission Should View State Antitrust*

Enforcement, 17 LOY. CONSUMER L. REV. 497, 2004-2005. *See also*, Michael DeBow, *State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal*, in COMPETITION LAWS IN CONFLICT 267, 280-81 (Richard A. Epstein & Michael S. Greve, eds., 2004); Richard A. Posner, *Antitrust at the Millennium (PartII): Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940 (2001); Report of the Section of Antitrust Law of the American Bar Association from Richard J. Wallis, Chair, Section of Antitrust Law 2004-05, to the Antitrust Modernization Commission (Sept. 30, 2004), *available at* http://www.amc.gov/conunents/abaantitrustsec.pdf.; Stephen Calkins, *Perspectives on State and FederalAntitrust Enforcement*, 53 DUKE L.J. 673 (2003).

[32] About the antitrust enforcement in the U.S., *see also*, Richard A. Posner*, A statistical study of antitrust enforcement, supra note,* at. 365.

3.2 Public Enforcement

The DOJ an FTC are engaged in the so-called public enforcement of antitrust law. Although these two agencies have several competing jurisdiction functions, they act in complete co-operation spirit. The DOJ and FTC, indeed, are engaged in investigating on the same disputes to grant the most effective intervention, by deciding, on a common basis, which one shall precede in investigations on the grounds of the examination of experts and the staff available.

With respect to the antitrust enforcement, it is mainly granted upon the beginning of the investigations,[33] which can turn into civil or criminal proceedings. Investigations may start by a claim of privates, as well as by preliminary investigations carried out by the Authority itself, among which investigations carried out during the pre-notification phase of a merger. Here, the agency might identify some antitrust issues that are worth investigating.

Once the Agency complete its investigations, it might: (*i*) decide to relieve its claims and concerns in relation to the investigated company/ies; (*ii*) prosecute the alleged breaching conduct in a civil or criminal proceedings; (*iii*) or settle the dispute by entering into an agreement.

In case *sub* (*ii*), referring to the prosecution of the alleged violation in a proceedings, this latter, as mentioned, can be a civil or a criminal one, according to the nature of the breaching conduct.

Regarding to the criminal proceedings it is important to notice that it is carried out exclusively by DOJ, specific antitrust Authority that has jurisdiction in the criminal enforcement field.[34]

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[33] Richard A. Posner*, A statistical study of antitrust enforcement*, *supra* note, at 416. In particular, "The power to initiate antitrust proceedings is shared by the private bar, the Department of Justice, the Federal Trade Commission, and state agencies. Although this dispersion of authority is of long standing, no reasoned principles for dividing the work of antitrust enforcement among the various enforcement institutions have yet evolved; the operative principle is catch-as-catch-can."

[34] *See e.g.* PHILLIP AREEDA, LOUIS KAPLOW, AND AARON EDLIN, ANTITRUST ANALYSIS, PROBLEM, TEXT, AND CASES, sixth ed., 46 (Aspen Publ., 2004). The major elements of the Department of Justice's antitrust policy are criminal activities, which represent 74 percent of the DOJ's cases. *See also*, Deborah Platt Majoras, *A Review of*

The DOJ shall prosecute the alleged unlawful conduct in a proceeding that appears as a willful misconduct of the investigated party.[35]

Thus, because the Authority has to give evidence, on the one hand, of the anti-competition effect of the conduct and, on the other hand, of the fact that such effect was willful, or in any case was caused by a willful intention of the company.

The most important element is that DOJ's intervention is focused, in any case, on such misconducts, being the exclusive agency that holds the power to prosecute them. In particular, from 1980 to 1993, criminal proceedings have been representing 80% of the total amount of proceedings carried out by the Authority and the sanctions have experienced a significant increase from the past.[36]

Specifically, antitrust criminal conducts can be sanctioned with a three-years period of imprisonment or with a fine up to $350,000 for individuals,[37] while a company can be sanctioned with a fine up to 10 million dollars.[38]

Recent Antitrust Division Actions, in Section of Business Law 2003 Conference for Corporate Councel, Washington D.C. (June 2003) *available at* http://www.justice.gov/atr/public/speeches/201159.htm. According to the former Deputy Assistant Attorney General of the Department of Justice, Antitrust Division, Deborah Platt Majoras, the "[c]riminal antitrust enforcement remains at the core of our mission. The cartel activity uncovered in Division investigations over the [2002] has cost U.S. consumers and business many hundreds of millions of dollars annually.

[35] *See United State v. United States Gypsum* (438 U.S. 422, 98 S. Ct. 2864 (1978). Here the Supreme Court established that the DOJ have to demonstrate the criminal intention to obtain a condemnation.

[36] For further information *see* J. Gallo e al., *Criminal Penalities Under Sherman Act: A Study in Law and Economics*, 16 RES. L. & ECON. 25, 27 (1994). Thus, the DOJ represents for companies the most feared antitrust authority. This sensation is clear also in dealing with mergers and acquisitions matter. *See* John D. Carroll, *The Widening Gap Between FTC, DOJ Merger review*, in http://www.law360.com/articles/81917/the-widening-gap-between-ftc-doj-merger-review. In particular, according to some scholars "..most notably the Antitrust Modernization Commission had suggested that the FTC's burden is lower than the DOJ's, especially in light of the fact the DOJ typically has to meet both the preliminary and permanent injunction standards in the same proceeding."

[37] Although the U.S. antitrust law establishes the imprisonment for some antitrust violations, rarely the DOJ imposed it. *See* R. Posner, *A statistical study of antitrust enforcement, supra* note, at 389, ("imprisonment is a rarely used sanction; it has been imposed in fewer than 4 per cent of the Department's criminal cases, and then mostly in cases involving either acts of violence or union misconduct. The first prison sentence for "pure" price fixing was imposed in the 1955-1959 period. The next such was in the electrical-equipment case of 1960, where seven company officials were given 30-day terms. Prison sentences have been imposed in two cases since then, but it is too early to tell whether the reluctance of judges to impose prison sentences in antitrust cases is diminishing significantly.")

[38] *See* Robert H. Lande and Joshua AT Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, B.Y.U.L. Rev., 315 (2011). In particular the paper pointed out that "*DOJ prosecutions also result in prison sentences and house arrests, which significantly deter illegal activity as well. From 1990 to 2007 criminal prosecutions by the DOJ Antitrust Division resulted in sentences that total 330.24 years in prison. In addition, Antitrust Division activity also led to another 96.85 years of "house arrest or confinement to a halfway house or community treatment center*». *See also*, Herbert Hovenkamp, *Federal*

Section 3 of the Robinson-Patman Act also imposes to the price discrimination conducts a one-year period of imprisonment and a fine up to $5,000, although the most important provisions of this act concerns non-criminal conducts.[39]

In conclusion, regarding to conducts which can be sanctioned under criminal law, the Criminal Fines Improvements Act dated 1984 sets forth that, for breaches carried out after its issuance, the fine can be calculated up to the double of the amount earned by the sanctioned party or the loss suffered by the harmed party.[40]

In the investigations concerning civil crimes, DOJ generally issues the Civil Investigation Demands (CDIs),[41] which constitute summons towards entities deemed to possess any information useful to the investigations and which allow the parties to request any relevant documents to the dispute and to submit oral evidence, as well as to carry out any questioning.[42]

The acquired information and available to the Department at this stage can be exclusively shared with FTC, and in any case they cannot be publicly disclosed.[43]

As pointed out in the introduction, public enforcement in this case does not specifically refer to DOJ, but dealing with civil crimes, and also the FTC is involved.

Differently than the DOJ, the FTC is not bound to the judicial systems and the relevant procedural and evidential rules. In fact, it is an Authority having an independent regulation, jurisdictions and technical entities relating to antitrust law and protection of

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Antitrust Policy - The Law of Competition and its practice, supra note, at 534 e Areeda e Kaplow, *Antitrust Analysis*, *supra* note__, at 54ff.

[39] *See* Areeda e Kaplow, *Antitrust Analysis, supra note__,* at 55; ABA, *Antitrust Law Development, supra note__,* at 564, ("[s]ection 3 has bene enforced rarely, and no prosecutions have benn brought sine the 1960s. The Supreme Court has discussed Section 3 on only two occasions». In particular on this matter see Nashville Milk v. Carnation Co., where the Supreme Court alleged that this Act does not represent an antitrust law according to the terms of the Clayton Act, and hence its violation did not give you the right to act for compensating private damages or for getting an injunctive relief.

[40] However, it might be even more difficult to show a similar quantification of the sanction rather than to show *treble damages*, which later are examined. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY - THE LAW OF COMPETITION AND ITS PRACTICE, supra *note*, at 535.

[41] For further information see also, AMERICAN BAR ASSOCIATION, DOJ CIVIL ANTITRUST PRACTICE AND PROCEDURE MANUAL, *supra* note__, at 61ff.

[42] The right of the DOJ to issue a CDI is provided by the *Antitrust Civil Process Act*. In particular, with regard to the CDI's futures see *Antitrust Civil Process Act, 15 U.S.C.A. §§ 1311-1314. See also*, American Bar Association ("**ABA**"), *DOJ Civil Antitrust Practice and Procedure Manual, supra* note__, at *63*.

[43] The explicit exemption is provided by the *Freedom of Information Act,* 15 U.S.C.A. § 1314(g).

consumer interests field. The FTC, as previously mentioned, prosecutes the anti-competition crimes having competitive jurisdiction powers to DOJ, undertaking to procure that all antitrust regulations in favor of markets competition and consumers as well, are duly enforced, having also surveillance powers.

The DOJ and FTC are not the sole agencies, even if they are the most important, having the power to grant public enforcement in United States. In this regard, despite their minor role, the so-called States' Attorneys General, or the Attorneys General of the State have to be taken into account.[44]

In fact, the States play a dual role in relation to antitrust law.[45]

On the one hand, they act as private players within an antitrust proceedings[46] and, on the other hand, they represent public authorities engaged in protecting their public constituency.[47] In fact, the same generally participates in a proceedings to claim for treble damage (examined in the following) on behalf of private entities, with reference to disputes concerning price trust; but they can also deal with the enforcement of the law on concentrations, by ordering, for instance, the divestiture as a remedy to a

[44] *See* Richerd A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 GEO. J.L. & PUB. POL'Y, 5ff (2004).

[45] *See* Robert L. Hubbard and James Yoon, *How the Antitrust Modernization Commission Should View State Antitrust Enforcement*, *supra* note__, "*[u]nder state law, many state attorneys general can prosecute antitrust violations as crimes and almost all have broad powers to investigate potential civil claims. In addition to the typical federal antitrust right to injunctive relief under Section 16 of the Clayton Act, state attorneys general can act as parens patriae to prevent actual or threatened harm to the state's general economy. Finally, state attorneys general represent consumers. State attorneys general pursue damages on behalf of state residents through parens patriae actions under federal antitrust law.*" Hence, the State Attorney General represents "*an effective and ideal spokesman for the public in antitrust cases, because a primary duty of the State is to protect the health and welfare of its citizens. He is normally an elected and accountable and responsible public officer whose duty is to promote the public interest*."

[46] ABA, ANTITRUST LAW DEVELOPMENTS, SEVENTH ED., *supra* note__, at 753. In particular, "[a]lthough the United States is not a person for purpose of Section 4, Section 4A of the Clayton Act authorizes the United States to sue on its own behalf and to recover treble damages resulting from antitrust violations. A state is considered a person when the state asserts antitrust claims on behalf of itself. Under Section 4C, a state also may assert antitrust claims as *parens patriae* on behalf of its citizens who are "natural persons" (as opposed to corporations) and recover treble damages."

[47] *See* RICHARD A. POSNER, *FEDERALISM AND THE ENFORCEMENT OF ANTITRUST LAWS BY STATE ATTORNEYS GENERAL*, *supra* note__, at 8. «*State attorneys general are politicians, that is, they are elected rather than appointed officials».*

merger already approved by FTC.[48]

In addition, under the Hart-Scott-Rodino Antitrust Improvement Act dated 1976, States have the right to enforce the so-called *parens patriae* actions[49] for damages caused by breaches of Sherman Act suffered by their citizens.[50]

The *parens patriae* actions represent a state instrument aimed at compensating the damages suffered in general by the citizens and it has been acknowledged by the Supreme Court long before the effectiveness of today's governing law.[51] In particular, the Court has stressed the State role in relation to public damages rather than those suffered by a single entity.

To date, 23 States and the District of Columbia have provisions relating to *parens patrie* for antitrust crimes, thus granting citizens a compensation for any possible suffered damage without needing any additional claim (for example, class actions). [52]

3.3 Private Enforcement

Having analyzed the public enforcement procedure, we can examine the most significant features of antitrust private enforcement procedure in the United States,

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[48] *See California v. American Stores*, 15 U.S.C.A. § 18a; e HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY - THE LAW OF COMPETITION AND ITS PRACTICE*, *supra* note__, at 539.

[49] Jay L. Himes, *Exploring the Antitrust Operative System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the Microsoft Case*, 11 GEO. MASON L. REV. 37, 2002. ("Congress has created an antitrust enforcement system that enables national competition policy to be established in cases brought by persons other than the United States. Besides authorizing criminal prosecutions, civil damage and injunctive actions, forfeiture proceedings and administrative cases by either the DOJ or the FTC, Congress has enacted statutes permitting damage and injunctive actions by the States themselves and by private parties. The antitrust rights of action thus afforded are designated to be cumulative, not mutually exclusive . . . . They may proceed simultaneously or in disregard of each other.")

[50] *See* Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, *pat* 8-12. In particular, «*I turn now to antitrust enforcement by the states, beginning with the authority conferred in 1976 on state attorneys general by the Hart-Scott-Rodino Antitrust Improvements Act to bring suits (parens patriae suits) on behalf of the residents of their states under federal antitrust law. The effect of the Act, in principle at least, is to make public enforcement of federal antitrust law a competitive rather than a monopoly "market.*"" *See also*, Herbert Hovenkamp, *Federal Antitrust Policy - The Law of Competition and its practice*, supra note, at 539.

[51] *See Louisiana v. Texas,* 176 U.S. 1(1900).

[52] ABA, ANTITRUST LAW DEVELOPMENT, 6TH EDITION, *supra note__*, at 638. In addition, we observe that the creation of the Multistate Antitrust Task Force of the National Association of Attorneys General ("NAAG") of 1983 beard a better coordination in the actions promote by States on behalf of privates.

which probably represents the most interesting aspect of analysis in the US antitrust regulation context.

Despite the several attempts to globalize the antitrust matter,[53] some significant differences still remain between the Italian-European background and the US one.[54] Among these, private enforcement can be deemed one of the most important.

In particular, in Europe and Italy the deterrent effect of such regulation is granted, more or less efficiently, by the mere sanction issued by the watchdog agency, *i.e.* by public enforcement. On the contrary, in the United States, the same role is undertaken by private enforcement.[55]

Claims for damage compensation by private entities actually represent the most significant threat for the companies under investigation for alleged breaches of antitrust law.[56]

In particular, in the United States there are the so-called *treble damages*, which grant the damaged party a compensation in an amount three times equal to the actually suffered damage plus a compensation for legal fees which, as you can easily infer,

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[53] *See* European Commission, COM (2005) 672 final, Green Paper on Damages Actions for Breach of the EC antitrust rules, Bruxelles, 19.12.2005; e COM (2008) 165 final, White Paper on Damages Actions for Breach of the EC antitrust rules, Bruxelles, 2.4.2008. For further information *see also*, Donald R. Barker, *The EU Green Paper on private damages actions-an ambitious response to a very difficult set of pratical and philosophic issues*, COMPETITION LAW REVIEW 239ff (2005).

[54] In Europe a number of studies were carried out on the quantification of damages matter with respect to private antitrust enforcement. *See e.g.*, *Quantifying antitrust damages Towards non-binding guidance for courts - Study prepared for the European Commission* (Dec. 2009) *available at* http://ec.europa.eu/competition/antitrust/actiondamages/. In particular the report is the result of a study carried out for the Commission on the damage's quantification in the antitrust private enforcement context. Quantification of damages that represents one of the most important limit in acting for a compensation of antitrust damages.

[55] *See* ROBERT H. LANDE AND JOSHUA AT DAVIS, COMPARATIVE DETERRENCE FROM PRIVATE ENFORCEMENT AND CRIMINAL ENFORCEMENT OF THE U.S. ANTITRUST LAWS, *supra* note__, In particular, *(*"a quantitative analysis of the facts demonstrates that private antitrust enforcement probably deters more anticompetitive conduct than the DOJ's anti-cartel program. This deterrence effect is, of course, in addition to its virtually unique compensation function. If this article's conclusion about the importance of private enforcement for deterrence is true, private antitrust enforcement also should receive much of the praise given to DOJ anti-cartel efforts. Further, private enforcement should be encouraged in the United States rather than hampered through new legislation or through restrictive judicial interpretation of existing law. And the United States' version of private antitrust enforcement should be something for other countries to consider.")

[56] *See* J. Maria Glover, *The structural role of private enforcement mechanismis in public law*, in 53 WM. & MARY L. REV., 1137 (2012). The author points out that "[p]rivate litigation and the mechanisms that enable it are not merely add-ons to our regulatory regime, much less are they fundamentally at odds with it."

constitutes a strong incentive for private entities to claim for.[57] However, this incentive could not be applied according to the Italian law, because it is expressly forbidden to private entities to gain any profit through claims for damages.[58]

On the contrary, in the United States, Clayton Act expressly allows any private entity "who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold damages by him sustained, and the cost of suit, including a reasonable attorney's fee."[59]

This inevitably strengthens the deterrent effect of the antitrust regulation and promotes the prosecution of occasional and local anti-competition crimes as well, which are frequently neglected by public enforcement.

In this manner, the regulation to protect competition shall hardly be underestimated by companies as well as by private entities, these latter entities having a strong incentive

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[57] For further information, *see e.g.*, Areeda e Kaplow, *Antitrust Analysis, Problems, Text and Case*, supra note__, at 73ff. In particular, with respect to treble damages the authors allege that "[t]he treble damages remedy gives private persons a powerful financial incentive to enforce the antitrust law. Under both the Sherman Act and Clayton Act, any private person "injured in his business or property by reason of anything forbidden in the antitrust laws…shall recovered threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee"." Similarly, *see also*, ABA, *Antitrust Law Development*, seventh ed., *supra note__*, at 776ff. Also this book clarifies that the main purpose of treble damages provision is to discourage both companies to violate antitrust law and to stimulate the *private enforcement* of this regulation. With respect to those damages it is worth to take into account that the antitrust law specifically provides cases where treble damages are automatically excluded. In particular, it concerns: (*i*) the Department of Justice's amnesty program; (*ii*) certain joint venture and the so-called *standards development organization*; (*iii*) and some conducts carry out by export companies. *See also*, H. Hovenkamp, *Federal Antitrust Policy*, *supra* note, at 541ff. See also, Charles F. Phillips, Jr., *The Consent Decree in Antitrust Enforcement*, 18 WASH. LEE L. REV. 39, 48 (1961). ("Treble damage suits were relatively unimportant during the first 50 years of antitrust enforcement, when only 13 suits were won by private parties. The postwar period, however, has witnessed the emergence of the private litigant as a significant adjunct of antitrust enforcement. Damages have been assessed both frequently and in substantial amounts. From 1951 to 1957, there were 220 public and 1,28o private suits. Although the maximum penalty that may be imposed upon conviction of an antitrust violation is S5o,ooo for each count in the indictment, the recovery in some private actions has exceeded the million dollar figure.")

[58] It is the principle established in the Italian law system according to, the damage compensation never cannot cause a profits for the harmed person. *See* Cass. civ., sez. III, 5 giugno 2012, n. 8992, la quale ha precisato che «*si deve, infatti, ribadire che funzione tipica del risarcimento, qualunque ne sia la forma, è di porre il patrimonio del danneggiato nelle medesime condizioni in cui si sarebbe trovato, se il fatto dannoso non si sarebbe prodotto…corollario di detta funzione del risarcimento è che esso non può creare in favore del danneggiato una situazione migliore di quella in cui si sarebbe trovato, se il fatto dannoso non fosse avvenuto, immettendo sul patrimonio un valore maggioe della differenza patrimoniale negativa indotta dallo stesso*».

[59] Section 5, Clayton Act (1916).

to obtain the application, while companies try to avoid heavy sanctions and consequences that arise from any breach of the regulation.[60]

Therefore, the United States grant both justice to damaged parties, and circulation of the antitrust culture among civil entities, by extending such regulation to everybody, and not limit this law to big companies.

In this way the competition is materially and theoretically raised to public good and as such, it is granted to everybody.

However, it is worth pointing out that private enforcement in the United States did not immediately register a great success.[61] On the contrary, at the beginning it was very ineffectual, becoming only subsequently an important instrument to protect competition.

In addition, in the antitrust private enforcement field also class action[62] has a significant role. It is a very common action in the United States, which can be

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[60]We need to specify that treble damages represent sums that the sanctioned companies can fiscally deducible. In any case this circumstance does not seem effect with respect to the deterrent effect of this law. *See* AREEDA E KAPLOW, ANTITRUST ANALYSIS - PROBLEMS, TEXT, AND CASES, *supra* note 34, at 73ff. For further information on treble damages, *see also*, AMERICAN BAR ASSOCIATION, THE PRIVATE ENFORCEMENT OF SECTION 7 OF THE CLAYTON ACT 7ff (Am. Bar. Ass'n, 1977); C DOUGLAS FLOYD E E. THOMAS SULLIVAN, *PRIVATE ANTITRUST ACTIONS - THE STRUCTURE AND PROCESS OF CIVIL ANTITRUST LITIGATION* (Aspen Publish., 2005). As case law on private enforcement, *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hanover Shoe Inc. v. United Shoe Machinery Corat*, 392 U.S. 481 (1961); California v. ARC America Corat, 490 U.S. 93 (1989).

[61]*See* RICHARD A. POSNER E FRANK H. EASTERBROOK, ANTITRUST - CASES, ECONOMIC NOTES AND OTHER MATERIALS 534 (American Casebook series, second edition, 1980). As Posner described in this book, also in the United States at the beginning private enforcement was weak. There were only few private antitrust claims until 1941. Then, from 1941 to 1949 there were 669 private cases with an average of about 250 claims per year from 1950 to 1959. However, although private cases are increased generally the number of antitrust claims did not change. Similarly, see *also*, HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note, at 542, according to "although private antitrust actions were filled soon after the passage of the Sherman Act, the number of such cases was not large until the 1950s. The number grew rapidly through the 1960s and exploded in the 1970s. Recently the number of private filings has leveled off. However, the private antitrust action continues to be the principal mechanism by which the antitrust law are enforced. Roughly 90% of the antitrust cases are brought by private plaintiffs." See also, RICHARD A. POSNER, A STATISTICAL STUDY OF ANTITRUST ENFORCEMENT, *supra* note __at 376ff. In particular, the author alleged that "[T]he veritable explosion of private cases in the most recent period may similarly reflect a recent rash of procedural rulings highly favorable to antitrust plaintiffs."

[62] *See also*, *In re* Hydrogen Peroxide Antitrust Litigation*,* 552 F. 3d 305 (3rd Circ., 2009). Here the Court of Appeal specified that ("[f]irst, the decision to certify a class calls for findings by the court, not merely a *threshold showing*' by a party, that each requirement of Rule 23 is met. Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence. Second, the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits including disputes touching on elements of the cause of action. Third, the court's obligation to consider all relevant evidence and arguments extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it.")

appealed to when the government does not take any action and the numerous damaged people would not claim individually for treble damages' acknowledgement.

In this case, a single claimant could act as representative of a class of damaged people by the same unlawful conduct.

In particular, the class action can be performed exclusively according to specific provisions set forth by the Federal Rule of Civil Procedure 23(a): 1) the class members have to be numerous; 2) there are questions of law or fact common to the class; 3) claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

In addition, in several occasions the case law has pointed out further requirements and the key aspects of the procedure. A very important point is the satisfaction of the requirements set forth by article 23(a), which must be identified as well as proven.[63]

Most class actions can be performed pursuant to provisions of article 23(b), which requires, on one side, that all laws and facts common to class members predominate over any question affecting only individual members, and, on the other side, that class action results superior to other available instruments to compose the dispute.[64]

3.4 Brief Considerations

From the brief overview of the US antitrust regulation, we understand that the U.S. antitrust background is quite different than the Italian and European contexts, which overshadow a crucial and converse scenario represented by private enforcement.

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[63] The Court of Appeal specified that a potential conflict of interest between the members of a class does not preclude the certification. *Kohen v. Pacific Inv. Management Co.*, 571 F. 3d 672 (2009).

[64] William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652 (1983). In particular, this article develops, for example, an analysis on "what is an antitrust injury, the appropriate sanctions for such an injury, the choice between public and private enforcement of antitrust laws and related questions on standing to sue, and the relevance of the antitrust victim's conduct to his ability to recover damages." According to Landes, the rule to determine the optimum sanction o the recognized damage is "simple to state: the fine should equal the net harm to persons other than the offender." The first scholars that applied the economic analysis in the antitrust enforcement were Gary Becker e Ronald Coase. See Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

This latter, as mentioned, has a significant target. On the one hand, it helps companies understanding that if they breach any antitrust law, they can incur heavy sanctions, under financial and standing profile, and on the other hand, it develops an antitrust culture among citizens by raising the protection of competition to public good.

In any case, public and private enforcement have a common final purpose—namely to identify the most suitable sanction against antitrust crimes[65]—within which there are the main characters of our study: consent decrees or consent orders.

[65] William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV., 1983, pat 652 e ss. This article develop an analysis, for instance, on « *what is an antitrust injury, the appropriate sanctions for such an injury, the choice between public and private enforcement of antitrust laws and related questions on standing to sue, and the relevance of the antitrust victim's conduct to his ability to recover damages*». According to Landes, the rule to identify the optimal sanction o damage is «*simple to state: the fine should equal the net harm to persons other than the offender*». The first to apply the economic analysis to antitrust enforcement were Gary Becker e Ronald Coase. *See* Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

III. CONSENT DECREE AND CONSENT ORDERS - NATURE AND PROCEDURE

1. Introduction

Having briefly analyzed the main futures, regulatory reference points and enforcement procedures in the US antitrust regulation, we move to the heart of our study that concerns consent decrees and consent orders.

The consent decree is the wording used to indicate the agreement between DOJ and the investigated companies in an ongoing antitrust proceedings executed in a decision by a judge, the so-called decree.

Consent orders, on the other hand, constitute the result of a proceedings resolved by a negotiation, but in this case the agreement is entered into between FTC and the investigated entity, representing itself a deed by the Authority having the same effectiveness and results as a regulatory provision.[66]

This chapter starts from the analysis of the nature and benefits of this important antitrust instrument[67] which, in the United States, affects 75 percent to 90 percent of the civil proceedings[68] resolved by the controlling Authorities;[69] outlining then the procedure as well as the amendments to the regulation determining its progress.

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[66] AREEDA E KAPLOW, ANTITRUST ANALYSIS-PROBLEMS, TEXT, AND CASES, *supra* note 34. ("Once an investigation has been completed, the FTC will generally afford a party the opportunity to settle under a consent order procedure roughly similar to that used by the Justice Department. The Commission notifies the party of the terms of a proposed complaint and submits a proposed cease and desist order") *Id*. at 69. In addition, ("without admitting any violation of law, the party may then agree to negotiate the terms of a cease and desist order that, when entered, will have the same force and effect as a regular FTC final order.") *Id*. at 56

[67] Clark E. Walter, *Consent decrees and the Judicial Function,* CATH. U. L. REV. 326 (1971). ("The consent decree has become one of the Antitrust Division's most important instruments for terminating antitrust cases, and it would be unrealistic to suggest that its importance will not continue in the future.")

[68] The DOJ used really often consent decrees in the civil antitrust actions. As Areeda, Kaplow and Edlin noted, "most civil antitrust actions initiated by the Justice Department terminate in a settlement that is filed with the court and incorporated in a judicial order." AREEDA, KAPLOW, EDLIN, ANTITRUST ANALYSIS-PROBLEMS, TEXT, AND CASES, *supra* note 34, at 52.

[69] *See* ABA, *Antitrust Law Developments, supra* note 1, at 703. ("Settlement by consent decrees is the Antitrust Division's most common method of resolving antitrust claims.") *See also*, AREEDA & KAPLOW, ANTITRUST

Once examined such aspects, we will deal in the following chapters with deterrence and the relevant regulatory effects in connection with the analyzed institution.[70] In particular, some significant cases resolved by a similar agreement shall be examined in order to understand its actual operational and financial benefits.

This study has the purpose of identifying, in a more structured US background, helpful guidelines for Europe and, in particular, for Italy, by determining the circumstances in which it is suitable or not to enter into similar agreements between the antitrust Authority and the investigated company. The effects, not exclusively under a competition profile, of such institution cannot be neglected, because it regulates, as a proper agreement, the conducts of the market leading operators.

The United States have a centuries-old experience, dating back to 1906,[71] which has to be taken into account. In 1906 an antitrust agreement between the parties has first been entered into and executed by a judge's order.[72]

ANALYSIS-PROBLEMS, TEXT, AND CASES, *supra* note 34, at 63. ("Most civil antitrust actions initiated by the Justice Department terminate in a settlement that is filed with court and incorporated in a judicial order known as a *consent decree*") and ("from its first use in 1906, the consent decree has been used with increasing frequency; since 1955 consent decrees have consistently accounted for approximately 70 percent of all terminations of civil actions filed by the Antitrust Division.") *Id*.. *See also*, Clark E. Walter, *Consent decrees and the Judicial Function, supra* note 67, at 315. ("The consent decree has become one of the Antitrust Division's most important instruments for terminating antitrust cases.") Janet L. McDavid, William A Sankbeil, Edward C. Schmidt, Barry J. Brett, *Legislative issues and judicial developments, antitrust consent decrees: ten years of experience under the Tunney Act*, 53 ANTITRUST L. J., 883 (1983). ("Consent decrees have become increasingly important tools in the Justice Department's administration of the antitrust laws. During the period 1955 -1973, approximately 80 percent of all Justice Department civil antitrust actions were terminated by consent decrees. Since 1973, approximately 92 percent of such cases ended in the entry of consent decrees.") *See also*, Singmund Timberg, *A primer on antitrust consent judgments and FTC consent orders*, 39 BROOK. LAW REVIEW 567 (1973). ("In recent years, eighty to eighty-five per cent of the civil cases brought by the Antitrust Division have been terminated by consent judgments. Seventy-five per cent of the FTC proceedings are terminated in similar fashion.") *Id*.

[70] *See* CONSENT DECREES, IN PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW - AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 327(a) (Aspen Publisher, 1978, Supplement No. 2009). ("As the D.C. Circuit observed in Microsoft, an antitrust consent decree cannot be read as though its animating spirit were solely the antitrust laws.") *Id*.

[71] *See United States v. Otis Elevato*r, Civil No. 13884, C. C. Calif., June 1, 1906, reprinted in 1 Decrees &Judgments in Federal Antirust Cases 107; Earl A. Jinkinson, *Negotiation of consent decrees*, 9 ANTITRUST BULL., 674 (1964). ("[T]he antitrust law was a mere child when in 1906, defense counsel first successfully resolved a case by resorting to the device of a judgment or decree entered with the consent of the parties.") *See also,* Jay L. Himes, *Judicial Review of Justice Department Consent Decrees: Is the Tunney Act Glass Half-Empty or Half-Full?, in «Spring Convention and Expo Las Vegas*», Nevada, February 28, 2007, at 1. ("The Justice Department's use of consent decrees to settle antitrust cases, which are submitted to the court for

The consent decrees' procedure is stated in Section 5 of Clayton Act, approved in 1914 by the Congress and dealt in the following.

2. Benefits and Nature of Consent Decrees

As mentioned above, most antitrust proceedings by DOJ or by FTC are resolved through an agreement executed by a consent decree[73] or order depending on the fact that it is entered into between an investigated company and DOJ or FTC.

Similar negotiations,[74] with reference to consent decrees, can be carried out in any time during the procedure.[75] Further to a preliminary investigation, upon completion of the investigations but before the proceedings, during the proceedings or upon issuance of a decision determining the possible liability against the investigated entity.[76]

The benefits deriving from the analyzed institution are different and some of them have a similar application in the European and Italian backgrounds.[77]

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approval, began back in that early period of activity, about 100 years ago.") Celillianne Green, *The 1982 AT&T Consent Decree- Strengthening The Antitrust Procedures and Penalties Ac*t, 27 HOWARD L. J., 1642 (1984). ("The use of consent decrees as a mechanism for settling antitrust disputes dates back to the early 1900's. Since that time, the popularity of consent decrees has grown steadily and they have become increasingly more common place.") *Id*.

[72] ANTITRUST CONSENT DECREES 1906-1966, COMPENDUM OF ABSTRACT, American Enterprise Institute, Washington D.C. (1968). ("Although the first federal antitrust law, the Sherman Act, was adopted in 1890 and the first consent decrees involving consensual elements were entered a few years later, the present form of consent decree took define shape in the late 1930s and early 1940s.")

[73] *See* Thomas M. Mengler, *Consent Decree paradigms: models without meaning*, 29 BOSTON COLLEGE LAW REVIEW, 292 (1988). ("A consent decree is a settlement, in the form of a court order, containing injunctive relief in which the trial court agrees to maintain jurisdiction over the case.") *Id*. *See also*, Charles F. Phillips, Jr., *The Consent Decree in Antitrust Enforcement*, 18 WASH. LEE L. REV. 39, 40-42 (1961).

[74] *See* Sigmund Timberg, *A primer on antitrust consent judgments and FTC consent orders*, *supra* note 69, at 567; ABA, ANTITRUST LAW DEVELOPMENTS (SEVENTH ED.), *supra* note 1, at 719.

[75] *See* Phillip E. Areeda and Herbert Hovenkamp, *Consent Decrees*, PHILLIP E. AREEDA AND HERBERT HOVENKAMP , ANTITRUST LAW - AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 25 (Aspen Publishers, 1978, update 2009 (Supplement No. 2009).

[76] *See* AREEDA E KAPLOW, ANTITRUST ANALYSIS-PROBLEMS, TEXT AND CASES, 5 ed., *supra* note 70, at 63.

[77] *See also*, Phillip E. Areeda and Herbert Hovenkamp, *Consent Decrees, supra* note 75, at 25. ("Consent settlement offers obvious advantages for both the defendant and the government. The Justice Department can spread its limited enforcement resources over more suits and thus achieve broader antitrust enforcement than would be possible if every suit had to be fully litigated. Settlement can also benefit the defendant who prefers to avoid the expense, publicity, and business disruption of discovery procedures and trial as well as the treble damage consequences of adjudicated liability.")

In particular, consent decrees offer companies an instrument to prevent[78] claims for treble damages.[79] In fact, if the government resolves the proceedings by entering into an agreement with the investigated companies,[80] private entities lose the benefits of *prima facie* provision set forth in Section 5.[81]

This means that, differently than an antitrust conviction decision, the consent decree does not prove the unlawful conduct by the company, which as a covenant in a proceedings should be proved to be actually breaching by the claimant.

The company prevents in this way any possible claim by private entities with reference to the conduct subject of the decree, since the evidence to be submitted requires long-lasting and expensive investigations, which an individual entity would hardly bear.

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[78] The President specified to the Congress his hopeless: "that we shall agree in giving private individuals who claim to have been injured by these processes the right to found their suits for redress upon the facts and judgment proved and entered in suits by Government…," 51 CONG. Rec. 1962-64 (1914).

[79] At the beginning, the fist version of the Clayton Act stated "that consent decrees be given the same evidentiary effect as litigated judgments. In the Senate, however, it was argued that if such a clause were adopted it would "effectually put an end to all consent decrees." The Senate view prevailed, and a resulting provision in Section 5(a) exempts "consent judgments or decrees entered before any testimony has been taken" from the operation of the section." Clark E. Walter, *Consent Decrees and the Judicial Function*, 20 CATHOLIC UNIV. L. REV. 312 (1971).

[80] Section 5(a) of the Clayton Act establishes that "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be **prima facie evidence** against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . ." With this respect, *see also*, Earl A. Jinkinson, *Negotiation of consent decrees*, *supra* note 71, at 685. ("In 1914 when Congress drafted Section 5 and the exception for consent decrees, a consent decree was just that a decree or judgment entered on the consent of both parties.") *See also,* Section 5, of Clayton Act, "[t]he benefits for consenting defendants are obvious. Probably the most important is the escape from treble-damage liability, which can be achieved by avoiding a judicial or administrative determination of antitrust liability and by depriving aggressive treble-damage plaintiffs of the evidence made public in a litigated record. Subsidiary benefits include the elimination of heavy trial expenses, the avoidance of unfavorable publicity, the saving of executives' time which would otherwise be spent in litigation, and the removal of legal uncertainties which would have an important bearing on business decisions." *Id*. *See also,* Janet L. McDavid, William A Sankbeil, Edward C. Schmidt, Barry J. Brett, *Legislative issues and judicial developments, antitrust consent decrees: ten years of experience under the Tunney Act, supra* note 69, at 884. ("The only statutory reference to consent decrees was in Section 5(a) of the Clayton Act, which provided that the entry of a consent decree should not constitute prima facie evidence against the defendant in any subsequent litigation.") *Id*.

[81] Clark E. Walter, *supra* note 79, at 313. ("In an antitrust action where the plaintiff has limited financial and investigative resources, the successful prosecution of his treble damage action may depend on the availability of a government judgment which serves as **prima facie evidence of the alleged violation.**") *See also*, Earl A. Jinkinson, *Negotiation of consent decrees*, *supra* note 80, at 678. ("A consent decree is not available as prima facie evidence against the defendant in a private suit for damages, which may be the most persuasive reason of any he gives. In fact, only the desire to avoid prima facie guilt proves valid . . . Section 5 was designed to aid injured persons who may not have had the means to sue the antitrust violator without such assistance.")

In this regard, there has been an attempt not to deprive consent decrees of such effect by applying a clause named "asphalt clause."[82] This, in particular, allowed a private entity to uptake the decree during proceedings as evidence of the breach by the company and to this latter to lose the most significant incentive to address to such procedures.

For this reason, in cases in which the same has been included by the Government, the judge did not consider it by experiencing the critiques of those people who deemed such clause as an unjustified attempt to avoid the provisions contained in Section 5, approved by the Congress.[83] Section 5, expressly sets forth the exemption of consent decrees from *prima facie* evidence.

However, it seems that there are no provisions preventing an individual entity to submit such decision during a proceedings. In this case, the judge has the possibility, even if not compulsory, to consider it.[84]

In conclusion, the main benefits[85] connected to this instrument are still at present:[86]

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[82] *See* Bernard Kaplan, *The Asphalt Clause—A New Weapon in Antitrust Enforcement*, 3 BOSTON COLLEGE L. REV. 355 (1962). ("The term 'asphalt clause' refers to a specific provision in a consent decree terminating a civil antitrust case brought by the federal government. The clause provides that the decree shall have a specified prima fade effect in favor of the plaintiffs in certain subsequent private treble damage actions for the same violation. Its existence is the result of administrative and judicial, rather than congressional action"). *Id*. at 355. *See also*, William Barnabas McHenry, *The Asphalt Clause—A Trap for the Unwary*, 36 N.Y.U. L. REV. 1114 (1961).

[83] Clark E. Walter, *supra* note 70, at 319. In 1982, in *United States v. Brunswick- Balke-Collender Co.*, "[t]he court approved the decree without the *asphalt clause* characterizing the government's apparent policy of seeking to advance the cause of private litigants as an unauthorized attempt on the part of an administrative agency to avoid Congressional intent as clearly set forth in the proviso in § 5 of the Clayton Act." *Id.* That provision, said the court, "gave the defendants *an unqualified right* to avoid a judgment with prima facie effect." *Id.*

[84] David S. Konczal*, Ruing Rufo: Ramifications of a Lenient Standard for Modifying Antitrust Consent Decrees and an Alternative,* 65 THE GEORGE WASHINGTON L. REV., 133 (1996). ("If, however, an antitrust dispute between the defendant and the United States is settled with a consent decree, private parties bringing suit against the defendant will not receive the benefit of the prima facie evidence rule and will therefore confront a heightened burden in establishing that the defendant's actions violated the antitrust laws.")

[85] Charles F. Phillips, Jr., *The Consent Decree in Antitrust Enforcement*, 18 WASH. LEE L. REV. 39, 46 (1961). Both Government and parties have important benefits due to consent decrees.

[86] *Id*. at 130. ("Consent decrees are extremely attractive to both the Antitrust Division and defendants, primarily because of the avoidance of time consuming and expensive litigation.")

a) For the investigated company, the possibility to prevent treble damages,[87] expensive costs for the proceedings,[88] the negative publicity, by saving time and energies necessary to its business;[89]

b) For the Government, a significant saving of time and money,[90] by exempting to manage a long-lasting antitrust proceedings and to proceed in carrying out expensive investigations.

In fact, consent decree resolves the dispute without carrying out a proceeding[91] by holding harmless the investigated entity by any further governmental investigation in relation to the conduct subject of the decree.[92]

As regards the nature, judges[93] and scholars[94] of antitrust regulation acknowledge, almost unanimously,[95] a contractual origin of such agreement,[96] without neglecting the

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[87] *See*, Phillip E. Areeda and Herbert Hovenkamp, *Consent Decrees*, PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW - AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, *supra* note 70, at 327, c), "Third parties may not maintain an action for damages or initiate contempt proceedings for a defendant's violation of a consent decree. And while Clayton Act §5(a) allows a litigated decree to be used as prima facie evidence of liability in subsequent private actions against the defendant, it explicitly prohibits that use of pretrial consent decree."

[88] Sandford I. Weisburst, *Judicial Review of Settlement and Consent Decrees: An Economic Analysis*, 5 THE JOURNAL OF LEGAL STUDIES, University of Chicago, 55 (1999). ("The parties are presumed capable of weighing the costs and benefits of going to trial versus settling. And the parties often conclude that settlement is the optimal strategy: it allows them to conserve the substantial costs of pursuing a legal claim through a full trial, and to the extent that the parties are risk averse, it enables them to avoid the uncertainty inherent in a trial.")

[89] David S. Konczal*, supra* note 83, at 133. ("Antitrust defendants have a number of incentives to enter into consent decrees rather than to litigate a case to judgment. Consent decrees enable antitrust defendants to avoid four major evils of antitrust litigation: the prima facie evidence rule, the economic consequences of litigation, negative publicity, and risk.") *Id*.

[90] Earl A. Jinkinson, *Negotiation of consent decrees*, *supra* note 80, at 688. ("The use of consent decrees may save the Government a great deal of time and money.") See also, Earl A. Jinkinson, *supra* note 80, at 569. ("The Government also benefits in several ways. Limited government manpower and financial resources may be more effectively allocated, and the inevitable delays inherent in antitrust litigation may be avoided.") *Id*.

[91] *See* Charles F. Phillips J, *The Cosent Decree in Antitrust Enforcement*, 18 WASHINGTON AND LEE L. REV., 40 (1961). ("In theory, one of the principal objectives of the consent decree procedure is to eliminate the time and expense involved in trial preparation. Consequently, a compromise is ordinarily reached at a relatively early stage in the litigation.")

[92] *Id.*

[93] *See* Earl A. Jinkinson, *supra* note 71, at 674. Consent decree by American courts is as "[a]n agreement of the parties under the sanction of the court . . . in the nature of a solemn contract." *See United States v. Hartford-Empire Co.,* 1 F. R. D. 424, 426 (N. D. Ohio, 1940). Similarly *see also*, *White v. Joyce*, 158 U. S. 128, 147 (1895); *Pacific R. B. Co. v. Ketchum*, 101 U.S.289, 295 (1879); *Swift & Co. v. United States*, 276 U.S.310, 324

fact that consent decrees represent in any case a, or a sort of, judicial act.[97] In particular, the same, except consent orders by FTC, which are more similar to the European decisions entailing undertakings, represent a decision by the judge,[98] having

(1928); *Thompson v. Maxwell Land Grant Co*., 168 U. S. 451, 470 (1897), according to ("[t]his definition is judicially sound since a consent decree is negotiated in much the same manner as a contract, binds both parties, and may be vacated for similar reasons, such as lack of actual accord or fraud in its procurement.") *See also*, Thomas M. Mengler, *supra* note 73, at 301. ("The Court thus viewed the consent decree as essentially a contract between the parties.") *Id*.

[94] See RICHARD A. EPSTEIN, ANTITRUST CONSENT DECREES-IN THEORY AND PRACTICE 4 (The AEI Press, 2007). ("The consent decree represents a distinctive and imaginative amalgam. It operates both as a contract between two or more parties to settle disputes between them and as a contract between two or more parties to settle disputes between them and as a final judgment of the court that has entered it. It just marries the flexibility of a private contract to the legal clout of a final judgment. The settlement mechanism spares both sides the risk and expense of a prolonged trial.") *See also*, Clark E. Walter, *supra* note 70, at 315. ("These negotiations closely resemble normal business contract negotiations. The parties are engaged in a bargaining process in which the government offers to refrain from formal litigation in return for the defendant's consent to enter a *contract* obligating him to institute or refrain from certain conduct . . . The parties are engaged in a bargaining process in which the government offers to refrain from formal litigation in return for the defendant's consent to enter a *contract* obligating him to institute or refrain from certain conduct. The resulting *consent decree*, when ratified by the court, carries the sanction of contempt if breached."

[95] However someone took a different position rejecting the theory according to which consent decrees have a contractual nature. *See e.g*., judge Cardozo who "expressly rejected the theory that such a decree, once entered, was a contract, because defendants retain a 'right to exact revision in the future.'" *United States v. Swift & Co.*, 286 U. S. 106, 115 (1932). A minor school of thought hold the "Judicial Act Model," but as Mengler recognizes, this model is wake "the judicial act model is flawed because it grants the district court remedial powers that are appropriate only after a factfinder has found a defendant liable or after the defendant has admitted liability… But the contention that all defendants who enter into consent decrees are liable is simply wrong. A defendant may have many reasons for settling a lawsuit. He or she might conclude that the actual expenses of litigation when measured against the relief requested by a settling plaintiff weigh in favor of settlement." Thomas M. Mengler, *supra* note 73, at 321,

[96] *See United States v. Amour & Co*, 402 U.S. 673, 681-82 (1971). ("Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms . . . Naturally the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the partie shave purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.") Similarly, *see also*, *United States v. Hartford-Empire Co*., 1 F. R. D. 424, 426 (N. D. Ohio, 1940) where Supreme Court defined *consent decrees* as "[a]n agreement of the parties under the sanction of the court . . . in the nature of a solemn contract."

[97] *See* Sigmund Timberg, *supra* note 69, at 577. ("Consent judgments entered by courts in antitrust cases and consent orders by the Federal Trade Commission in proceedings before it are both judicial (or quasi-judicial) acts and contracts between the Government and the private defendants.") Lawrence M. Frankel, *Rethinking the Tunney Act: a model for judicial review of antitrust consent decrees,* 75 ANTITRUST L. J. 579 (2008). ("A consent decree is a judicial act: the decree is entered as an order of the court, and is enforceable by judicial sanction.")

[98] *See United States v. ITT Continental Baking Company*, 420 U.S. 223 (1975). ("Consent decrees and orders have attributes both of contracts and of judicial decrees…While they are arrived at by negotiation between the parties and often admit no violation of law, they are motivated by threatened or pending litigation and must be

a level of authority and interpretation higher than a mere negotiation between private entities.[99]

Some experts consider them as agreements included in a judicial decision or, in any case, a hybrid institution having the traditional features of an agreement and a judicial act as well.[100] In fact, Federal Courts of the United States have the right to issue "such orders or decrees as are necessary or appropriate" in order to comply with the provisions of antitrust law.[101] On the contrary, European and Italian judges do not have such right.

With respect to their content, consent decrees are classified in two categories: (*i*) those ordering *behavioral remedies*, (*ii*) and those, which on the contrary determine *structural remedies*.[102]

Prime example of structural remedies is AT&T case,[103] in which the Authority has ordered the telephony giant to split in different companies.

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approved by the court . . . Because of this dual character, consent decrees are treated as contracts for some purposes but not for others.") *Id*.

[99] *See e.g.,* RICHARD A ESPSTEIN, ANTITRUST CONSENT DECREES, IN THEORY AND PRACTICE, 4 (The AEI Press, 2007). ("First, the enforcement of a private settlement has to run all the risks associated with a civil action for breach of contract . . . Second, a claim for breach of contract is vulnerable to attack on the grounds that the contract does not embody the final agreement, that it has been induced by fraud, and that it does not represent the complete deal between the parties . . . Third, the remedies for violating a consent decree are more potent than for an ordinary breach of contract. Breach an agreement, and the usual remedies are damages, injunction, and specific performance if you can get them . . . " Similarly, *see also*, Thomas M. Mengler, *supra* note 73, at 292. ("Consent decrees are more efficient than private settlements because a court maintains jurisdiction over a lawsuit. Parties to a consent decree, unlike parties to a private settlement, can enforce the terms of the decree without filing a new suit and starting at the end of the queue.")

[100] *See*, Phillip E. Areeda and Herbert Hovenkamp, *Consent Decrees*, PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW - AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, *supra note*, at 25–37; RICHARD A ESPSTEIN, ANTITRUST CONSENT DECREES, IN THEORY AND PRACTICE, *supra* note, at 4. *See also*, Larry Kramer, *Consent decrees and the rights of third parties,* 87 MICHIGAN L. REV. 324 (1988). The author alleged that consent decrees are neither a contract nor a judge decision, but both of them. ("A consent decree is what it is: an agreement between the parties to end a lawsuit on mutually acceptable terms which the judge agrees to enforce as a judgment.") *Id*.

[101] *See N. Secs. Co. v. United States*, 405 U.S. 562 (1904). *See also*, ABA, ANTITRUST LAW DEVELOPMENTS (SEVENTH ED.), *supra* note 1, at 718.

[102] *See* Daniel L. Rubinfeld, *Settlements in Antitrust Enforcement: A U.S. Economic Perspective,* (with Jeffrey Perloff) in L. White (ed.), PRIVATE ANTITRUST LITIGATION, M.I.T. Press, 1988, pp. 149-184.

[103] *United States v. AT&T*, (1982). *See also*, Richard A Espstein, *Antitrust Consent Decrees, in theory and practice*, *supra note*, at 54ff.; Lawrence A. Sullivan and Ellen Herz, The *AT&T Antitrust Consent Decree: Should Congress Change the Rules*, 5 BERKELEY TECN. L. J. 236ff (1990).

As to behavioral remedies, we can mention the famous Microsoft case,[104] better defined in the following.

Uninterrupted monitoring costs relating to behavioral remedies have to be taken into account in choosing between a category and the other, even if the preference of the Authority towards the first category of remedies at present seems to be at issue.[105]

3. Procedure of Consent Decrees - Tunney Act of 1974

3.1 Brief Outlines

As mentioned in the preceding paragraph, consent decrees can apply at any time during antitrust proceedings, even subsequently to a decision.[106]

Differently, in Italy, investigated companies are granted a three-months period from the notice of investigation to submit alternative undertakings to avoid any possible

[104] *United States v. Microsoft,* 15 July 1994. The *Federal Trade Commission* investigation started in 1991 and it verified a potential monopolization in the operative system of PC market. The FTC joint a statement phase and in 1993 it decided to close its investigations, while the Department of Justice started an investigation settled in July, 1994. This procedure was not the only regarding Microsoft. Then, indeed, there were others claims of monopolization against Microsoft, which how we will see concerned also Europe.

[105] With respect to behavior remedies, even if it concerns mergers, *see* Robert B. Bell, *Regulation by Consent Decree*, ANTITRUST ABA, at 73ff. In particular, see the author's considerations at 77. ("For many years the Division has taken the position that, with a few exceptions, regulatory remedies cost too much to administer, are easy to evade, and move the Division away from its proper mission as a law enforcement agency into a regulatory role for which it is ill suited. Recent decrees and the 2011 Remedies Guide reject that position. While this new approach to merger remedies may eventually prove to be effective, the result is far from certain. If it turns out not to be effective, the Division may have to change its approach to remedies once again.") *Id*.

[106] *See* supra note 12.

decision acknowledging the unlawful conduct.[107] Such period, even if not mandatory, is set forth in the Authority's guidelines.[108]

On the contrary, in Europe there is not a term for the submission of undertakings,[109] but the European Commission issues the decision[110] without involving any court,[111] which can have a possible or subsequent role.

In the United States, with reference to consent decrees,[112] courts are immediately involved at a first stage and their role has been increasing during the years, above all since the issuance of the Tunney Act.[113]

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[107] Italian antitrust law n. 287/90, art. 14*ter* "1. Within three months from notification of the launch of an investigation into the possible violation of Articles 2 or 3 of this law or Articles 81 or 82 of the EC Treaty, companies may offer commitments that would correct the anti-competitive conduct, which is the subject of the investigation. The Authority may, after having assessed the suitability of such commitments and within the limits of EU law, make them binding on for those companies and terminate the proceeding without ascertaining the contravention. 2. If the commitments made binding under Paragraph 1 are not observed, the Authority may levy a fine of up to 10 percent of turnover. 3. The Authority, acting in its official capacity, may reopen the proceeding if: a) there is a change in a factual element of the case on which the decision was based; b) the companies concerned act contrary to their commitments; c) the decision was based on information provided by the parties which is shown to be incomplete, inexact or misleading."

[108] *See* AGCM Decision, Sep. 6 2012, n. 23863 - *Procedure di applicazione dell'articolo 14 ter della legge 10 ottobre 1990, n. 287*, in *Boll*. 35 (Sep. 2009).

[109] *See* in Europe where consent decrees are called *commitment decisions*. For further information *see e.g.*, Christopher J. Cook, *Commiment Decision: The Law and Practice under Article 9*, 29 WORLD COMPETITION LAW AND ECONOMIC REVIEW, 209-228 (2006); KJ Cseres, *The impact of Regulation 1/2003 in the New Member State*, 6 THE COMPETITION L. REV. 145-182 (2010); J. Davies E M. Das*, Private enforcement of Commission commitment decisions: a step climb, not a gentle stroll*, 199-226 «International Antitrust Law & Policy», Fordham University School of Law (2005); J. Temple Lang G, *Commitment Decision Under Regulation 1/2003: Legal Aspects of a New Kind of Competition Decision*, 8 EUROPEAN COMPETITION L. REV., 347 – 356 (2003).

[110] The European Commission is more similar to the FTC, governmental antitrust agency, than DOJ that is a department of justice. As well as the DOJ, the European institution takes decisions at this level without courts intervention that intervene only in an eventual and following phase.

[111] In particular, *see* article 9, Regulation CE 1/2003. ("Where 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. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission . . . ") *Id*.

[112] With regard to consent orders taken by the FTC, we have to pointed out that they do not required an examination by courts. Consent orders, indeed, "entered in FTC antitrust proceedings are far from ceremonial: they involve an elaborate process of negotiation and are scrutinized by the full Commission in order to determine whether they are in the public interest." *See* Sigmund Timberg, *A primer on antitrust consent judgments and FTC consent orders*, *supra* note 69, at 577.

[113] For a period *Pre-Tunney Act, see* Janet M. McDavid, William A. Sankbeil, Edward C. Schmidt, Berry J. Brett, *Legislative issues and judicial development. Antitrust consent decrees: ten years of experience under the Tunney Act*, 52 ANTITRUST L. J. 885 (1983). Authors observed that "in Sam Fox Publishing Co. v. United States, the Supreme Court rejected a prospective intervener's claim that a consent decree provided inadequate relief and reemphasized the government's autonomy in negotiating consent decrees: 'sound policy would strongly lead us

Originally, the stamp or certification rendered by the judge [114] was of little importance,[115] while recently courts show their interest and involvement from the beginning[116] and the risk of their denial has been gradually increasing.[117] In AT&T case,[118] for example, which is one of the first cases experiencing the application of

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to decline appellants' invitation to assess the wisdom of the Government's judgment in negotiating and accepting the . . . consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government is so acting.'" *Id*. More specifically, Congress concerns on the strong secrecy of consent decree's procedure. Indeed, it avoided public to access and comment the proposed decrees feeling completely confident on the legal system. *See* AREEDA E KAPLOW, ANTITRUST ANALYSIS-PROBLEMS, TEXT, AND CASES, 5TH ED., *supra* note 66, at 53. *See also*, *Gordon F. Hampton, Current Antitrust Consent Decree procedures – should they be changed?*, 42 ANTITRUST L. J., 130ff (1973).

[114] *See* Thomas M. Mengler*, Consent Decrees Paradigms: model without meaning*, *supra* note 73, at 301. ("The Court thus viewed the consent decree as essentially a contract between the parties, which the approving court had properly rubber-stamped and which the interpreting court consequently should construe only narrowly.") *Id*. *See also*, Sigmund Timberg, *A primer on antitrust consent judgments and FTC consent orders*, *supra* note 69, at 577. ("Because they are usually entered without any prior testimony or factual record and the parties have waived their constitutional right to trial, the courts tend to interpret or enforce them on the basis of their literal language, rather than in light of the basic purposes of the parties in agreeing to the consent settlement.") *Id*. Lawrence M. Frankel, *Rethinking the Tunney Act: a model for judicial review of antitrust consent decrees*, 75 ANTITRUST L. J. 549 (2008). ("Congress was concerned about judicial "rubber stamping" of proposed decrees.") *Id*.

[115] For further information on the Tunney Act, *see e.g*., Lawrence M. Frankel, *supra* note 114, at 549-622; Jay L. Himes, *Judicial Review of Justice Department Consent Decrees: Is the Tunney Act Glass Half-Empty or Half-Full*?, in Spring Convention and Expo Las Vegas, Nevada, February 28, 2007.

[116] *See* Thomas M. Mengler*, supra* note 73, at 298. ("Justice Frankfurter agreed with the majority's resort to the judicial act paradigm: 'Of course, the District Court had the power to modify the consent decree in order to effectuate its basic purposes. The fact that the decree embodied the agreement of the parties no more limited the power of the court than if it had been a contested decree.'") *See also,* Janet M. McDavid, William A. Sankbeil, Edward C. Schmidt, Berry J. Brett, *Legislative issues and judicial development. Antitrust consent decrees: ten years of experience under the Tunney Act*, *supra* note 80, at 889. ("consistent with the view that the Tunney Act 'was not intended to change the status of consent decrees, but rather to ensure that judges took seriously an obligation they already had.'") *Id*. *See also*, Jay L. Himes*, Judicial Review of Justice Department Consent Decrees: Is the Tunney Act Glass Half-Empty or Half-Full?, supra* note 71, at 5. ("Congress sought to eliminate *judicial rubber stamping* of Justice Department proposals, and, instead, to cement the court's role as 'an independent check upon the terms of decrees negotiated by the Department of Justice.'") *Id*.

[117] Sandford I. Weisburst, *supra* note 86, at 58. ("The court may reject the settlement, leading to a new round of settlement negotiations (and if those fail, to a trial). Taking into account the effects of this process on the parties incentives ex ante, settlement negotiations become more difficult for the parties if they cannot predict what the court expects.") *See also*, Natalie L. Krodel, *The Tunney act: judicial discretion in United States v. Microsoft Corporation*, 62 BROOK. L. REV., 1293 (1996). In particular, on this matter we need to observe that in Microsoft case the intervention of judge Sporkin, who in the light of the Tunney Act rejected the proposed consent decree of the DOJ and Microsoft, the Congress intervened to resolve the secrecy among parties by identifying the terms of the agreement. According to the judge, the court's role was not limited to a simple *rubber stamp.* He alleged that "[i]n refusing to approve the decree, Judge Sporkin clashed with the Justice Department regarding the appropriate amount of discretion he had to review the settlement under the 1974 Antitrust Procedures and Penalties Act, commonly referred to as the Tunney Act, which requires courts to determine whether a consent decree in an antitrust case is "in the public interest." Similarly, *see also*, Cecillianne Green, *The 1982 AT&T Consent Decree- Strengthening The Antitrust Procedures and Penalties Ac*t, 27 HOWARD L. JOURNAL, 1628 (1984). ("In 1974, the secretive aspects of the consent decree negotiation process were eliminated by the enactment of the Antitrust Procedures and Penalties Act. 'The objective of the Act was to assure the integrity of and the public confidence in settlements by consent decree.'")

[118] 460 U.S. 1001 (1983), *United States v. American Tel. &Tel. Co*., 552 F. 131 (D.D.C. 1982).

Tunney Act,[119] the judge identified the compliance to public interest of the agreement with exclusive reference to certain points, not as a whole,[120] by neglecting its acceptance.

Such evaluation was rejected by the Supreme Court, which denied the objections of the district court in relation to its denial.[121] However, the case is still helpful in understanding the position of the judge after issuance of Tunney Act.[122]

The judge, who was first a mere background actor, has become a main character of the procedure.

3.2 Tunney Act of 1974

Nowadays, the judicial entity examines such agreements also on the merit,[123] taking the opportunity whether to resolve the case.[124]

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[119] See *Lawrence M. Frankel, Rethinking the Tunney Act: a model for judicial review of antitrust consent decrees*, *supra* note 95, at 551. Here the author specified that: "[a]ccording to the legislative history, the Act was to remedy '[v]arious abuses in consent decree procedures by the Antitrust Division and by district courts' and to assure 'the integrity of and public confidence in procedures relating to settlements via consent decree procedures." Thomas M. Mengler, *supra* note 73, at 308. ("Because Judge Greene was uncertain whether the Tunney Act actually governed the proposal by the Justice Department and AT&T, he followed Tunney Act procedures without deciding whether the Act actually applied to the proposal.") *Id*.

[120] *See* Thomas M. Mengler*, supra* note 73, at 308. 9"Judge Greene found that although most of the decree's provisions served the public interest, some did not. He consequently refused to approve the proposed decree unless the parties agreed to several changes, which they did.") *See also*, Celillianne Green, *supra* note 71, at 1611.

[121] Thomas M. Mengler*, supra* note 73, at 308. ("By summarily affirming Judge Greene's entry of the AT&T consent decree, the Supreme Court sanctioned a district court's weighing of the equities before approving a consent decree.")

[122] This regulation seems recognized unlimited judge discretion over *consent decrees*. *See* Lawrence M. Frankel, *Rethinking the Tunney Act: a model for judicial review of antitrust consent decrees, supra* note 95, at 549. ("The Act appears to yield almost unlimited discretion to district judges, and different judges have approached their task under the Act in very different ways.")

[123] Clark E. Walter, *Consent decrees and the Judicial Function, supra* note 79, at 316. ("As a general rule, consent decrees are accepted and signed by the court as a matter of purely formal routine. If the court, after a brief presentation by defendant's counsel and the Antitrust Division attorneys, is satisfied that the parties are in agreement, the requested order is entered with only cursory examination.") *Id*.

[124] Sandford I. Weisburst, *supra* note 86, at 58. ("Judicial review is one possible response to the inadequate representation problem in settlement negotiations. In essence, judicial review of settlement is a hybrid between trial and settlement. The costs of a prolonged trial are avoided by holding a less costly fairness hearing on the proposed settlement, and the court's review assures that inadequately represented parties will not be injured by the settlement.")

The Tunney Act,[125] as we will analyze, has granted also a wider consideration to third parties by giving them the opportunity to submit their comments to the terms and conditions of the agreement before approval by the court.[126]

This act represents, thus, the reference text of the procedure of consent decrees,[127] included in Section 5 of Clayton Act and amended by this latter.

In particular, the phases of the current procedure are the following:

1) DOJ submits the District Court its proposal of consent decree and it publishes in the Federal Register for a period of at least 60 days before the date of the final decision. During this period, third parties can submit their comments to the decree and

[125] With this respect, *see e.g.,* Janet M. McDavid, William A. Sankbeil, Edward C. Schmidt, Berry J. Brett, *Legislative issues and judicial development. Antitrust consent decrees: ten years of experience under the Tunney Act*, 52 ANTITRUST L. J., 884 (1983). ("The Tunney Act expanded and codified the judicial role in overseeing the entry of consent judgments in antitrust case.") *See also,* Thomas M. Mengler*, supra* note 73, at 308. ("The Tunney Act requires that a district court follow certain procedures before approving a proposed consent decree submitted by the United States in a government antitrust action. Among these procedures, the district court must require the Justice Department to publish the proposed consent decree in the Federal Register and receive comments from the public for sixty days, to publish a competitive impact statement, and to respond to all public comments received within the sixty-day period. After the Justice Department has complied with these procedures, the district court may enter the proposed consent decree only if it determines that the decree is 'in the public interest.'")

[126] Janet M. McDavid, William A. Sankbeil, Edward C. Schmidt, Berry J. Brett, *supra* note 111, at 884, ("The Tunney Act provides specific rules and procedures by which notification of a proposed consent decree, and an opportunity for comment, is given to third parties before the decree is approved by the court.") Similarly, the European law system, as well as the Italian one, establishes the so-called market test, which provide a similar opportunity for the third parties. In particular, in Italy, for example, the procedure statues that "11. I terzi interessati possono presentare le proprie osservazioni scritte in merito agli impegni proposti (market test) entro un termine di trenta giorni decorrenti dalla data di pubblicazione degli impegni stessi sul sito Internet. Nel caso in cui l'Autorità necessiti di ulteriori informazioni, la Direzione competente formula richieste in tal senso ai soggetti che possano fornire elementi utili alla valutazione degli impegni. Le Parti saranno tempestivamente informate dalla Direzione istruttoria competente dell'esito del market test, rispetto al quale sarà consentito un immediato accesso agli atti." AGCM, Comunicazione sulle procedure di applicazione dell'articolo 14ter della legge 10 ottobre 1990, n. 287.

[127] Janet M. McDavid, William A. Sankbeil, Edward C. Schmidt, Berry J. Brett, *supra* note 111, at 904. ("The Tunney Act was enacted to ensure that consent decrees are in the public interest. The act is essentially procedural; even prior to its enactment, many courts recognized their obligation to protect the public interest. The Tunney Act established mandatory and discretionary procedures to assist the courts in making their public interest determination. In addition, the Act outlines factors the courts should consider in assessing the public interest.")

both comments and the relevant governmental replies are published in the said Federal Register;[128]

2) DOJ has the obligation to provide for anybody, upon request, with the communication on the competitive impact of the decree, which has to contain specifically: (*a*) nature and purpose of the proceedings; (*b*) a description of the alleged antitrust breaches and the relevant origin; (*c*) an explanation relating to the proposed decree, including extraordinary circumstances which lead to the submitted agreement and preempting the competitive effects of the suggested remedy; (*d*) remedies available to the possible private claimants which may have been affected by the alleged antitrust violation; (*e*) a description of the available procedures to amend the proposed decrees; (*f*) and, in conclusion, an evaluation and a specification of the alternative measure to the considered decree.[129]

3) A summary of the proposed decree, its relevant competitive impact and a list of the actual instruments in the United States and available to the public,[130] in order to comment the agreement, shall be published for a period of 7 days in a national journal and at least 60 days before the effectiveness of such decree;[131]

4) During the mentioned above 60-days period or for an extended time period granted by the Court,[132] the United States, that is DOJ, receives and records all submitted comments with reference to the proposed consent decree.[133]

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[128] *See* Section 5(b), Clayton Act 1914.

[129] *See* Section 5(b), Clayton Act 1914. Janet M. McDavid, William A. Sankbeil, Edward C. Schmidt, Berry J. Brett, *supra* note 111, at 885.

[130] *See United States v. AT&T*, 552 F. Sup at 131, 148 & n. 72 (D.D.C. 1982), 460 U.S. 1001 (1983). ("The legislative history shows that Congress was particularly concerned that the *excessive secrecy* of the consent decree process deprived the public of the opportunity to scrutinize and comment upon proposed decrees, thereby underteming confidence in the legal system. In addition, the legislators found that consent decrees often failed to provide appropriate relief, either because of miscalculations by the Justice Department or because of the 'great influence and economic power' wielded by antitrust violators. The history, indeed, contains references to a number of antitrust settlements deemed blatantly inequitable and improper on these bases.")

[131] *See* Section 5(c), Clayton Act 1914.

[132] That term cannot be reduced, except for exceptional cases justified by the Attorney General or his appointed. Section 5(d) statues that "[t]he Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments. Upon application by the United States, the district court may, for good cause (based on a finding that

5) Before approving any consent decree the court shall determine if the same is compliant with the *public interest*.[134] In particular, the Court shall consider: (i) the competitive impact; (ii) the enforcement and amendment, as well as early effects; (iii) alternative remedies individually examined; (iv) public impact in general or, more specifically, on individual damaged entities; (v) and, in conclusion, issuance of additional considerations relating to the adequacy of the decision.[135]

6) In addition, in order to evaluate the compliance of the agreement with the public interest, the Court has the right to: (a) obtain witness statements by governmental officers and experts;[136] (b) appoint experts or advisors; (c) authorize the participation of third parties as *amicus curiae* in a phase or for the whole duration of the proceedings; (e) amend the written comments, replies and objections; and (f) carry out any activities deemed necessary by the judge to the public interest.[137]

7) Not later than 10 days from the 60-days term indicated in point (1) above, each covenant shall submit the Court a description of the written and oral communications

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the expense of publication in the Federal Register exceeds the public interest benefits to be gained from such publication), authorize an alternative method of public dissemination of the public comments received and the response to those comments."

[133] *See* Section 5(d), Clayton Act 1914.

[134] *See,* Lawrence M. Frankel, *supra* note 95, at 555. ("The court "has an independent duty to assure itself that entry of the decree will serve the interests of the public generally." But "public interest" is never defined, nor are judges given any real guidance on how to measure a decree against the public interest or when to use the additional procedures.") *See also*, *Gordon F. Hampton, Current Antitrust Consent Decree procedures – should they be changed?*, *supra* note 113, at 133. The author recognized that "the bill requires a court, before entering any consent judgment, to determine if entry is in the public interest. To make this determination, the court must first consider the public impact of the judgment, including termination of the alleged violation, duration of the relief sought, anticipated effects of alternative remedies and any other factors bearing upon the adequacy of the judgment. Second, the bill requires the court to consider the impact of the judgment upon the general public as well as upon individuals alleging specific injury… Third, the court must consider any possible public benefit which could be derived from a full-blown trial of all issues in the case."

[135] *See* Section 5(e), Clayton Act 1914.

[136] *See,* Lawrence M. Frankel, *supra* note 95, at 611. ("A court ought to take if it needs more information is to invite the parties in for a hearing,") *Id*. However, taking a testimony represents a residual relief. ("If the court's concern with the decree relates to clarity, enforcement, harm to third parties, or efficacy, it should seek evidence of the type on which the DOJ relied (for example, documents, party and third-party witnesses) rather than seeking to compel testimony directly from an official.") *Id*.

[137] *See* Section 5(f), Clayton Act 1914. The court, for example, can ask for "an additional written sub-mission from the DOJ to, for example, clarify its position, explain its reasoning, or provide information supporting a particular choice made in adopting the settlement." See Lawrence M. Frankel, *Rethinking the Tunney Act: a model for judicial review of antitrust consent decrees*, *supra* note 95, at 613.

rendered by itself or on its behalf, including those issued by its office, manager, and employees on its behalf to another office or employee of the United States.[138]

8) However, before issuance of any consent decree the covenant shall notify the district court that the requirements of this subsection have been satisfied, that submissions are true and the description of the communications by the covenant, who would reasonably be aware of them, is complete.[139]

The procedure sets forth that the deeds shall not be submitted in any other claim or antitrust proceedings by another party against the covenant, as long as the Court has carried out an examination of the public interest and the procedure indicated in point (5) and (6) above, for the purpose of accepting the consent decree. This latter, as mentioned, shall not have in any case the right to constitute a *prima facies* evidence pursuant to Section 5(a) of Clayton Act in any other claim or proceedings against the involved entity.[140]

In addition, should a civil or criminal proceedings take place before the procedure for consent decrees on behalf of the United States in order to prevent, limit or punish an anti-competition conduct, not included in Section 5(a) of Clayton Act,[141] it is deemed as pending until one year from the judge decision.[142]

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[138] However, as Section 5 (g) of Clayton Act statues, an exemption exists. The exemption is "that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection."

[139] *See* Section 5(g), Clayton Act 1914.

[140] *See* Section 5(h), Clayton Act 1914.

[141] Section 15(a) of the Clayton Antitrust Act explicitly statues that: "any person who shall be injured . . . by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . ." 15 U.S.C. § 15(a).

[142] *See* Section 5(i), Clayton Act 1914.

In short, Tunney Act,[143] as mentioned, has significantly affected the Court role in the procedure for consent decrees by allowing it to go beyond a mere certification of the agreement.[144]

In fact, the same has to evaluate if the agreement is also compliant with the public interest and the parties' needs as well.

In addition, a re-examination by the judge in this sense determines a precedent, which constitutes a determent effect and a guideline for future agreements.[145] However, such re-examination by the Court has increased the costs of such procedure for the parties and it is thus sometimes hardly affordable.[146]

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[143] The Tunney Act was modified in 2004. That modification entailed that "[t]he 2004 legislation made it clear that courts need to look at the substantive competitive effects of a decree, and not simply at ambiguity, enforcement, potential harm to third parties, and mockery of the judicial function." *See* Lawrence M. Frankel, *Rethinking the Tunney Act: a model for judicial review of antitrust consent decrees, supra* note 95, at 570. *See also*, Jay L. Himes, *supra* note 113, at 4. ("The changes that Congress made in 2004 are intended to *restore* the federal court's review authority to assure that proposed consent decrees are good for competition and consumers . . . The central purpose of the 2004 changes was to reaffirm judicial empowerment. By the amendments, Congress intended the courts to "undertake meaningful and measured scrutiny of antitrust settlements to insure that they are truly in the public interest.") *Id*.

[144] With respect to the role played by courts, *see e.g*., Lawrence M. Frankel, *Rethinking the Tunney Act: a model for judicial review of antitrust consent decrees, supra* note 95, at 562. ("The court acknowledged that a district judge should not *assume the role of Attorney General* by substituting its prosecutorial judgment for that of the Executive Branch, but recognized that even where the *government is challenged for not bringing as extensive an action as it might* there could be extreme circumstances under which a court should decline to enter a decree, where entering the decree would *make a mockery of judicial power*.") *Id*. The Congress seems worried about the excessive confidentiality of the DOJ into the consent decrees procedure, and this seems one of the reasons that concerned the adoption of the Tunney Act. On this matter, *see e.g*., Jay L. Himes, *supra* note 113, at 2. ("A 1959 congressional report similarly called judicial consent decree approval *a matter of purely formal routine*, and sharply criticized the overall secrecy of the Justice Department's program.") *See also*, Charles F. Phillips J, *supra* note 89, at 41. ("[T]he negotiations are secret, the public is excluded from the negotiating process, and the information that is exchanged between the parties is strictly confidential. After agreement has been reached on the terms of the decree, the final arrangements for its submission for court approval are kept confidential.")

[145] *See* Sandford I. Weisburst, *supra* note 86, at 68. ("The judicial review mechanism enables the court to expose the settlement to public view. Further, the judicial review mechanism allows for creation of *precedents* of a sort--the court's opinion approving or rejecting the proposed settlement—that not only deter but also provide guidance to parties seeking to conform to the law.")

[146] ("The easier it is for the parties to predict what the court expects in the settlement, the lower the cost and uncertainty presented by judicial review. Conversely, as it becomes more difficult for the negotiating parties to predict what the court expects and thus to predict the outcome of judicial review, the cost of settlement increases, making settlement less likely.") *Id*. at 66. With regard to the costs of the Tunney Act, *see also*, Lawrence M. Frankel, *Rethinking the Tunney Act: a model for judicial review of antitrust consent decrees*, *supra* note 95, at 596. ("[S]ome of the costs imposed by the Act are unavoidable, for instance, the cost to the DOJ of preparing the CIS, publishing the required documents, and responding to comments . . . This additional cost, uncertainty, and delay can have an adverse impact on antitrust enforcement, and on the very public interest that the Act was meant to protect.") *Id.*

Nevertheless, the success of consent decrees seems to be increasing, affecting even today almost 80% of DOJ's proceedings.

3.3 Role of Third Parties in the Procedure

Generally, the so-called *outsiders* in relation to the antitrust proceedings[147] have the possibility to submit documents as *amicus curiae*,[148] in order to inform the parties about their interest in the proceedings and the nature of their claims.[149]

These outsiders have also the right to become party in the proceedings, even if in general the Government tends to object their active participation in the proceedings or in the definition of the agreement.[150] With this respect, the Supreme Court has rejected the participation of third parties, even if these appealed to the Federal Rule of Civil Procedure 24(a)(2),[151] to support their request.

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[147] For further information on the role of the third parties during the procedure of consent decrees, *see* Larry Kramer, *supra* note 98, at 321; Susan B. Dorfman, *Mandatory consent: binding unrepresented third parties through consent decrees,* 78 MICHIGAN L. REV., 153 (1994).

[148] Janet M. McDavid, William A. Sankbeil, Edward C. Schmidt, Berry J. Brett, *supra* note 111, at 892. ("Although the courts typically deny third-party intervention in consent decree proceedings, they generally permit prospective interveners to participate as amici curiae. The courts have concluded that through amicus curiae participation, third parties can adequately provide the court with their views on the proposed decree.")

[149] In an antitrust procedure the parties are, on the one hand, the United States, namely the DOJ or the FTC, and on the other hand, the defendant. Hence, for outsiders we mean the third parties, namely all the subjects that are not considered parties in the procedure. The outsiders when the parties find an agreement to settle the can "sometimes assert an interest in the settlement and seek to participate in proceedings on the proposed decree. There are several possible mechanisms for such participation: intervention as a party, amicus curiae status, and filing comments or objections with the Justice Department." *Id.*, at 891.

[150] *See*, *Consent Decrees*, in Phillip E. Areeda and Herbert Hovenkamp, ANTITRUST LAW - AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, *supra* note 66, at 327 c). *See also*, Janet M. McDavid, William A. Sankbeil, Edward C. Schmidt, Berry J. Brett, *supra* note 111, at 893. ("Efforts by third parties to intervene in consent decree proceedings have been regularly denied by the courts, both prior to and after enactment of the Tunney Act.") *Id*.

[151] Federal Rule of Civil Procedure 24(a)(2): "(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who: . . . (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."

In addition to the Tunney Act, third parties have the right at present to participate, by commenting the terms of the agreement entered among the Authority and the investigated company before their definition.[152]

Such comments, as alleged, have to be published by the Government through submission of a brief summary drafted by the Court, which shall have to consider it in evaluating the public interest of the consent decree.

4. Amending Consent Decrees. Is it Possible?

Regarding to the chance by the parties to amend the terms and conditions of the agreement once defined in the decree, there are two different scenarios. A first scenario is represented by those who object such request, while the other one supports the acceptance of possible amendments to the decree, should the judge deem them necessary, given the judicial nature and the agreement's necessity of flexibility.

At present, many consent decrees, to resolve upon raising misunderstandings, provide for a specific clause relating to the court jurisdiction to modify the decree, if subsequently requested by one or both parties.[153]

In particular, it is possible that both the investigated company[154] and DOJ[155] request the court, which issued the consent decree, an amendment to the agreement for

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[152] *See* Janet M. McDavid, William A. Sankbeil, Edward C. Schmidt, Berry J. Brett, *Legislative issues and judicial development. Antitrust consent decrees: ten years of experience under the Tunney Act*, *supra* note 111, at 884. ("The Tunney Act provides specific rules and procedures by which notification of a proposed consent decree, and an opportunity for comment, is given to third parties before the decree is approved by the court.")

[153] *See* SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION (ABA), ANTITRUST CONSENT DECREE MANUAL 60 (1979), which established the so-called *retention-of-jurisdiction clause* according to, "[j]urisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance therewith, and for the punishment of violations thereof." *Id.*

[154] Specifically, the investigated company will seek to mitigate the restrictions imposed by the consent decree asking for its modification. David S. Konczal*, supra* note 84, at 140.

[155] Usually the DOJ ask for a modification of the terms of the decree. See *Chrysler Corat v. United States,* 316 U.S. 556 (1942).

subsequently occurred events, which can be of any nature.[156] For example, they can be connected with technologies which may render the decree unnecessary or too expensive for the company, or with industrial changes or an increase in competition in a certain field, etc.

Originally, the Court was adverse to possible amendments to the decree, by stating its nature as agreement and not as judicial order, thus being amended, provided that the damage arising from the subsequently occurred event is proven by evidence.[157] Then this attitude has changed.

In Swift case,[158] dating back to the twenties, judge Cardozo stated that there were no doubts to "the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent."[159] In particular, very strict criteria for possible amendments were determined, stating that "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."[160] This means that in order to obtain the acceptance of a request, the party

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[156] For further information on this topic, *see e.g*., David S. Konczal*, supra note 84*, at 130ff.; *See also,* Phillip E. Areeda and Herbert Hovenkamp, *Consent Decrees*, PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW - AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, *supra* note 66, ¶327b)*;* Jed Golfard, *Keeping Rufo in its cell: the modification of antitrust consent decree after Rufo v. Inmates of Suffolk County Jail,* 72 N.Y.U.L. REV., 625ff. (1997).

[157] The dominant position argued for identified *consent decree* as a hybrid institution locates between a contract and a judge order. This position embraces both stances, namely who identifies *consent decree* as a contract, and who is inclined to consider it as a simple order of judge. The first position would limit the judge's discretion; hence the chance to modify the consent decree, on the contrary, the second perspective would make broader the judge power and easier its participation in the procedure. On this issue, it is worth to analyze the judge Eastbrook though that is favor for considering the decree as a contract rather than a pure judge's order. Eastbrook alleged that "the terms of the consent decree should be adhered to absent a breakdown of '*some fundamental supposition of the contract.*' If such a breakdown occurs, the decree should be dissolved and the case returned to the trial court. In the usual situation where the dispute involves smaller, unanticipated matters, modification is not justified unless the decree itself could be interpreted as providing for such modification." *See* Jed Golfard, *supra* note 154, at 627.

[158] Charles F. Phillips, Jr., *supra* note 89, at 44.

[159] In United States v. Swift & Co., 286 U.S. 106 (1932), Justice Cardozo held that "we are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent."

[160] Janet M. McDavid, William A. Sankbeil, Edward C. Schmidt, Berry J. Brett, *Legislative issues and judicial development. Antitrust consent decrees: ten years of experience under the Tunney Act*, *supra* note 111, at 887. ("In United States v. Swift & Co., the court established procedures to assist it in determining whether a proposed modification of a consent decree was in the public interest.") *Id*.

had to give evidence of the subsequently occurred circumstances affecting the consent decree, causing a serious harm.

Subsequently, in the *Chrysler Corp. v. United States,*[161] the DOJ asked for amendment of a decree dated 1938. Such amendment, being rejected according to Swift test, had to be proven by the Government that "grievous wrong evoked by new and unforeseen conditions."[162]

However, the Court intended to accept the request by DOJ, through a different test, for the evaluation whether the amendment was aimed at obtaining or rejecting the purpose of the consent decree. Therefore, since in Chrysler case the request represented such attainment, the Court accepted it.[163]

Thus, judges could choose whether to appeal to the strict Swift test[164] or to address to the more flexible one as in Chrysler case.[165]

For example, in the *United States v. United Shoe Machinery Corp,* the judge chose the Swift test, stating that he did not approve the amendment to the decree requested by the Government, because the standard requirements were not satisfied.[166] However, the judge objected the decision by the District Court in his final decision, because he deemed that the amendment was in compliance with the criteria determined by Swift, and that the decree had to be interpreted consistently to its background.[167]

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[161] 316 U.S. 556 (1942).

[162] Swift, 286 U.S. at 119.

[163] *See* Thomas M. Mengler*, Consent Decrees Paradigms: model without meaning*, *supra note__*, at 298.

[164] *See* Sigmund Timberg, *A primer on antitrust consent judgments and FTC consent orders*, *supra note* at 572. "This standard was followed by two experienced antitrust judges in denying defendants' requests for modification: Judge Kloeb in United States v. Owens-Corning Fiber Glass Corat, and Judge Ryan in United States v. InternationalBoxing Club of New York, Inc.."

[165] *See* Thomas M. Mengler*, supra* note 73, at 299. "Unhappy with their restricted roles under Swift, some lower courts have relied on Chrysler or its progeny to modify a consent decree. Chrysler, like Swift, is alive and well."

[166] The District Court having heard the government's require to modify the decree, it opted for rejecting it alleging standards established by *United States v. Swift & Co.,* according to which, the chance to modify the original decree was limited "(1) a clear showing of (2) grievous wrong (3) evoked by new and unforeseen conditions." in *United States v. United Shoe Machinery Corat*, 266 F.Supat 328, 330 (1967).

[167] 391 U.S. 244 (1968). "[N]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change." 286 U. S. 119. *See also*, Sigmund Timberg, *A primer on antitrust consent judgments and FTC consent orders*, *supra* note, at 575. The Supreme Court held that the standard and the allegation of the District Court, which after ten years since the original judgment, have to guarantee a relief that "should put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act."

Consistently with this assumption, the court attitude was changing towards a favorable view to any possible amendment to the decree.

In the most recent *Rufo v. Inmates of Suffolk County Jail*,[168] which is not an antitrust case, the Supreme Court applied a more flexible test towards the request for a mere change in the circumstances for the acceptance of the amendment.[169] Such test applied also to Kodak case[170] in which the judge stated that the decree was necessary in case of monopoly by the company and that such would become unnecessary once the market turned to be competitive.[171] Similarly, the *United States v. Western Electric Co.*[172] was resolved and the district court expressly stated that the Rufo test applied thereto.[173]

5. FTC's Consent Decrees

[168] *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992).

[169] *See*, Phillip E. Areeda and Herbert Hovenkamp, *Consent Decrees*, PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW - AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, *supra* note 66, par. 327b); David S. Konczal, *Ruing Rufo: Ramifications of a Lenient Standard for Modifying Antitrust Consent Decrees and an Alternative, supra* note 83, at 132. ("The Court announced a less stringent standard than in Swift, emphasizing 'the need for flexibility in administering consent decrees . . .' The Court held that consent decrees may be modified "when changed factual conditions make compliance with the decree substantially more onerous,' 'when a decree proves to be unworkable because of unforeseen obstacles,' or "when enforcement of the decree without modification would be detrimental to the public interest.'") From the Rufo case, indeed, we can learn that the power of the court to modify the decree follow at the beginning equity reasons. On this case, *see e.g.,* Jed Golfard, *supra* note 154, at 635. ("In Rufo v. Inmates of Suffolk County Jail, the Court explicitly abandoned Swift's "grievous wrong" standard for requests to modify institutional reform consent decrees . . . Under Rufo, then, moving parties are not required to demonstrate that the decree's specific purposes have been achieved; they need only show that a significant change in circumstance (fact or law) warrants modification and that the modification is "suitably tailored to the changed circumstance.") *Id*.

[170] *United States v. Eastman Kodak Co*., 63 F.3d 95 (2d Cir. 1995). This case concerns two decrees considered as relief against the antitrust violations carried out by Eastman Kodak from 1921 to 1954. Those decrees impeded companies to sell the private label of films or bundling selling of films and developing and printing service. *See* Jed Golfard, *supra* note 154, at 642.

[171] *See* Phillip E. Areeda and Herbert Hovenkamp, *Consent Decrees*, PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW - AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, *supra* note 66, par. 327b).

[172] *United States v. Western Electic Company inc.,* n. 94-5252, argued nov. 16, 1994 – February 17, 1995.

[173] "The district court, adopting Rufo, granted AT&T's request, agreeing that neither party to the original decree anticipated the RHCs' entry into markets outside of their previously delegated regions. Because these unanticipated changes caused the decree effectively to prohibit significant business activity that the district court had decided to allow in the original entry of the decree, the decree had been rendered 'substantially more onerous.'" Jed Golfard, *Keeping Rufo in its cell: the modification of antitrust consent decree after Rufo v. Inmates of Suffolk County Jail, supra* note 154, at 645.

5.1 Overview

Generally, the consent order, as mentioned, identifies the agreement entered into between FTC[174] and the investigated company.

The same, differently than consent decrees, does not represent a judicial order, but a provision issued by FTC, which similarly to the Italian Competition Authority and the European Commission, has an administrative nature.

Similarly to consent decrees, consent orders do not order any civil or criminal sanction against a company and do not represent any remedy for the damaged parties. On the contrary, they prevent the reiteration of unlawful conducts[175] through an agreement entered among parties.[176]

Such agreement may entail a cease and desist order[177] against certain antitrust conducts[178] and in any case specific remedies agreed between FTC and the investigated company.

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[174] *See* Chapter II. Because the FTC has a double task, it is a bipartisan and independent agency. Specifically, the FTC "shares jurisdiction over federal antitrust enforcement with the Antitrust Division of the US Department of Justice (DOJ), and it enforces a variety of federal statutory and regulatory provisions aimed at protecting consumers from deceptive and unfair business conduct." *See* Jon Leibowtz, *The United States Federal Trade Commission: continuity and challenges*, 5 COMPETITION L. INTERNATIONAL 8 (2009). The FTC, indeed, was established to have a specialized agency to protect both competition and consumer welfare, which this latter probably only courts could not adequately guarantee. *See* D. Balto, *Returning to the Elman vision of the Federal Trade Commission: reassessing the approach to FTC remedies*, 72 ANTITRUST L. J.1113 (2005). Similarly, *see also*, D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present and Future*, 71 ANTITRUST L. J. 319 (2003).

[175] This is provided by both the FTC Act and Commission orders, which, if violated, do not provide the right to claim against privates.

[176] The Administrative Procedure Act (5 U.S.C. 554(c)) Specifically, it specified that "where time, then nature of the proceeding, and the public interest permit, every person with an interest in an adjudicative proceeding shall be granted the opportunity to submit facts, arguments and offers for settlement or adjustment. It is the policy of the Commission to make this opportunity available during or upon completion of the investigation (Rule 2.31(a)) as well as during adjudication (Rule 3.25)." FTC, OPERATING MANUAL, Chapter 6, at 1.

[177] DOUGLAS BRODER, U.S. ANTITRUST LAW AND ENFORCEMENT - A PRACTICE INTRODUCTION, OXFORD UNIVERSITY PRESS, 2ND ED., 204 (2012). The Federal Trade Commission Act, 1914, Title 15 U.S.C. § 45(b) established that "[w]henever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it **shall issue and serve upon such person, partnership, or corporation a complaint** stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint."

5.2 Procedure for Consent Orders

FTC, as stated in the preceding paragraph, is composed by five Commissioners appointed by the President,[179] in charge for seven years, which control the investigations carried out by its staff of economists and attorneys.[180] This Authority, similarly to DOJ, protects competition, and in order to carry out its activity, has the right to issue, according to Section 5(b) of FTC Act, a cease and desist order against the detected antitrust crimes.

The FTC, similarly to the DOJ, carries out investigations[181] aimed at monitoring the market operators who seem to be breaching antitrust regulation,[182] and in case it verifies alleged breaches, it notifies it to the operator formally starting a proceeding.

The parties have the right to enter into an agreement resolving the proceeding, both before and after the objection by FTC to their alleged unlawful conduct.[183]

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[178] *See* ABA, I ANTITRUST LAW DEVELOPMENTS, *supra* note 1, at 657. "*Section 5(b) of the FTC Act empowers the Commission, after notice and a hearing, to issue an order requiring a respondent found to have engaged in unfair methods of competition or unfair or deceptive acts or practices to "**cease and desist**" from such conduct.*"

[179] The Federal Trade Commission Act, 1914, Title 15 U.S.C. § 41 - *Federal Trade Commission established; membership; vacancies; seal.* ("A commission is created and established, to be known as the Federal Trade Commission (hereinafter referred to as the Commission), which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the Commissioners shall be members of the same political party. The first Commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from September 26, 1914, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed: Provided, however, That upon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified. The President shall choose a chairman from the Commission's members. . . Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the Commission shall not impair the right of the remaining Commissioners to exercise all the powers of the Commission. The Commission shall have an official seal, which shall be judicially noticed."

[180] AREEDA E KAPLOW, ANTITRUST ANALYSIS-PROBLEMS, TEXT, AND CASES, 5TH ED., supra note__, at 72. Fur further information on the investigation procedure, *see also*, ABA, I ANTITRUST LAW DEVELOPMENTS, 175, 665ff.

[181] To initiate the investigation activity it is not required an authorization of the Commissioners, but the authorization of directors, vice-directors, assistants or assistants or associate directors of one of the regional office. See ABA, ANTITRUST LAW DEVELOPMENTS, *supra* note 175, at 665.

[182] On this matter, *see also*, FTC, *A Brief overview of the Federal Trade Commission's investigative and law enforcement Authority* (Jul. 2008) *available at* http://www.ftc.gov/ogc/brfovrvw.shtm.

[183] *See* Paul G. Bower, *New Developments in FTC Remedies*, 41 ANTITRUST L. J. 465 (1972).

In fact, most cases started by FTC are resolved through remedies set forth in a consent order.[184]

Such remedies can have a different nature. In protecting competition, the industry restructuring remedies by requiring a divestiture[185] or in any case a restructuring within the company's structure, are very important.[186]

The FTC has complete discretion in identifying remedies and generally promotes comments by the public,[187] which whether in disagreement can lead the Authority to re-examine contents and to proceed with the preliminary investigation.[188]

In case the public agrees with the proposed remedies, both the agreement and the analysis that has been carried out to support the public comments are published in the Federal Register.

Then, the defined agreement is examined by the Commission,[189] which is composed by five commissioners[190] for any possible considerations. In case this latter authorizes

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[184] The consent order agreement usually includes "a proposed order, an admission of proposed findings of fact, admissions of judicial fact, and a waiver of the FTC's obligation to make findings of fact and conclusion of law. It also generally contains a waiver of all rights to judicial review." See ABA, ANTITRUST LAW DEVELOPMENTS, *supra* note, at 675. Similarly, *see also*, FTC, OPERATING MANUAL, CHAPTER 6, at 1. ("Consent agreements are used by the Commission to secure an effective and legally enforceable order to cease and desist, to divest, or for other corrective action without expending time and resources required to fully prepare and adjudicate a case.") *Id*.

[185] For further information on the structural remedies that imposes a divestment and their procedure, *see* FTC, *A Study of the Commission's Divestiture Process*, 1999, in http://www.ftc.gov/os/1999/08/divestiture.pdf.

[186] *See* Paul G. Bower, *New Developments in FTC Remedies*, 41 ANTITRUST L. J. 465, 472 (1972).

[187] The FTC publishes the terms of the joined agreement to allow public to give its comments in the next thirty days.

[188] *See* Paul G. Bower, *supra* note 186, at 466. ("[T]he Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has a wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.") *See also*, *FTC v. Ruberoid Co.* (343 U.S. 470, 1952), and *FTC v. National Lead Co*., 352 U.S. 419, (1957). Here that concept was repeated.

[189] When the agreement is executive, the staff send to the Commission such agreement through the office and the Secretary receives it with all the concerned files and the following documents "a)Transmittal memorandum; b) Agreement; c) Complaint; d) Decision and Order; e) Analysis to aid public comment." FTC, OPERATING MANUAL, *supra* note 176, at 6.

[190] However, the company or the investigated entities may show the content of the consent decree to the Administrative Law Judge (ALJ) responsible for the antitrust issues. The ALJ judge, if decides to certify the agency's agreement might imply that it is likely feasible. See ABA, *Antitrust Law Developments*, *supra* note 1 at 677. Indeed, the ALJ is the judiciary authority in charge of antitrust issues. *See* D. Balto, *Returning to the Elman vision of the Federal Trade Commission: reassessing the approach to FTC remedies*, *supra* note at 1115. ("The FTC's administrative litigation process is far better suited than a federal court to address difficult issues of remedies. First, unlike a generalist federal district court judge, an administrative lawjudge (ALJ) focuses on the individual matter presented rather than facing the competing interest of numerous non-antitrust matters. Second,

the agreement,[191] this is notified to allow the involved parties to submit their comments in the following sixty days.[192] In particular, a reply is given to any consideration submitted to the staff of the Commission.

Once determined the final content of the consent decree, which takes into account also the received comments, it is published.

However, the Authority has the possibility then to amend the order, should new events occur which may require such amendment or should the amendment be connected to reasons of public interest.[193]

However, such order, similarly to the consent decree, does not entail any acknowledgement of violating conduct by the investigated entity.[194]

5.3 About the Amendment of Consent Orders

As to any possible amendment to consent orders, FTC has the right to carry it out since the Authority represents both the public prosecution system and the judge of the proceedings.[195]

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an ALJ and the Commission bring greater expertise and familiarity with other, often complex, antitrust cases that they manage on a daily basis, and the FTC's combination of lawyers and economists is invaluable in fashioning and monitoring relief. Third, the FTC continually learns from the remedies in numerous settled cases.")

[191] However the FTC might issue in exceptional cases issues a final consent order, before the expiration of the thirty days provide for eventual comments since the publication. *See* ABA, ANTITRUST LAW DEVELOPMENTS, *supra* note 1, at 675.

[192] Indeed, "[i]nterested persons should address letters of comment or views respecting matters on the public record to the Secretary . . . Commission staff handling the matter should retain a copy of any letters addressed directly to the staff, and promptly forward to the Records Division the original for filing and one copy for placement on the public record, respectively. The original is placed in a permanent *Public Record Comment* file and retained with the official files. The convenience copy on the public record is removed at the end of the 60-day period, and placed in a "pending" file until a determination is made by the Commission." FTC, OPERATING MANUAL, *supra* note 176, at 11.

[193] *See* FTC Act, Section 5(b). *See also*, D. Balto, *supra* note 187, at 1119. ("Under Section 6 of the FTC Act, the FTC is authorized to conduct after action reviews to determine whether particular remedies are effective. However, this power continues to be largely ignored by the FTC.") *Id*.

[194] FTC, OPERATING MANUAL, *supra* note 176, at 15.

[195] *See* ABA, ANTITRUST LAW DEVELOPMENTS, *supra* note 1, at 683. ("The rule that govern FTC adjudications are designed to separate functions that are adversarial (and therefore not impartial) from those that are adjudicative (and therefore must remain impartial).")

The FTC carries out a very simple test based on "public interest". In particular, Section 3.72(b)[196] of its regulation sets forth that an order by the Commission can be amended if the changes of circumstances or of the law require it consistently with the protection of public interest.[197]

In conclusion, the definitive consent order can be enforced before the Court of Appeals within sixty days from its issuance.[198]

6. Brief Conclusion

In this chapter, in relation to the nature and procedure of consent decrees and orders, we have identified the significant similarities and differences to the decisions entailing undertakings in Italy and Europe.

A transaction resolution of the antitrust proceedings can occur in the United States at any time during the procedure and, in case of consent decrees, the order, benefiting from the judge's examination, constitutes a precedent.

In addition, as mentioned, the request for amendments to the order is generally accepted, provided that the subsequently occurred events are proven to be necessary to the public interest; such instrument becoming particularly flexible.

Thanks to the long-time US experience in implementing consent decrees, many issues and insights over the procedure and features of the examined antitrust regulation come to light. Such experience cannot be neglected in order to increase the efficiency that represents the purpose of this matter.

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[196] 16 C.F.R. § 3.72(b) (1972).

[197] Sigmund Timberg, *supra* note 69, at 576.

[198] *FTC Act, Section 5(c).* The examination of the consent order might be required by the Federal Circuit of the Court of Appeal where the applicant is resident or it has its own business. *See also*, AREEDA E KAPLOW, ANTITRUST ANALYSIS-PROBLEMS, TEXT, AND CASES, 5TH ED., *supra* note 66, at 57. ("The courts of appeals have exclusive jurisdiction to review and affirm, modify, or vacate FTC orders.") *Id*.

IV. THE THIRD LEVEL OF REGULATION - CONSENT DECREES

1. Introduction

Having outlined the application background of consent decrees, their procedure and nature, we analyze one of its most interesting aspects: "the regulation effects of the consent decrees[199]".

This antitrust tool allows the FTC and U.S. Courts to establish behavior rules to the markets[200]; the same rules that limit the so-called " freedom of market."

In particular, the following analysis raises many questions and issues.

First of all, whether the consent decrees have tangible regulation effects in the concerned markets. To develop this first point we will analyze two important cases that marked the US antitrust law: the AT&T and Microsoft case.

Second, the regulation effects of the consent decrees directly reflect on the ability and legitimacy of judges and FTC in defining the correct rules of the markets; whether they represent the best subjects to regulate the markets and whether they have appropriate knowledge to carry out this task[201]. Indeed, we cannot neglect that the rise of antitrust as regulation increases the importance of economics in antitrust analysis, and perhaps the judge does has an insufficiently expert economic perspective.

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[199] 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*.

[200] *See* United States: Container Corp., 393 U.S. 333 (1969), the law was reasonably clear that agreements to decrees, has also been an integral part of helping to establish the rules of behavior for market participants.

[201] Micheal R. Baye, Joshua D. Whright, *Is Antitrust too Complicate for Generalist Judges? The impact of Economic Complexity & Judicial Training on Appeals*, available at http://ssrn.com/abstract_id=1319888.

Moreover, consent decrees imposed by the judges or FTC seem to expand judges' traditional role. From a judge's position, today there appear more contractual parties on the same rank as the investigated companies.

Additionally, this chapter includes a paragraph on remedies in the merger cases, which analyze the different kinds of remedies commonly used by the agencies. The same remedies generally apply in the consent decrees.

Finally, we will analyze the pro and anticompetitive effects of consent decrees and the role of judges and FTC evaluating the opportunity of this antitrust tool as a regulator of the market.

2. The Boundary between Antitrust law and Regulation law - AT&T and Microsoft case

2.1 Introduction

The task at hand is to answer the following questions: Does an effective boundary between antitrust and regulation law exist [202]? Or talking about one do we automatically imply the other?

As Justice Breyer explained, regulation and antitrust aim at similar goals: low and economically efficient prices, innovation, and efficient production methods. Historically the first one seeks to achieve these goals directly whereas the second one seeks to achieve them indirectly[203]. However, it no longer seems so. Today antitrust law is often characterized as an alternative to regulation.

[202] Philp J. Weiser*, The Relationship of Antitrust and Regulation in a deregulatory era,* 50 ANTITRUST BULL. 549, 551 (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.")

[203] *Id.* at 550.

Harry First noted "Antitrust has come to be seen more as policy[204] and less as law,[205]" and according to the author this is due to the increasing use of consent decrees[206] by the Antitrust Division and FTC[207].

Indeed, the consent decrees seem to regulate the parties' day-to-day business conduct and create more standards than apply or simply interpret the law.[208]

In this way the antitrust enforcers no longer confine their inquiry to whether that defendant has violated the law, but they ask whether the defendant's conduct maximize consumer welfare or otherwise serves the public interest[209].

In particular, the consent decrees tend to focus on the remedy rather than the wrong and there could arise a separation of powers issue as a branch of Government, here the Legislature, "invades the territory of another", the Judiciary.[210]

Regarding this Douglas Meladem identifies two different paradigms: the Law Enforcement Model and Regulatory Model. Under the first model, the government

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[204] *See* Micheal P. Kenny & William H. Jordan, *United States v. Microsoft: into the Antitrust Regulatory Vacuum Missteps the Department of Justice*, 47 EMORY LJ. 1351 (1998). ("To be sure, the DOJ, through its Antitrust Division, has important law enforcement responsibilities with regard to the Sherman Act. Pursuant to 15 U.S.C. 4, for example, the Division has been authorized by Congress "to institute proceedings [in the federal district court] in equity to prevent and restrain . . . violations . . . of Sections 1 to 7 of…[the Sherman Act]. Significantly, with regard to non-criminal matters, Congress has given the Antitrust Division the limited power to seek to restrain violations of the Sherman Act; it has not delegated to the Antitrust Division broad powers to formulate competition policy or to otherwise regulate market behavior. Nor has Congress delegated to the Antitrust Division any regulatory authority over the personal computer or computer software industries….the Division in the recent years has subtly attempted to transmogrify its narrow enforcement mandate into a broader regulatory mandate into a broader regulatory mandate to pursue nebulous doctrinal visions of the "public interest".) *See also* RICHARD A. POSNER, HOW JUDGES THINK, 86 (Harvard Univ. Press. 2008). In particular Posner noted that "the combination of legalist and legislative elements in many cases further blunts the judge's sense that he wears two hats—that sometimes he is a "real" judge and sometimes really a legislator—and so helps show he is a "real" judge and sometimes really a legislator—and so helps show why few judges think of themselves as occasional or any other kind of legislators."

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

[206] Celillianne Green, *The 1982 AT&T Consent Decree – Strengthening The Antitrust Procedures and Penalities Act*, 27 HOWARD L.J. 1611, 1614 (1984). ("The rapid increase in the use of the consent decree to settle antitrust disputes dates back to 1928 when the Unites States Supreme Court recognized the power of the attorney general to enter into a consent decree.")

[207] The Antitrust Division, for example, entered into 8 consent decrees in 1993, 19 in 1994, and 12 in the first half of 1995. During the same period, the Division filed only five complaints that were not accompanied by consent decrees.

[208] Michael L. Weiner, *Antitrust and the Rise of the Regulatory Consent Decree, supra* note 199*,* at 8.

[209] A. Douglas Melamed, *Antitrust: The New Regulation, supra* note 199, at 13.

[210] Brian M. Hoffstadt, *Retaking the Field: The Constitutional Constraints on Federal Legislation that Displaces Consent Decrees*, 77 WASH. U. L. Q. 53, 57 (1999).

simply enforces the laws focusing on past conduct, whereas under the Regulatory Model it tends to focus on prospective regulation of the private sector by the government.[211]

According to Meladem there is not a net dichotomy between the Law Enforcement Model and the Regulatory Model, but rather he identifies a *continuum* between the two models[212]. Precisely from this *continuum* we might identify the third layer of regulation imposed by "consent decrees."

2.2 AT&T case

Probably, the AT&T case represents the leading case of the regulation of consent decrees[213].

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[211] P. C. Carstensen, *Remedies for Monopolization from Standard Oil to Microsoft and Intel: the changing nature of Monopoly Law from Elimination of Market Power to Regulation of its Use,* 85 S. CAL. L. REV. 815 (2012). For instance, as Carstensen noted, in American Tobacco case, the trial court, despite finding substantial unlawful conduct, entered essentially a regulatory decree, whereas in Standard Oil case the court ordered a substantial undoing of the trust. ("In resolving the question of remedy, the Court had to decide what were the goals of Section 2 as well as what the proper role for courts should be in overseeing the economy.") *Id*. Similarly in Standard Oil case the Supreme Court focus not on the merit of specific conduct that contributed to a substantial monopoly, but on the question of whether the firm's position was so inherent and inevitable that no remedy was appropriate. In particular, the Court sought a remedy that would deal with the monopoly itself rather than engage in detailed regulation of its business conduct. *See also* Alan J. Meese, *Standard Oil as Lochner's Trojan Horse*, 85 S. CAL. L. REV. 783 (2012).

[212] A. Douglas Melamed, *Antitrust: The New Regulation*, *supra* note 196, at 13. ("Antitrust enforcement has moved markedly along the continuum from the Law Enforcement Model toward the Regulatory Model.") *Id*.

[213] 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") *Id*.. *See also*, 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, 2, 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, *supra* nota 207, at 53. ("[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

On the 24 August 1992 the Judge Harold H. Greene ordered that the Bell System was dismembered into what eventually became seven Bell Operating Companies (BOCs), each one with its own geographic base and one long-distance company, the truncated AT&T.

Prior to the divestiture, AT&T dominated the telecommunications industry in the United States[214]. This company through its control of local telephone service via the Bell Operating Companies (BOC's) was able to maintain its power in the industry[215].

According to Green and Baxter, the Assistant Attorney General[216], the ongoing regulation of the Bell System was ineffective against a large and skilled integrated firm[217], and the dismembered entities seemed the only solution. This structural separation appears to facilitate nondiscriminatory access to the incumbent's network and can blunt the distorting effects of stranded costs[218].

Thus, Judge Green approved a consent decree that probably represented the largest court-mandated break up since the split up of Standard Oil in 1911[219]. The justification

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Company (AT&T) has caused a revolution in the structures used of provide telecommunications service to American families and business.") *Id*.

[214] In November 29 of 1974, the Department of Justice (DOJ) filed suit charging AT&T had abused its monopoly over the telephone industry by consistently taking steps to keep competitors out of the market for equipment and long distance phone service.

[215] Celillianne Green, *The 1982 AT&T Consent Decree – Strengthening the Antitrust Procedures and Penalities Act*, *supra* note 71, at 1611. ("The local telephone services provided by the BOC's served as connectors for long distance callers and because AT&T controlled the local purchase of telephone equipment, the long distance wires, cables and other transmission facilities necessary to complete a long distance telephone call, it "completely insulated itself from competition.") *Id*.

[216] Howard A. Shelanski and J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 1 (2001). ("As architect of the AT&T divestiture, Baxter believed that a theory of antitrust liability should map coherently on to a proposed remedy. The remedy should end the conduct that is alleged to have harmed consumer welfare and that forms the basis for a finding of liability.") *Id*.

[217] Green wrote "over the relative merits of regulation and competition. The evidence adduced during the AT&T trial indicates that the Bell System has been neither effectively regulated nor fully subjected to true competition. The FCC officials regulated nor fully subjected to true competition. The FCC officials themselves acknowledge that their regulation has been woefully inadequate to cope with a company of AT&T's scope, wealth, and power." AT&T, 552F. Supp., 170.

[218] Christopher S. Yoo, *supra* note 210, at 5.

[219] Daniel F. Spulber, *Deregulating Telecommunications*, 12 YALE J. ON REG. 25, 26 (1995). ("In 1982, a consent decree known as the Modification of Final Judgment (MFJ) terminated one of the most significant antitrust suits since Standard Oil.' The breakup of the Bell System, which took place on January 1, 1984, constituted a large scale vertical divestiture. The MFJ assigned the long- distance and equipment manufacturing functions of the Bell System to AT&T.")

for the consent decree "was that AT&T had used its natural monopoly over local exchange services to impede competition in the related markets.[220]"

Greene's decree gave each BOC an exclusive monopoly as the local exchange carrier (LEC) in its territory, and imposed each to supply all long-distance carriers with equal and appropriate interconnections, subject to rate regulation by the FCC. In addiction the decree forbade the BOCs from entering any other line of telephone business, including competitive long-distance service and forays into the information services and equipment business[221].

Therefore, AT&T was to operate exclusively in the long distance market that would be open to competition from new carriers[222].

Even if there are some issues unresolved concerning this case and the network industry[223], the AT&T consent decree represents a good sample of the regulation effects of the consent decrees[224].

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[220] *United States v. Western Elec. Co*., 894 F.2d 1387, 1389 (D.C. Cir. 1990).

[221] Daniel F. Spulber, *Deregulating Telecommunications*, *supra* note 216, at 27. In particular, the consent decree required the Regional Bell Operating Companies (RBOCs) to provide "equal access" to the local network to all long-distance carriers and subjected the RBOCs to line-of-business restrictions. While regulated monopolies have traditionally been protected from rival entry, these restrictions "quarantined" the RBOCs within their market by barring their entry elsewhere.

[222] Many consider that the remedies of AT&T case provided an extraordinary stimulus to innovation and development of new technology. Richard Posner alleged that there is no doubt "that the telephone industry is more competitive today that it was before the breakup, and although it is uncertain how much of the increase in competition is due to the breakup, how much to the extensive deregulation of the telecommunications industry, how much to the interaction of the two events, and how much to new technology that would probably have been introduced even under the old regulatory regime, a careful study finds a positive effect from the divestiture itself. RICHARD A. POSNER, ANTITRUST LAW 110 (The University of Chicago Press, 2d ed., 2001).

[223] *Id*. at 54-73. As Epstein alleged, "the broad objectives of antitrust law—to prevent the creation of monopoly and preserve and maintain competitive conditions—are not attainable in network industries." *See also*, Robert W. Crandall, *The Remedy for the "Bottleneck Monopoly" in Telecom: Isolate It, Share It, or Ignore It?*, HARVARD UNIVERSITY, REGULATORY POLICY PROGRAM (2005). According to Crandall, "the development of long distance competition in the United States after AT&T divestiture was partly the result of a distorted regulated price structure and the regulation of the erstwhile monopolist, AT&T, which reduced the ability of AT&T to match the entrants' lower prices". In particular, the required isolating of the bottleneck was not necessary in 1984, and its unfortunate heritage is that it created a vertically fragment industry structure that is not sustainable today. In fact, once the network technology begins to chance, "any attempt to mandate the "unbundling" of that network at regulated rates become extremely difficult and even counterproductive". *Id*. In practically, the author noted that "changing technology has created the opportunity for new carriers to offer new services and to compete with the traditional local telephone companies in offering network access to millions of households and small-to-medium businesses. But these opportunities have required new networks, or at least the substantial rebuilding of older networks, not the sharing of the old technology." *Id*. *See also,* Daniel F. Spulber, *Deregulating Telecommunications*, *supra* note 216, at 27. According to Spulber "[t]he Bell System breakup led to increased regulation and litigation." *Id*.

Epstein in this case noted that "the consent decree introduced a third layer of regulation on top of a system that already divided the regulatory authority between the FCC and the various state commissions," and Judge Green imposed several conditions that the government had not requested[225].

For this reason, although someone criticizes the remedies of the AT&T consent decree, we can assume that consent decrees represent a tool of regulation, situated on a third layer after the FCC and the law system.

2.3 Microsoft I-II-III cases

A more recent example of regulation resulting from a consent decree is the Microsoft consent decree.

In 1993 the DOJ filed a suit against Microsoft. The DOJ investigated Microsoft conduct, especially its contracting practices with respect to the sale of its operating systems to Original Equipment Manufactures (OEMs). In particular, some of those licenses required OEMs to pay a "per-processor" licensing fee for all units they shipped, whether or not these used Microsoft's operating system.

Moreover, Microsoft backed up its exclusive-dealing regime with negotiated minimum purchase amounts from OEMs.

Thus the result was that any OEM who adopted a rival operating system was obligated to pay twice the fee for the privilege. First, the OEM had to pay Microsoft under its general obligation and, second it had to pay to the rival operating system vendor.

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[224] Philp J. Weiser*, Regulating Interoperability: Lessons From At&T, Microsoft, And Beyond*, 76 ANTITRUST L.J. 271, 274 (2009). The AT&T consent decree's ability "to spur competition in long distance is widely viewed in a favorable light and as a credit to importance of antitrust law as a competition policy strategy. For years, regulators had failed to address adequately the lack of equal access to the local Bell Companies' local networks and long-distance-firms made only a small dent in AT&T's dominant market share. . . Moreover, in the wake of the AT&T consent decree, the change in the nature of competition in long distance was palpable, with MCI and Sprint, as well as subsequent entrants, making huge stride in the marketplace."

[225] Philip J. Weiser, *Reexamining the Legacy of Dual Regulation: Reforming Dual Merger Review by the DOJ and the FCC*, 61 FED. COMM. L.J. 167, 168 (2009). "The AT&T antitrust case produced, for a twelve-year period, a world of two regulators: the AT&T consent decree court (with assistance from the U.S. Department of Justice) and the FCC."

The DOJ and Microsoft settled the suit in July 1994 with a consent decree[226].

The consent decree of 1994 obligated Microsoft to stop the lock in effect of the exclusive licenses and the double payments they required. Microsoft could not offer at lower prices exclusive licenses for greater than one year[227]. In addition, the consent decree stipulated that Microsoft should not enter into any License Agreement in which the terms of that agreement were expressly or impliedly conditioned upon: (*i*) the licensing of any other covered product, operating system software product or other product: or (*ii*) the OEM not licensing, purchasing, using or distributing any non-Microsoft product[228].

The decree imposed that Microsoft not explicitly or implicitly require as a condition of entering into any License Agreement, or for purposes of applying any volume discount, or otherwise, that any OEM include under its Per System License more than one of its Personal Computer System.

Moreover the Microsoft litigation involved a charge that Microsoft had imposed nondisclosure agreements on some ISVs, which would restrict their capacity to work for competing operating system companies and to develop competing products for an unreasonably long period of time. In this regard the consent decree provided some

[226] The District Court did not initially found the consent decree was in the public interest and refused to enter it. It determined: (1) the DOJ had not provided it with sufficient information to make the required public interest determination; (2) the scope of the proposed consent decree was too narrow; (3) the proposed decree was not an effective antitrust remedy; (4) the proposed enforcement and compliance mechanisms were not sufficient. U.S. District Judge Stanley Sporkin took a very expansive view of his role under the Tunney Act. However, on appeal the District Court of Columbia reversed this decision and held that the purpose decree was in the 'public interest'. The main issue was whether the district court had exceeded its authority under the Tunney Act in refusing to enter the decree. *See* Paula L. Blizzard, *II. Antitrust: b) Consent Decree Standard of Review: United States v. Microsoft Corporation*, 13 Berkeley Tech. L.J. 355. *See also* Deborah A. Garza, *The Microsoft Consent Decree*, 10 ANTITRUST 21 (1996). "Judge Sporkin insisted on opening up the DOJ's decision-making process. He demanded that the DOJ address alleged conduct "vapoware", in particular not challenged in the complaint, and that the DOJ, in effect, show cause why the decree should not include relief sought by Microsoft's competitors, United States v. Microsoft Corp. 159 F.R.D. 318 (D.D.C. 1995)…According to the DOJ if left standing, Judge Sporkin's decision would 'transform the Tunney Act into a blue print for judicial prosecution of antitrust cases' and eliminate consent judgments as an effective enforcement tool…. In dynamic high-technology industries the antitrust enforcement stakes are raised. On the one hand, because the path of innovation today will significantly affect future product quality and price, the potential benefits of enforcement are huge. On the other hand, because the path of innovation is highly uncertain and technology is rapidly changing, the potential costs of enforcement errors are also large." *See also*, Llyd C. Anderson, *United States v. Microsoft, antitrust consent decrees, and the need for a proper scope of judicial review,* 65 ANTITRUST L. J. 1, (1997).

[227] Moreover, the renewals, which were without penalty and at the sole discretion of the OEM, could not be made for more than a single year, either.

[228] The District Court of Columbia, *United States v. Microsoft*, final judgment, no. 94-1564 (1994).

remedies to ensure that a company could work on software products not only for Microsoft but also for its competitors without using Microsoft trade secrets to aid in its work on competitive systems.

Thus, a part of the 1994 consent decree represents an effort to reconcile anticompetitive behaviors with legitimate claims of proprietary protection for trade secrets[229].

Three years later, when Microsoft sought to launch a new operating system tied to the latest version of its browner (internet explorer 4)[230], the question arose about what counted as an 'integrated product'. This case is better known as Microsoft II.

In particular, the DOJ sought to hold Microsoft in a civil contempt, but in 1997 district judge Jackson denied this contempt because there was not clear and convincing evidence that Microsoft violated the consent decree.

Court of Appeal rejected Judge Jackson's decision, and in the meantime the DOJ began its second antitrust suit against Microsoft in May 1998, knows as Microsoft III. At the same time, a number of states and the District of Columbia filed a complaint against Microsoft alleging violations of both federal and state antitrust laws. The two

[229] Similarly, *see also*, Consent Decrees in *United States v. ASCAP* and *United States v. IBM*. Noel L. Hillman, *Intractable Consent: A Legislative Solution to the Problem of the Aging Consent Decrees in United States v. ASCAP and United States v. BMI*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 733. In particular, Hillman held that "The intersection of intellectual property and antitrust presents one of the great ironies in the law. Antitrust law presumes that the advantages of monopoly are outweighed by the dangers inherent in concentrations of market power. Yet the law of intellectual property, especially copyright law, seems to presume the opposite. A monopoly is good, even one extended and protected by statute for many decades, as is copyright. In those cases where this natural tension between seemingly opposite forces ceases to exist, the danger of monopolistic malfeasance increases. Where these forces coalesce, as when a copyright owner also accomplishes unfettered market power, the results can be disastrous for consumers of products subject to intellectual property rights." Another important case that shows this interconnection of intellectual property and antitrust is Rambus. Robert Tallman, *U.S And E.U. Antitrust Enforcement Efforts In The Rambus Matter: A Patent Law Perspective*, 52 IDEA 31 2012. According to Tallman, the FTC failed in this case to make its best case, losing where it should have been succeeded. The lesson learned of the *D.C. Circuit's Rambus Inc. v. Fed. Trade Comm'n* decision should be apply section 2 carefully based upon presented facts and all identifiable anticompetitive injuries.

[230] Microsoft had previously required OEMs to install IE 4's prosecutor, IE 3, as part of Windows. According to Microsoft the merging of Microsoft Windows and Internet Explorer was the result of innovation and competition, that the two were now the same product and were inextricably linked together and that consumers were now getting all the benefits of IE for free. Those who opposed Microsoft's position countered that the browser was still a distinct and separate product, which did not need to be tied to the operating system, since a separate version of Internet Explorer was available for Mac OS.

complaints, which the district court consolidated, sought various forms of relief, including an injunction against certain of Microsoft's business practices[231].

In particular, this suit concerned some anticompetitive practices on Microsoft's licenses, which covered with provisions against: (i) removing any desktop icons, folders, or "start" new entries; (ii) altering the initial boot sequence; (iii) and altering the appearance of Windows[232].

This case leads to observations. The main one is whether a fine than the remedies would be more efficient. Judge Jackson, for instance, imposed as remedy the break up of Microsoft into two corporations[233].

As Epstein noted Judge Jackson's remedy would have enormous negative consequences for future innovation in the computer industry[234]. The D.C. Circuit in fact stated that divestiture should be applied to unitary companies with great caution and only when "tailored to fit the wrong creating the occasion for the remedy"[235].

In cases like Microsoft and Google, the fundamental task of the antitrust agency and the Court is to balance the deterrence effect with the consequences for the future

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[231] Jay L. Himes, *Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the Microsoft Case*, 11 Geo. Mason L. Rev. 37, 2002. In particular "The cases, which alleged monopolization, exclusive dealing, and tying, were consolidated for pretrial purposes, and tried jointly on the issue of liability, beginning in October 1998 in Washington, D.C. This was the first time that the DOJ and the States went to trial together in an antitrust case. The DOJ and the States submitted joint papers throughout the liability and remedy proceedings before the District Court in the 1998-2000 period".

[232] United States Court of Appeal for the District of Columbia, No. 03-5030, (2003), *United States of America v. Microsoft Corporation*. "In *Microsoft III* we upheld the district court's finding that Microsoft's integration of IE and the Windows operating system generally 'prevented OEMs from pre-installing other browsers and deterred consumers from using them." 253 F.3d at 63-64. Because they could not remove IE, installing another browser meant the OEM would incur the costs of supporting two browsers. *Id.* at 64. Relying upon the district court's findings of fact, we determined that Microsoft took three actions to bind IE to Windows: (1) it excluded IE from the "Add/Remove Programs" utility; (2) it commingled in the same file code related to browsing and code used by the operating system so that removal of IE files would cripple Windows; and (3) it designed Windows in such a manner that, in certain circumstances, a user's choice of an internet browser other than IE would be overridden."

[233] Judge Jackson linked Microsoft to the Standard Oil trust, and he found Microsoft liable for violating the Sherman Antitrust Act.

[234] RICHARD A. EPSTEIN, *supra* note 92, at 84-111. He suggested: 1) never break up integrated firms because their continued integrated operations generate substantial efficiency gains; 2) never order a break up that fails to deal with the monopoly power that generated the initial lawsuit. In addition, Epstein noted that the break up would doubles have generated huge transaction costs, operational delays and inefficiencies, and contractual disputes in trying to assign assets, employees, and outside contracts to the two firms.

[235] *United States v. Microsoft Corp*., 253 F.3d 34, 106 (D.C. Cir. 2001).

innovation[236]. It is quite obvious that consent decrees reduce the deterrence effect, not serving as *prima facie* evidence of liability in later antitrust suit against the defendant by *private parties*[237].

At the end, Microsoft III case concluded with a consent decree[238] that imposed, for instance, Microsoft to be barred from retaliating against any OEM that sought to do business with Microsoft competitor in "developing, distributing, promoting, using, selling, or licensing any software that competes with Microsoft Platform Software or any product or service that distributes or promotes any Non-Microsoft Middleware."

Under the final judgment[239], all OEM licensees may install non-Microsoft icons and may even also remove Microsoft icons.

Another set of prohibitions concerns non-discrimination and disclosure. For instance the consent decree stated a general non discrimination on Microsoft in dealing with "covered OEMs".

In addiction, Microsoft should not retail against any independent software vendors (ISVs), independent hardware vendors (IHVs), Internet Content Providers ICPs [Internet Content Providers] because "ISV's or IHV's developing, using, distributing, promoting or supporting any software that competes with Microsoft Platform Software or any software that runs on any software that competes with Microsoft Platform

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[236] See e.g., Daniel L. Rubinfeld, *Antitrust Enforcement in Dynamic Network Industries*, 43 ANTITRUST BULL. 859 (1998). "The ongoing legal confrontation between the Antitrust Division of the Department of Justice and Microsoft has generated substantial commentary about competition and innovation in the computer software industry." Hillman, *supra* note 226. According to Hillman the consent decrees may fail "to anticipate how changes in tecnology and consumer habits alter market mechanisms and the effect the consent decree itself will have on how market actors behave." *See also* Philip J. Weiser, *The Relationship of Antitrust and Regulation in a Deregulatory Era*, *supra* note 199. "In such industries, antitrust courts (and regulators, for that matter) need to determine whether alleged anticompetitive conduct (say, denial of access to a network or exclusive dealing arrangements) reflects Schumpeterian competition, meritorious technological concerns, or predatory designs."

[237] Earl A. Jinkinson, *supra* note 71, at 678. "[A] consent decree is not available as *prima facie* evidence against the defendant in a private suit for damages, which may be the most persuasive reason of any he gives. In fact, only the desire to avoid prima facie guilt proves valid…. Section 5 was designed to aid injured persons who may not have had the means to sue the antitrust violator without such assistance." *Id*.

[238] United States Court of Appeal for the District of Columbia, No. 03-5030, (2003), *United States of America v. Microsoft Corporation*. The Court held that "[t]he remedial order of the district court in No. 02-7155 is affirmed. In No. 03-5030, the order denying intervention is reversed and the order approving the consent decree in the public interest is affirmed."

[239] The final judgment authorized the creation of an expert and neutral three person technical committee to oversee Microsoft activities including powers to interview personnel and examine documents.

Software, or exercising any of the options or alternatives provided for under this Final Judgment and OEMs[240].”

The decree expired after five years in 2007, and this case provided an important test of how antitrust law and remedies should be applied in the so-called “New Economy”, which emphasizes the information capital overshadowing the physical assets that are relatively minor [241].

According to Spencer Weber Waller , the 2001 D.C. Circuit Microsoft opinion[242] created a roadmap for a successful modern monopolization case and the resulting remedies. [243]

2.4 Consideration of These Cases

As Melamed noted consent decrees can represent a form of regulation[244]. Sometimes they “take on a life of their own as they endure, and are applied, in circumstances that bear little if any relationship to the alleged violations on which they were initially based.[245]”

This concept could be applied in the Division’s regulatory pursuit of Microsoft[246] or AT&T[247], and the issue is whether the regulation effect of the consent decree was the best solution.

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[240] United States Court of Appeal for the District of Columbia, No. 03-5030, (2003), *United States of America v. Microsoft Corporation*.

[241] Howard A. Shelanski and J. Gregory Sidak*, supra* note 213, *4.

[242] *United Stated v. Microsoft Corp.,* 253 F.3d 34 (D.C. Circ. 2001).

[243] Spencer Weber Waller, *The Past, Present, and Future of Monopolization Remedies*, 76 ANTITRUST L. J. 11, 2009-2010. In contrast, *see* Chris Butts, *The Microsoft Case 10 Years Later: Antitrust and New Leading “New Economy” Firms*, 275, Northwestern Journal of Tecnology and Intellectual Property, Volume 8, Issues 2 2010, 291. Chris Butts holds that “the Microsoft case did not provide a structure for antitrust regulation that can be rigidly or faithfully applied to antitrust analyses of all high-technology companies.”

[244] *See also* Spencer Weber Waller, *supra* note 240, at 24. (“As remedies narrow in the traditional antitrust arena, they may well expand in the regulatory arena. The past few years have seen an embrace of regulatory solutions to competition problems that is the reverse of the previous thirty years of deregulatory favor.”) *See also*, (“Regulatory remedies will grow in importance as long as the Supreme Court continues to narrow antitrust law’s domain over regulated industries.”) *Id*. at 29

[245] A. Douglas Melamed, *supra* note 199, at 13.

[246] Micheal P. Kenny & William H. Jordan, *supra* note 201, at 1390.

In such cases the consent decrees seem to outline the proper conduct of the investigated companies in the future, and the crucial question is whether some remedy is feasible that will move the market back toward workable competition.

For this reason, we must pay attention when using this antitrust tool[248]. If on the one hand consent decree represents a faster and more economic remedy against potential anticompetitive conducts, on the other hand, as Hillman noted, it might "fail to anticipate how changes in technology and consumer habits, alter market mechanisms and the effect the consent decree itself will have on how market actors behave."[249]

In any case, thanks also to analyzed cases, today the antitrust agencies are more aware of the possible effects of the consent decree and its convenience.

First of all, for resolving a case the antitrust agencies should consider whether a consent decree is more efficient than a fine. The first one usually imposes some conducts to the main players of a market limiting the so-called 'freedom' of that market. The consent decree is not an admission of liability; it does not serve as *prima facie* evidence of liability in later antitrust suits against the defendant by private parties or others[250], probably reducing the deterrence effect of the antitrust law.

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[247] Philp J. Weiser*, Regulating Interoperability: Lessons From At&T, Microsoft, And Beyond,* 76 ANTITRUST L.J. 271, 2009. The At&T and Microsoft case reflected "an effort by antitrust enforcers to develop both a substantive vision for a duty to deal requirement as well as an institutional strategy for enforcing it." *Id*.

[248] For instance, AT&T case shows that: (*i*) the predictions of antitrust litigants and judges about the future of technologically dynamic industry are often wrong; (*ii*) and enforcing and interpreting a complex decree can be administratively costly and potentially harmful to consumer welfare. D. Geradin and G. Sidak, *supra* note 210, *90. *See also*, Christopher S. Yoo, *Deregulation vs. Regulation of Telecommunications: A Clash of Regulatory Paradigms,* 36 J. Corp. L. 847, 862 (2011). Yoo argues that "any regulator attempting to manage competition in the manner called for by the ladder of investment must calibrate its intervention very carefully." *Id*.

[249] Noel L. Hillman, *Intractable Consent: A Legislative Solution to the Problem of the Aging Consent Decrees in United States v. ASCAP and United States v. BMI*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 733. Hillman noted that in these cases (United States v. ASCAP and United States v. BMI), the consent decrees, rather than alleviate the anti-competitive conducts, they imposed a market structure. According to the author in "the story of these consent decrees is a cautionary tale in a land increasingly ruled by intellectual property rights. In those places where market failure or dominance, weak antitrust enforcement, and intellectual property rights converge, consumers and small business owners may find themselves without adequate remedies to battle monopolistic conduct."

[250] Section 4 of the Clayton Act states that " any person who shall be injured in his business or property by reason of anything forbidden in the antitrust law" to sue for treble damages.

Second, opting for remedies the Agencies should choose those most pro-competitive for the markets concerned[251]. For instance, Shelanski and Sidak propose an economic welfare approach to evaluating all antitrust cases involving network[252] industries and other dynamic markets. Hence, the result it has to be a remedy that produces "a net increase in the sum of three kinds of efficiency: allocative, productive, and dynamic.[253]"

The central concern is which relief can both provide adequate protection for parties injured by an anticompetitive conduct, and increasing the competition of the concerning markets[254]. The remedy in a public antitrust action should do no more and no less.

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[251] D. Geradin and G. Sidak, supra note 210, at *19. The authors consider that a structural remedy is the optimal remedy. It improves net of enforcement costs and there does not exist a remedy that achieves the same efficiency gains with lower enforcement costs. Similarly, Carstensen considers the structural relied as the primary remedy in monopoly cases "even if the results are not resoundingly 'successful' as outside observers might like. At the same time the standards for such relief must of necessity be distinguished from claim that specific conduct by a monopolist is unlawful when its continued retention of a monopoly position is not in issue.

See also Robert B. Bell, *Regulation By Consent Decree*, 26 ANTITRUST ABA 73, Fall, 2011, *73. The 2004 Remedies Guide emphasizes that the structural remedies are preferred to conduct remedies in merger cases. The main reason is that these remedies are relatively clear and certain, and avoid costly government entanglement in the market. In any case, as the author points out "For many years the Division has taken the position that, with a few exceptions, regulatory remedies cost too much to administer, are easy to evade, and move the Division away from its proper mission as a law enforcement agency into a regulatory role for which it is ill suited. Recent decrees and the 2011 Remedies Guide reject that position. While this new approach to merger remedies may eventually prove to be effective, the result is far from certain. If it turns out not to be effective, the Division may have to change its approach to remedies once again."

[252] Rubinfeld specified that the word "network" apply "to the underlying economics of an industry, not to the hardware or software associated with the product. Network industries are created by network effects, whereby each individualss demand for a product is positively related to the usage of other individuals. Many markets are characterized to one degree or another by this phenomenon." Daniel L. Rubinfeld, *supra* note 233, at 861.

[253] Howard A. Shelanski and J. Gregory Sidak, *supra* note 210, at *99. In particular, according to the authors "[t]o determine whether a remedy is likely to benefit consumers and long-run economic welfare, the remedy must be shown to produce a net increase in the sum of three kinds of efficiency: allocative, productive, and dynamic. To justify a specific remedy, it does not suffice to show merely that the remedy would reduce prices in the short run or create market opportunities for a particular group of competitors. A case must instead be made that price declines will offset any production cost increases or losses in consumer-side network externalities; that the net gain from such price reductions will not entail offsetting costs in the form of inefficiently reduced innovation incentives; and that the remaining net gains cannot be achieved at a lower cost through an alternative remedial plan."

[254] Antitrust laws in general and merger policies in particular are designed to promote consumer welfare. In particular, *see* D. Geradin and G. Sidak, *supra* note 210. "In the late 1960s, Oliver E. Williamson demonstrated the effects on consumer welfare of a merger that restricts output (by raising prices) and lowers marginal costs (by achieving certain productive efficiencies). To defend a merger, according to Williamson, the merging parties must demonstrate that the cost savings achieved through greater efficiencies exceed the deadweight loss (the amount between the increased market price and the price that consumers would be willing to pay for the lost output). Cost reductions should be considered a social benefit, not just a private benefit to the parties, because the saved resources would be free to produce outputs elsewhere in the economy. Moreover, even under a merger

As Rubinfeld noted it is important that "while being appropriately cautious about criticizing aggressive pro-competitive behavior, the antitrust authorities make every effort to insure that dominant incumbent firms with monopoly power (firms with the ability to raise prices above and/or reduce quality below competitive levels and/or to exclude competitors) not use their substantial market power to harm innovation[255], to retard technological progress, and ultimately to harm consumers.[256]"

In Schumpeter's view, the real challenge for antitrust law and the antitrust agencies is to discern legitimate pro competitive innovation strategies that harm competitors simply because they are successful from those that are motivated for anticompetitive reasons[257].

In fact, if on the one hand, an undertaking represents a vital part of a sound antitrust policy, especially when it concerns the dynamic network industry[258], on the other hand innovation and efficiency suffers in direct response to the lack of competitive pressure[259].

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to monopoly, a portion of the cost savings would be passed on to consumers. According to Robert Bork, Williamson's insight can be extended to any antitrust analysis."

[255] For instance, Carstensen noted that in Alcoa case this company operated several plants at each stage of the process of producing aluminum, and that other aluminum producers existed around the world including Alcan, which Alcoa's owners controlled as well. All of this information shows that the monopoly was not necessary to efficient operation of the industry, and it represents a good example of market failure resulting in a avoidable monopoly. Carstensen, *supra* note 208, at 831.

[256] Daniel L. Rubinfeld, *supra* note 233, 860. *See also*, JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY, 4th ed., (Allen & Unwin, 1954). According to Schumpeter the most technological innovation would come from large corporations with market power and organized R&D operations implied that antitrust law's ideal of competition could have substantial social costs over time.

[257] *See* JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY*, *supra* note 253. Schumpeter stated that the task of antitrust law and regulation law is direct to develop appropriate standards for discerning what conduct engaged in by an entrenched incumbent will thwart entry and stall technological progress. *See also*, Philip J. Weiser, *The Relationship of Antitrust and Regulation in a Deregulatory Era*, *supra* note 221.

[258] See Daniel L. Rubinfeld, *Competition, Innovation, and Antitrust Enforcement in Dynamic Network Industries, Software Publishers Association* (1998 Spring Symposium) San Jose, California, 1998. "In dynamic high technology industries the antitrust enforcement stakes are raised. On one hand, because the path of innovation today will significantly affect future product quality and price, the potential benefits of enforcement are huge. On the other hand, because the path of innovation is highly uncertain and technology is rapidly changing, the potential costs of enforcement errors are also large. These higher stakes make it essential that sound antitrust enforcement principles be developed and appropriately applied."

[259] Carl Shapiro, *Exclusivity in Network Industries*, 7 GEO. MASON L. REV. 674 (1999). In this paper Shapiro argues that "exclusionary contracts and exclusive membership rules can be especially pernicious in network industries, posing a danger that new and improved technologies will be unable to gain the critical mass necessary to truly threaten the current market leader . . . The graver problem is that the pace of innovation may be slowed denying consumers the full benefits of technological progress that a dynamically competitive market would

For this reason, the antitrust authorities have to distinguish the practices that are on balance anticompetitive from those that involve competition on merit[260].

Finally, the Agencies and the judges can't neglect that frequently the remedies involve industries, as the network or banking industry, already regulated by a specific Authority (see for the USA, FCC and SEC).

As *Trinco* and Credit Suisse had suggested, we need to examine not only antitrust law, but also the regulatory sector, in crafting appropriate remedies that improve the market efficiency[261]. In similar cases the question is: who is the best subject to regulate these markets? Which are the powers and the limits of each Authority?

Philip J. Wiser argued "Trinko's lessons are far more complex than the maxim 'where regulatory agencies are on the scene, antitrust courts should retreat.'"[262] Whereas Judge Greene, AT&T case judge, argued that "the Commission is not and never has been capable or effective enforcement of the laws governing AT&T's behavior.[263]"

In Trinko, the Supreme Court concluded that[264] if these exists a regulatory structure appointed to deter and remedy anticompetitive harm, the further benefit to competition provided by antitrust enforcement "will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny." In addiction, the Court did not neglect the realistic assessment of the costs of an antitrust intervention that must be considered.[265]

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offer." Similarly, *see* Carstensen, *supra* note 211. "As AT&T, Xerox, Microsoft, and Intel all demonstrate, when the monopolist controls technological change, the pace and direction of that change is less desirable and useful to society as a whole.

[260] Daniel L. Rubinfeld, *supra* not 233, at 882.

[261] Spencer Weber Waller*, The Past, Present, and Future of Monopolization Remedies*, 76 ANTITRUST L. J. 11, 21, (2010).

[262] Philip J. Weiser, *The Relationship of Antitrust and Regulation in a Deregulatory Era,* 50 ANTITRUST BULL. 549, 550 (2005). *See also,* John Thorne, *A Categorical Rule Limiting Section 2 of the Sherman Act: Verizon v. Trinco,* 72 U. CHI. L. REV. 28, 2005. "The most interesting aspect of the Supreme Court's opinion in Verizon Communications Inc v Law Offices of Curtis V. Trinko, LLP is its tacit acceptance that the § 2 question needs a categorical resolution, with the choice of the categorical (not to say exceptionalness) rule driven by very serious consideration of both the institutional capacities of antitrust courts and the investment incentives created by the chosen categorical rule."

[263] *United States v. AT&T*, 552 F. Supp. 131, 168 (D.D.C. 1982).

[264] *Verizon Communications INC., v. Law Offices of Curtia v. Trinko*, LLP, no. 02-682, 540 U.S. 398, [***832].

[265] Philip J. Weiser, *The Relationship of Antitrust and Regulation in a Deregulatory Era, supra* note 199. "From reading *Trinko*, one might presume that the FCC and state public utility commissions have perfected the art of

In contrast, in AT&T the Court imposed its remedy, even through the FCC had the authority to do so. The court concluded that where an agency lacks practical authority, antitrust courts can impose the remedy themselves. However, in this and other similar cases[266] the antitrust court relied on the regulatory agency to enforce and police the remedy.

Similarly, Micheal Powell, as former FCC Chairman, stated that in many cases the agency's authority to impose fines to remedy anticompetitive conduct is insufficient to punish and to deter violations[267].

Consequently, we can conclude that often the antitrust intervention is appropriate, focusing on the behavior of a specific company, instead of trying to understand and compromise the dynamics of an entire market.

3. The Regulation Powers and Limits - Judges and FTC

Another issue concerns the role of the economic complexity in antitrust enforcement that is becoming more and more crucial. Frequently, the decisions of the Judges and FTC involve not only a legal perspective, but also an economic one. Unlike specialized regulatory agencies, the antitrust courts do not have staffs of economists or technologists to aid them in making judgments about dynamic market.

The increase of complex economics in the modern antitrust background can depend on both the use more and more frequently of the consent decrees by the antitrust agencies[268] and judges, and the success of the law and economic movement[269].

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enforcing cooperation between new entrants and incumbent providers on matters such as the interconnection between rival networks. There are, however, a number of areas where both federal and state agencies have much to learn from antitrust courts."

[266] *See* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

[267] Philip J. Weiser, *The Relationship of Antitrust and Regulation in a Deregulatory Era*, *supra* note 199. "It is fair to say that 'many important issues' remain 'unresolved,' they are 'relatively crude mechanisms' for addressing anticompetitive conduct, and 'their future remains uncertain.'" *Id*.

[268] Gordon F. Hampton, *Current Antitrust Consent Decree Procedures – should they be changed?*, 42 ANTITRUST L.J. 129, (1973). Consent decree and order constitute the bulk of antitrust enforcement. In these years more or less the 80 percent of the cases initiated by the government enforcement agencies have been settled.

Therefore, the task at hand is to answer the following question: are the antitrust agencies and judges in the modern antitrust cases the best subjects for the task of identifying remedies? How could the analysis and the selection of remedies of consent decrees be improved?[270].

Sometimes the antitrust courts must evaluate whether the conduct of the dominant firm has the effect of "denying consumers the full benefits of technological progress that a dynamically competitive market would offer[271]."

In this regard Posner, and similarly the ABA, argues the promise of improved judicial performance in antitrust, an area where legalist techniques are particularly unlikely to resolve open questions, in a hypothetical legal system where judges would be "armed with basic economic skills and insights[272]."

Posner considered also that "The real problem [facing antitrust law] lies on the institutional side: the enforcement agencies and the courts do not have adequate technical resources, and do not move fast enough, to cope effectively with a very complex business sector that changes very rapidly.[273]"

This consideration was confirmed by the study developed in the 2010s[274] from Baye and Wright. This study concerned the impact of economic complexity and the judicial

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[269]Jonathan B. Baker and M. Howard Morse, *Final Report of Economics Task Force*, 2006, *available at* http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/report_01_c_ii.authcheckdam.pdf. In particular, "the Task Force members reached consensus regarding the importance of economics in modern antitrust law and the recognition, therefore, that it is critical that judges and juries understand economic issues and economic testimony in order to reach sound decisions."

[270] *See* Micheal R. Baye and Joshua D. Wright*, Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity & Judicial Training on Appeals*, George Mason University Law and Economics Research Paper Series, 09-07, available at http://ssrn.com/abstract_id=1319888.

[271] Carl Shapiro, *Exclusivity in Network Industries*, 7 GEO. MASON L. REV. 673, 674 (1999). In particular, Shapiro alleges that in industries network the "rules imposed by incumbents that prohibit consumers or members from join a new network while still participating in the older network can deny the new network the foothold necessary to grow to become a genuine alternative to the established network. Exclusivity can also undermine consumer confidence in an emerging network. Such tactics can be and have been used to delay or blockade the emergence of the new and improved technologies in network industries.

[272] Jonathan B. Baker and M. Howard Morse, *supra* note 266, at 5. "We find no evidence that a judge's basic training in economics has an impact on appeals in economically complex cases, which is consistent with the intuition that basic economics is helpful in deciding simple antitrust cases but not cases involving complex economic and/or econometric evidence."

[273] Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, (2001).

[274] Micheal R. Baye and Joshua D. Wright*, supra* note 267.

training on appeal, wondering whether antitrust was too complicated for the generalist judge.

In particular, it showed, on one hand, that the decisions involving some evaluation of economic or econometric evidence were appealed approximately 10 percent more frequently than cases demanding less economic skill; and on the other one, that the decisions of judges who attended programs to learn basic economic skills are appealed at the same rate as their untrained counterparts in complex cases, but about 10 percent less often in cases that do not involve the evaluation of sophisticated economic or econometric evidence.

In practicality, the estimates resulting from this study demonstrated that "the type of repeat exposure to antitrust litigation contemplated by proposals for specialized courts is not as likely to improve decisions as more advanced economic training for judges or the use of court appointed experts." Similarly, Sidak wrote an interesting paper on neutral economic experts that reflects on how the use of Rule 706 assist the judges by facilitating the prompt settlement of not only antitrust cases, but also intellectual property, and other complex lawsuits.[275]

For this reason, a possible solution to improve the efficiency of antitrust remedies, which usually imply economic complexes, could be both the use of court experts and a more advanced economic training for judges.

Probably as to institutional strategies, courts should be more inclined to utilize experts to aid the understanding of complex technological and economic issues[276].

Similarly, assuming that the FTC's staff already has sufficient economic skills, the FTC could improve the quality of its decisions by appointing a neutral expert specialized in specific issues or markets. Probably, the impartiality and specific knowledge of a neutral expert assures a stronger and more efficient decision, stronger in sense of reducing the risk of appeal of the decisions.

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[275] Gregory J. Sidak, *Court-Appointed Neutral Economic Expert*, 9 J. COMPETITION L. & ECON. 359, (2013).

[276] Philip J. Weiser, *The Relationship of Antitrust and Regulation in a Deregulatory Era*, *supra* note 199.

In any case, the judge, with or without the aid of an expert, has the important task of evaluating the procompetitive and anticompetitive effects of the remedies. He has to balance these effects opting for the more fair decision.

This task calls to mind the judge's traditional role in weighing as a balance the consequences of his judgments.

4. Remedies in the Mergers

Antitrust authorities play a crucial role in analyzing a merger's competitive effects. In particular, the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act") requires that mergers of a certain size submit pre-merger notification to the FTC and DOJ and submit to an initial waiting period before the merger is permitted to close.

DOJ in cooperation with FTC provides guidance to businesses on complying with antitrust laws through the publication of Merger Guidelines[277] and additional policy statements. This set of rules has been amended a number of times. The first merger guidelines set forth by the DOJ were the 1968 Merger Guidelines.

The law and the guidelines state that once the merger is notified[278], there are two possible scenarios. In the first scenario, the parties are authorized to close their deal. In the second scenario, the agency[279] issues a request for additional information to each party, extending the waiting period. In this latter case the agency can negotiate a settlement (a consent decree) with the parties that includes remedies for restoring competition[280].

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[277] FTC Premerger Notification Office, *Premerger Introductory Guides*, revised in March 2009, *available at* http://www.ftc.gov/bc/hsr/introguides/introguides.shtm.

[278] Initially, both agencies undertake a preliminary substantive review of the proposed transaction.

[279] After preliminary review, if either or both agencies decide that a particular transaction warrants closer examination, the agencies decide between themselves, which one will be responsible for the investigation. Only one of the enforcement agencies will conduct an investigation of a proposed transaction.

[280] DEPARTMENT OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (June 2011), *available at* http://www.justice.gov/atr/public/guidelines/272350.pdf. In particular, the purpose of this Guide is to provide Antitrust Division attorneys and economists with a framework for fashioning and implementing appropriate relief short of a full-stop injunction in merger cases.

Remedial provisions in the decree must be appropriate, effective, and principled. As to what merger remedies are appropriate, the agencies have provided some guidance, but each merger is unique, and any proposed remedy is evaluated on the particular facts of the case[281].

The negotiation between the agencies and the companies is not subject to either establishing procedure or substantive requirements.

Commonly, the FTC and DOJ preferred structural relief in the form of divestiture to remedy the anticompetitive effects of an unlawful merger than behavior remedies[282]. However, by the last years, the agencies seem have been increasing willingness to consider a variety of innovative solutions to competitive concerns[283]. In fact, behavior remedies criticized in the 2004 version are presented in the 2011 version in a considerably more positive light.

In particular, it is due to the mergers that have become increasingly technology driven[284]; for instance, Google-ITA[285].

This apparent policy shift is not without consequences. In fact, it raises a number of concerns about their likely operation, effectiveness, and requirements for ongoing government monitoring and compliance enforcement. In addition, the behavior remedies pose practical problems for antitrust enforcement.

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[281] In any case, remedies must be based upon a careful application of sound legal and economic principles to the particular facts of the case at hand.

[282] In fact, up until this decade structural relief in the form of divestiture of a plan or facility was nearly the unique remedy used to address Section 7 violations.

[283] American Antitrust Institute, John E. Kwoka and Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, available at http://www.antitrustinstitute.org/~antitrust/sites/default/files/AAI_wp_behavioral%20remedies_final.pdf. *See also*, Mary L. Steptoe and David Balto, *The FTC's Use of imovative Merger Remedies,* 10 Antitrust 16, 1995-1996, 16.

[284] In particular, see the behavioral remedies employed by the DOJ in three recent merger cases: Ticketmaster-Live Nation; Comcast-NBCU; and Google-ITA. These three merger cases involve the use of multiple behavioral remedies, ranging from access conditions, firewalls, anti-retaliation provisions, to arbitration requirements, and provide for monitoring and compliance enforcement.

[285] Justice Department requires Google Inc. to Develop and License Travel Software in order to proceed with its acquisition of ITA Software Inc. See DOJ. *See*, Justice news, April, 2008, *available an* http://www.justice.gov/opa/pr/2011/April/11-at-445.html. Therefore, conduct remedies should be addressed early in the process, especially where an innovative solution may cure the competitive problem.

However, in trying to craft the correct remedies there are a number of considerations to keep in mind, for instance that: (1) entry is often the key to divestiture; (2) the views of consumers; (3) present of potential buyer; (4) some remedies are still not started.

But, above all, the purpose of remedies is not to enhance pre-merger competition but to restore it. In fact, restoring competition is the "key to the whole question of an antitrust remedy,[286]" and this principle should be applied not only in merger cases, but also in any antitrust cases.

5. Conclusions

After analyzing the regulation effects, the pro and anti-competitive consequences of consent decrees, and the different kinds of remedies, we are able to reflect on the opportunity and role of the consent decree in the antitrust enforcement.

Today most antitrust cases are settled and the consent decrees are become protagonist of this law. Often they represent the most efficient solution for the markets.

For this reason, the challenge for the antitrust agencies and the courts is to understand first whether the consent decree could be the best solution for the markets, and second whether it is more important in the current circumstances to guarantee the deterrence or the efficiency of antitrust law. Perhaps the US antitrust law is more mature and expert than the European one, and the deterrence effect can be overshadowed.

However, all along the judge weighs as a balance the positive and the negative effects of his decision. In the antitrust cases his task does not change. The only difference is that these cases often involve complex economic issues, and perhaps would benefit from the aid of a neutral expert.

We cannot neglect that his decision is able to influence the destiny of the markets and the technological innovation.

[286] United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961).

For this reason the judge will need the best tools to make the fairest decision not only for the markets, but also for the future of innovation.

V. THE DETERRENT EFFECT OF CONSENT DECREES

1. Brief Overview

Some might think that consent decrees are far from the concept of deterrence. However, as we will see, this is not correct or it is only partially correct.

Over the years, the consent decree has shown to be an invaluable tool for enforcing antitrust law.[287] Today approximately 80 percent of antitrust 'non-criminal'[288] lawsuits bought by the Government are settled by consent decrees,[289] becoming the main enforcement device of 'no criminal' antitrust law.[290] However, the use of this tool to

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[287] See ABA, I ANTITRUST LAW DEVELOPMENTS, SIXTH ED., 703 (2007). "[S]ettlement by consent decrees is the Antitrust Division's most common method of resolving antitrust claims."*Id*. AREEDA & KAPLOW, ANTITRUST ANALYSIS-PROBLEMS, TEXT, AND CASES, *supra* note 34, at 63. ("Most civil antitrust actions initiated by the Justice Department terminate in a settlement that is filed with court and incorporated in a judicial order known as a 'consent decree'") and ("from its first use in 1906, the consent decree has been used with increasing frequency; since 1955 consent decrees have consistently accounted for approximately 70 percent of all terminations of civil actions filed by the Antitrust Division;") *Id*. Clark E. Walter, *Consent decrees and the Judicial Function*, *supra* note 67, at 315. "The consent decree has become one of the Antitrust Division's most important instruments for terminating antitrust cases." *Id*.

[288] Companies that conspire to fix price or allocate markets might benefit of the DOJ's amnesty program. Under the DOJ's corporate leniency policy, a company will not be charged criminally for those conducts if it reports its antitrust activity at an early stage. *See e.g*. Deborah Platt Majoras, A Review of Recent Antitrust Division Actions, in *Section of Business Law 2003 Conference for Corporate Councel*, Washington D.C. (June 2003) available at http://www.justice.gov/atr/public/speeches/201159.htm. In particular, "[th]e Division's ability to detect antitrust offenses has dramatically improved in recent years due to a number of factors, including the higher rate of amnesty applications, the Division's proactive use of amnesty, the Division's increasing use of search warrants, and the increased assistance provided by foreign antitrust authorities, including coordinated searches in multiple jurisdictions." As the DOJ noted, "[o]ver 90 percent of hundreds of defendants charged with criminal cartel offences during the last 20 years have admitted to the conduct and entered into plea agreements with the [DOJ]."Anne O'Brien, Senior Counsel to the Deputy Assistant Attorney General for Criminal Enforcement, *13th Annual EU Competition Law and Policy Workshop*, Florence (June, 2008), *available at* http://www.justice.gov/atr/public/speeches/235598.htm.

[289] In particular, " [b]y 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." Douglas H. Ginsburg & Joshua Wright, *Antitrust Settlements: The Culture of Consent*, *Bill Kovacic Liber Amicorum Proofs open for review until Oct. 1*, 1 (2012). *See also*, Charles F. Phillips, Jr., *supra* note 57, at 50.

[290] Andrea Berger Kalodner, *Consent Decrees as an Antitrust Enforcement Device*, 23 ANTITRUST BULL. 277, 277 (1978). ("By this cumulative process, better than 800 consent decrees have been entered since 1906; most are still operative. And if the Department of Justice continues to file an average of 60 antitrust suits per year, 40 to 50 consent decrees can be added yearly to the already existing 800 decrees.") *See also*, Steven C. Salop and Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 26 J. REPRINTS ANTITRUST L. & ECON.

settle antitrust suits has both positive and negative consequences. One of the most relevant issues is how to guarantee the deterrent effect of antitrust law, even though no fine is imposed.

But, before analyzing the deterrent effect of consent decrees this chapter will clarify the definition of deterrence and deterrent effect.[291] In particular, why and how the deterrence of antitrust law is guaranteed, and the different deterrent tools adopted in the US and EU.

Then, this chapter will develop a comparison between the European Intel and U.S. Intel cases. The advantage of looking at the treatment of the Intel cases across different jurisdictions is that the operative facts of the cases are virtually the same in each jurisdiction, but the antitrust solution was different. While the European Commission imposed a fine to Intel, the FTC preferred to enter into a consent decree, which imposed conduct remedy. In sum, it seems one perfect case to analyze and compare the deterrence effect of fines with the deterrence effect of consent decrees.

Finally, this chapter concludes with some considerations of the role of deterrent effects in antitrust enforcement and especially of consent decrees. In other words, when is it more important to guarantee efficiency rather than a deterrent effect in the market, and when instead is the opposite recommended.

2. Deterrence and Deterrent Effect – Meaning and Implications

Before analyzing the relation between consent decrees and deterrence, it is worth clarifying the concept of deterrence and its role into antitrust law. As Block and Sidak held:

11, 22 (1966). The authors showed on a table that "almost 75% of the cases were settled, if we use a broad definition of settlement; another 10% reached final judgments of some kind; and the remainder of the cases were still pending, had been transferred or consolidated, or had unknown outcomes." *Id*.

[291] Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 690-702 (2010).

[T]hrough its antitrust enforcement system, society allocates resources to deter anticompetitive behavior.[292]

Therefore, the antitrust enforcement,[293] including both public and private enforcement, guarantees deterrence of antitrust violations.[294] Antitrust agencies, and in the US also states' attorneys general, protect public enforcement.[295] Conversely, private actions which include individual or—as class action—collective actions, assure private enforcement.

As analyzed in the first chapter, there is a crucial difference between EU and US antitrust enforcement. While in Europe the deterrence derives almost entirely from public enforcement[296], in the US the deterrence is guaranteed more by private actions than public interventions.[297]

In particular, in the US the treble damages rule exists. Section 4 of the Clayton Act permits "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the

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[292] Micheal K. Block & Joseph Gregory Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?*, 68 GEO. L. J. 1131, 1131(1980).

[293] *See e.g.*, Charles F. Phillips, Jr., *The Consent Decree in Antitrust Enforcement*, 18 WASH. LEE L. REV. 39 (1961).

[294] A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 1 (National Bureau of Economic Research, Working Paper No. 338, April 1979). ("It is frequently the case that a particular sanction can be enforced within a variety of institutional arrangement. For example, some antitrust penalties in the United States are enforced both by public agencies—the Justice Department and the Federal Trade Commission—and private parties—the victims of the violations and their lawyers.") *Id*.

[295] A MITCHELL POLINSKY & STEVEN SHAVELL, THE THEORY OF PUBLIC ENFORCEMENT OF LAW (National Bureau of Economic Research, Working Paper 11780, 2005), *available at* http://www.nber.org/papers/w11780. Public enforcement of law is the use of governmental agents to detect and to sanction violators of legal rules.

[296] Robert H. Lande and Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 315, B.Y.U.L. Rev. (2011).

[297] *See* Chapter II, 14 – 19. *See also* Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 676 (2010).

cost of suit, including a reasonable attorney's fee."[298] And, of course, this rule promotes private actions,[299] and reinforces the deterrent effect.

One similar provision already existed in the 17th century. The English Statute of Monopolies of 1623 established that a person injured by an illegal monopoly "*shall recover three times as much as the damages that he sustained...*"[300] (21 Jac. 1, c. 3 (1623)).

Hovenkamp specified that:

> Treble damages are a form of general deterrence: an intended antitrust violation that appears profitable when the risk of detection, litigation, and single damages is considered may appear unprofitable when the damages will be multiplied by 3.[301]

This definition is consistent with the Supreme Court's statements.[302] On several occasions, the U.S. Supreme Court recognized that the private treble-damage action has both compensation[303] and general deterrence goals[304]. In *Illinois Brick Co. v. Illinois*, for example, the Court stated that:

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[298] Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. s 15. *See also* AREEDA E KAPLOW, ANTITRUST ANALYSIS ' PROBLEMS, TEXT AND CASE, *supra* note 34, at. 73.

[299] *See e.g.*, Robert H. Lande and Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, (Univ. of San Francisco Law Research Paper No. 2010-17), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1565693.

[300] Herbert J. Hovenkamp & Louis B. Scwartz, *Treble Damages and Antitrust Deterrence: a dialogue,* 18 ANTITRUST L. & ECON. REV. 67, 68 (1986).

[301] *Id*.

[302] *See* William H. Page, *Antitrust Damages and Economic Efficiency: An Approach To Antitrust Injury*, 25 J. REPRINTS ANTITRUST L. & ECON. 507, 514 (1995). In Brunswick the "Court's reasoning and the legislative history giving priority to the deterrent function are consistent with an economic interpretation of the function of antitrust damages. Although damages certainly serve to compensate as well as the deter, the principal function of compensation from an economic point of view should be to spur private parties to bring suit; to the extent the deterrent function is served, compensation will become unnecessary, because the amount of competitive harm will be reduced."

[303] See e.g., Roderick G. Dorman, *The Case for Compensation: Why Compensatore Components are required for Effective Antitrust Enforcement*, 68 GEO. L. J. 1113, 1113 (1980). Dorman analyzes here why antitrust law does provide compensation. Having examined the important contribution of Professor Schrwarz, Dorman analyzes "the goals of antitrust law and an enumeration of the goals that are and are not examined in Schwartz's hypothetical enforcement system." *Id*. at 1113, 1114. According to Dorman, "compensatory components are as indispensable under the current regime of antitrust enforcement as they would be in an antitrust law enforcement system having efficiency as its only goal. *Id*.. *See also*, Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 676 (2010). According to Crane, the two goals of antitrust private enforcement are not always feasible. Because the true economic victims of antitrust conducts are the numerous and distance downstream consumers, compensation goal would fail. Similarly, deterrence is limited. Usually the company managers responsible for the antitrust violations leave their company before the latter "internalizes the cost of the violation." *Id*. at 677.

> The reach of s 4 have been consistent with its broad objectives: to compensate victims of antitrust violations and to deter future violations…. section 4 does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . (but) is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. (Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236, 68 S.Ct. 996, 1006, 92 L.Ed. 1328 (1948).)

Thus, treble damages are widely recognized as a tool of deterrence[305] that in Europe does not exist, despite the recent attempts there to introduce a similar rule.[306] The European Commission has adopted on June 11, 2013, a proposal for a Directive, which strive to remove several of practical difficulties that consumers face when they seek a compensation for antitrust damages.[307] Almunia, in one of his last speeches, recognized the importance to ensure that all antitrust victims "can obtain redress for

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[304] According to Page the primary function of the treble damages rule is "deterrence of such conduct rather than compensation of victims, subsidization of small business, or similar goals directed to the private rather the social cost of violations." *Id.*, at 514. Similar see also Jonathan B. Baker, *Private Information and the Deterrent Effect of Antitrust Damages Remedies*, 4 J. L. ECON. & ORG., 385, 407 (1988). "The private treble damages remedy for antitrust violations has been both condemned and defended for its ability to deter violations and compensate victims" but "he absence of private information concerning the likelihood of a successful antitrust recovery-neither treble damages nor any private damage remedy can accomplish either goal. So long as antitrust violators possess some private information, however, some private damages remedy (not necessarily treble the overcharge) creates complete deterrence, renders compensation unnecessary, and promotes efficient resource allocation." On the purpose of treble damages *see also*, Joseph Gregory Sidak, *Rethinking Antitrust Damages*, 33 STAN. L. REV. 329, 330 (1981). "The purposes of treble damages are twofold: to compensate plaintiffs for their injury and to punish the defendant in order to deter future violations." Similarly, Professor Schwartz held that because the optimal 'price' of an antitrust violation must reflect both the total harm caused and the costs of enforcement, the latter is based on the concept of damage is antithetical to an efficiency-oriented system. A measure of recovery wholly contrasted from the concept of damage must be devised before this optimal 'price' can be achieved." Warren F. Schwartz. *An Overview of the Economics of Antitrust Enforcement*, 68 GEO. L.J. 1075 (1980).

[305] Herbert J. Hovenkamp & Louis B. Scwartz,, *supra* note 100. ("Presumably a firm contemplating activity that might violate the antitrust laws does so because it hopes to make a profit and this will happen if anticipated returns exceed anticipated costs, the latter being a function of (1) the probability that the activity will be detected; (2) the probability that, if detected, it will be successfully challenged in court; and (3) the size of the expected penalty (the damage award and litigation costs.")

[306] European Commission, COM (2008) 165 final, *White Paper on Damages actions for breach of the EC antitrust rules,* (Bruxelles, 19.12.2005), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF; COM (2005) 672 final, *Damages actions for breach of the EC antitrust rules*, Bruxelles, (19.12.2005), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0672:FIN:EN:PDF; Donald R. Barker, *The EU Green Paper on private damages actions-an ambitious response to a very difficult set of practical and philosophic issues*, COMPETITION L. Rev. 239 (2005). *See also*, Daniel A. Crane, *supra* note 298, at 678-679, 699-701.

[307] EUROPEAN COMMISSION, *Proposal for a Directive of the European Parliament and the Council,* COM(2013), *available at* http://ec.europa.eu/competition/antitrust/actionsdamages/proposal_directive_en.pdf.

the harm they suffered, especially once a competition authority has found and sanctioned such a breach."[308] And in June 2013, the European Commission issued a proposal for a directive that provides some rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.[309] And, recently the Chief of the European Antitrust Commission has remarked the importance of introducing private antitrust actions, wishing to implement the measures during the actual legislative term.[310]

The logic of the treble damages provision is based on principle that the purpose of antitrust law is the protection of competition and not competitors. And, the European proposal does not include this provision, suggesting standard that already exist in many different jurisdictions.[311] As a study of the International Competition Network (ICN) observed, most refereed to unjust enrichment rules.[312]

Therefore, permitting recovery for the efficiency gains connected with a nominal violation would contradict the purpose of this law.[313] And even if it may intimate some potential violators, a limited remuneration could be more effective.[314]

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[308] *See* Press Release, *Antitrust: Commission proposes Legislation to Facilitate Damage Claims by Victims of Antitrust Violations* (June 2013), available at http://europa.eu/rapid/press-release_IP-13-525_en.htm. According to Almunia, although the right to claim compensation in all EU Member States exists, companies and consumers "are not always to exercise it in practice." Similarly the EU Court of Justice recognized the right for all victims of antitrust infringements to be compensated for the harm suffered.

[309] EU Commission, *Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, COM(2013) 404 final (16 Jun. 2013), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF. *See also, Press Release*, Antitrust damages in EU law and policy (Nov. 2013), http://europa.eu/rapid/press-release_SPEECH-13-887_en.htm; *see also,* Melissa, Lipman, *EU Lawmakers Urged to Get Antitrust Litigation Plan Moving* (Nov. 7, 2013), *available at* http://www.law360.com/competition/articles/487117/eu-lawmakers-urged-to-get-antitrust-litigation-plan-moving.

[310] Melissa Lipman, *EU Antitrust Chief Voices Hope for Damages Proposal* http://www.law360.com/articles/504656/print?section=competition (Jan. 28, 2014).

[311] Daniel A. Crane, *supra* note 291, at 702. According to the author, continental systems are not wrong in rejecting rules, like "class actions, treble damages, liberal discovery, or other features of the U.S. system." *Id*.

[312] International Competition Network Annual Conference, Moscow (May 2007), *Report of the Cartels Working Group*, Interaction of Public and Private Enforcement in Cartel Case, at 12.

[313] *See* William H. Page, *supra* note 301, at 476. The Court in *United States v. Grinnell* held that "adequate relief in a monopolization case should . . . deprive the defendants of any of the benefits of the illegal conduct". Einer Elhauge, *Disgorgement As an Antitrust Remedy*, 76 ANTITRUST L.J. 79, 2010, 80.

[314] Micheal K. Block & Joseph Gregory Sidak, *supra* note 292. *See also* Amanda Kay Esquibel, *Protecting Competition: The Role of Compensation and Deterrence For Improved Antitrust Enforcement*, 41 FLA. L. REV. 153, 167 (1989). ("Treble damages fail to deter potential violators for several reasons. First, treble damage suits suffer from the free-rider problem. As noted, free-riders diminish the effectiveness of private enforcement by

Certain economists dissatisfied with the deterrence of treble damages rule proposed models of optimal deterrence.[315] To prevent the costs of error connected with case-specific rules, the antitrust rules are often over inclusive and prohibit conducts even though they are efficient. The optimal deterrence model seeks to correct "for this over inclusiveness by setting the penalty for antitrust violations at a level just sufficient to deter only inefficient instances of the violation."[316] Nevertheless, because for example on economic actors can have infinitive effect offences, this model is not perfect.[317]

However, comparing the deterrence between the US and EU antitrust systems certainly we have to take into account the different antitrust enforcement approach, and we need to consider the other deterrence tools that in the US exist and in EU does not.[318] *Parens patriae* is only an example.[319] But where are consent decrees in antitrust enforcement located?

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taking advantage of it without paying. Treble damages fail to compensate for free-riders because even with trebling, victims may lack sufficient incentive to sue antitrust violators. An antitrust violation is a ripple through the economy.")

[315] *See* Amanda Kay Esquibel, *supra* note 314, at 155.

[316] William H. Page, *Optimal Antitrust Penalties and Competitors' Injury*, 88 MICH. L. REV. 2151, 2191 (1990).

[317] *Id*. at 169. ("[O]ptimal deterrence models typically assume that all parties are risk-neutral, all enforcement costs are zero, and the probability of apprehension and conviction is one. Fines are the exclusive enforcement weapon, and the fine should equal the net harm to persons other than the offender.") *Id*. *See also* Gregory J. Werden, Scott D. Hammond & Belinda A. Barnett, *Deterrence and Detection of Cartels: Using All the Tools and Sanctions*, 56 ANTITRUST BULL. 207, 209 (2011). ("Theoretical analyses of deterrence often invoke the economic theory of optimal deterrence,' a key premise of which is that the conduct under consideration is sometimes socially desirable and therefore would be over deterred by sufficiently severe sanctions.")

[318] In the US for instance the cartel are crimes. According to the doctrine, because the monetary sanctions on corporation are insufficient, the law provided sanctions also on culpable individuals. *See* Gregory J. Werden, Scott D. Hammond & Belinda A. Barnett, *supra* note 316, at 214.

[319] *See* Richerd A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 GEO. J.L. & PUB. POL'Y 5, 8-12 (2004). "(I turn now to antitrust enforcement by the states, beginning with the authority conferred in 1976 on state attorneys general by the Hart-Scott-Rodino Antitrust Improvements Act to bring suits (parens patriae suits) on behalf of the residents of their states under federal antitrust law. The effect of the Act, in principle at least, is to make public enforcement of federal antitrust law a competitive rather than a monopoly 'market'.") *Id*. Herbert Hovenkamp, *Federal Antitrust Policy - The Law of Competition and its practice*, *supra* note 38, at 539. In *llinois Brick Co. v. Illinois* the U.S. Supreme Court held that "Congress acted on the premise that s 4 gave a cause of action to indirect as well as direct purchasers when it recently enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1394-1396, 15 U.S.C. s 15c et seq. (1976 ed.), and authorized state attorneys general to sue as *parens patriae* to recover damages on behalf of citizens of their various States."

Because consent decrees permit evasion of the treble damages rule someone might affirm that consent decrees have no deterrent effect.[320] But we have to keep in mind that deterrence means not the concrete fine or damages that the firms have to pay for an antitrust violation. Rather it implies the expected value of punishment[321] or "*the utility of punishment*. As Polinsky noted, companies do not engage in an activity if the external costs exceed their private benefits,[322] and such behavior is efficient in a society's perspective. In the same perspective, a private plaintiff would be encouraged to invest in antitrust litigation when its expected recovery increases, taking into account also litigation cost. Schwartz held that the deterrence is compromised if antitrust enforcement is costly.[323]

Hence, the antitrust enforcement has to provide appropriate incentives to both companies and privates[324] to guarantee deterrence. To companies the antitrust law has to provide incentives to desist from an anticompetitive conduct, because it is costly and the risk to be pursued is high. To privates, instead, this law has to provide

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[320] *See* Chapter III. In particular, Earl A. Jinkinson, *Negotiation of consent decrees*, 9 ANTITRUST BULL. 673, 696 (1964). ("The benefits for consenting defendants are obvious. Probably the most important is the escape from treble-damage liability, which can be achieved by avoiding a judicial or administrative determination of antitrust liability and by depriving aggressive treble-damage plaintiffs of the evidence made public in a litigated record. Subsidiary benefits include the elimination of heavy trial expenses, the avoidance of unfavorable publicity, the saving of executives' time which would otherwise be spent in litigation, and the removal of legal uncertainties which would have an important bearing on business decisions.") *Id*. *See also*, Janet L. McDavid, William A Sankbeil, Edward C. Schmidt, Barry J. Brett, *Legislative issues and judicial developments, antitrust consent decrees: ten years of experience under the Tunney Act*, 53 ANTITRUST L. J. 884 (1983). ("The only statutory reference to consent decrees was in Section 5(a) of the Clayton Act, which provided that the entry of a consent decree should not constitute prima facie evidence against the defendant in any subsequent litigation.")

[321] Micheal K. Block & Joseph Gregory Sidak, *supra* note 297, at 1132.

[322] A. Mitchell Polinsky, *Detrebbling versus Decoupling Antitrust Damages: Lessons from the Theory of Enforcement*, 74 GEO. L. J. 1231, 1986, 1233. ("[U]nder private enforcement, individuals or firms are willing to invest in enforcement only if they at least break even-that is, only if their fine revenue is at least as great as their enforcement costs." Similarly William H. Page agued that "If treble-damage actions are to promote economic efficiency, the size of the award should approximate the social cost or inefficiency caused by the violation, discounted by the likelihood that the conduct will be discovered and penalized. Firms will not engage in a practice if their expected gain in doing so is less than their expected (private) cost, including any penalties incurred for violating the antitrust laws.") *Id*. *See* William H. Page, *supra* note 301, at 472.

[323] Warren F. Schwartz, *An Overview of the Economics of Antitrust Enforcement*, 68 GEO. L. J. 1075 (1980). ("The cost-minimization approach could be applied to evaluate the efficiency of antitrust enforcement". Schwartz noted that "[b]ecause it is costly to enforce the antitrust laws, it is likely that the system will not be constructed to deter all violations. If a potential violator has a choice between two types of violation which offer the prospect of equal gain, it will be necessary to create an incentive to choose the one that does the least harm.") *Id*. at 1083.

[324] Reza Rajabium, *Private Enforcement and Judicial Discretion in the Evolution of Antitrust in the Unite States*, 8 J. COMPETITION L & E. 187, 188 (2012).

incentives to invest in private actions. The grant in case of their success should be high. In sum, if the risk to be pursued were high and the economic consequences were important, companies typically "risk-averse" would be likely to engage in anticompetitive conduct. And the economic consequences and the risk to be pursued increase if the privates act against the opportunistic behavior of the companies. Public enforcement is important, but probably private enforcement should be recommended. Private enforcement, in addition to punishing the anticompetitive behaviors, recovers the damages to consumers —the real protagonists of the market. The nominal damages allow restoration of the initial state between the parties re-establishing equilibrium, and treble damages have the clear intent to deter anticompetitive behaviors. Inevitably the deterrent effect of a law increases even if it is widespread over privates and not only over companies.

3. Consent Decree and Section 5 of Clayton Act

As above outlined, in the US antitrust system treble damages represents the fundamental deterrent tool provided by antitrust enforcement, and usually private actions follow a successful litigation carried out by the government[325]. The Section 5 of Clayton Act provides that

A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be *prima facie* evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment.

[325] Robert W. Stedman, *Consent Decree and the Private action: an Antitrust Dilemma*, 53 CAL L. REV. 627, 646 (1965).

However, this provision does not apply to consent decrees, which do not serve as *prima facie* evidence in an antitrust procedure[326]. Consequently, because consent decrees and private actions are often mutually exclusive, the legislator seems to encourage the use of consent decrees in antitrust litigations.[327]

To avoid this reciprocal exclusivity the Government attempted to circumvent the section (5) provision introducing the so-called "*asphalt clause*". This provision allowed both the entry of consent decrees and the use of government judgment as *prima facie* evidence in treble damage actions. Asphalt clause represents a defendant's antitrust violation admission. But it can be used as *prima facie* evidence "only in actions by states or their political subdivisions instituted prior to the entry of the consent decree.[328]" In Massachusetts the Government successfully used in three different actions a consent decree that included an asphalt clause. But later the infrequent use of this clause was considered impracticable. Keeping the asphalt clause the government deprived consent decrees of the most important incentive in their adoption.

4. Consent Decrees and Deterrence

As previously outlined, over two thirds of US antitrust cases are settled and this statement leaves some questions unaddressed. For instance: why are settlement rates so high? Do they represent successful extortion by plaintiffs? What relation is there between consent decrees and treble damages remedy?[329] The previous discussion might partially answer of these questions, and I will refer to this discussion especially to justify the success of consent decrees in the antitrust system and the logic that

[326] Clayton Act § 5 (Tunney Act), 15 U.S.C. § 16 "this section shall not apply to consent judgments or decrees entered before any testimony has been taken."

[327] Robert W. Stedman, *supra* note 316, at 632. "Of course, if section 5(a) of the Clayton Act is designed to encourage consent decrees rather than to aid private litigants, this advantage is justified. The parties are more likely to reach agreement on relief if they know the probable extent to which the court will grant the Government's demands."

[328] *See* Robert W. Stedman, *supra* note 316, at 638.

[329] Steven C. Salop and Lawrence J. White, *supra* note 287, at 28.

brings the parties to settle a case. Then, the task at hand it is to understand the relation between consent decrees and deterrence.

A consent decree is "a compromise between two parties in a civil suit; the exact terms [of which] are fixed by negotiation between the parties and formalized by the signature of the federal district judge."[330] As we have seen in the previous chapter, even though the context of consent decree negotiations may differ from normal business contract negotiations, the essence of consent decrees does not change.[331] The parties, Government and defendants are engaged in a bargaining process where the Government offers to refrain from formal litigation in return for the defendant's consent to a legally binding contract. The consent decrees back the defendants by the sanction of contempt, obligating them to refrain from certain conduct or to engage in certain forms of conduct.[332] And once industry leaders have entered consent decrees, the other firms active in the same market tend to conform to the decree. Therefore, the consent decree influences the behavior of the business community and consequently corporate growth and capital information.[333] However, for most people the term 'consent decree' is unfamiliar. This unfamiliarity could depend on that whereas the trial is public, the consent decree is the product of a negotiation between DOJ or FTC and the company charged with antitrust violations. During negotiations the information exchanged is confidential and there is no public participation at this stage of the consent decree process.[334] This consideration might explain why economists, attorneys, politicians, and press seem to ignore the consent decree, and why the widespread use of this device can compromise the deterrent effect of antitrust enforcement.

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[330] Lohn J. Flinn, *Consent Decrees in Antitrust Enforcement: Some Thoughts and Proposals*, 53 IOWA L. REV, 983, 987 (1968).

[331] *See* Chapter III.

[332] Lohn J. Flinn, *Consent Decrees in Antitrust Enforcement: some thoughts and Proposals, supra* note 320, at 987. We have to consider that there is any legal limitation upon the power of litigants in private equity actions under the antitrust laws to settle their case archiving a legally enforced decree by entering into a consent decree.

[333] Andrea Berger Kalodner, *Consent Decrees as an Antitrust Enforcement Device*, *supra* note 287, at 279.

[334] *See* James Rob Savin, *Tunney Act '96 : Two Decades of Judicial Misapplication*, 46 EMORY L. J. 363, 367 (1997).

But in spite of their apparent flaws,[335] this antitrust tool offers many advantages not only to the Government and defendants, but also to the public. And this consideration might justify the widespread use of this tool in settling antitrust disputes.

Antitrust litigation is costly,[336] complex and time consuming, and the consent decree appears as an important device of economy[337]. Thus, that the consent decree is largely the culmination of negotiation rather than of litigation makes it in several ways attractive. It is a sort of compromise, reached because neither party is willing to give up the certain advantages of the decree for the uncertain possibility of a victory in litigation in which time and money must be consumed.

Moreover consent decrees seem to respond to the need for flexibility and pragmatism in antitrust enforcement,[338] which involves dynamic markets. According to Lawrence and White,[339] the question at hand is not why consent decrees are so widespread but rather why any cases continue to trial. The authors provide an example to show when these agreements bring benefits to the parties. They assume that both parties agree that "plaintiff had a thirty percent chance of obtaining an award of $1 million and if a trial would cost each side additional legal fees of $50,000, any settlement above $250,000 would be more beneficial to the plaintiff than continued litigation. Similarly, any settlement below $350,000 would benefit the defendant.[340]"

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[335] A critical view is provided by Zamora. *See* Anthony N.R. Zamora, *The Century Freeway Consent Decree*, 62 S. CAL. L. REV. 1805, 1843 (1989). "Like many of its counterparts nationwide, the decree is ambitious in scope. Yet, the decree falls within the confines of the Constitution. While some problems have hindered the decree's implementation, the court should respond to these issues by incorporating improvements to the decree where needed."

[336] These costs reflect the hours of economists, lawyers, and company personnel. For example, AT&T predicted that full litigation of the-current lawsuit brought by the Government could cost as much as $500 million to $1 billion. Instead, the costs of consent decree might well be far less than half the costs of litigation.

[337] Maxwell S. Isenbergh and Seymour J. Rubin, Antitrust Enforcement through Consent Decrees, 53 HARV. L. REV. 386, 387 (1940). *See also* Steven C. Salop and Lawrence J. White, *supra* note 287. A settlement payment by the defendant to the plaintiff of an amount that is in the vicinity of this expected monetary value would allow both parties to save the litigation expenses of a trial. Thus, on an expected value basis (as a method of weighting the probabilities), both parties would be better off with the settlement.

[338] Maxwell S. Isenbergh and Seymour J. Rubin, *Antitrust Enforcement through Consent Decrees*, *supra* note 327. "For half a century, unsuccessful enforcement has intensified the 'call for new social inventions, or fresh adaptations of old experience,' in the antitrust field. The consent decree is an encouraging sign of response."

[339] Steven C. Salop and Lawrence J. White, *supra* note 287, at 36.

[340] *Id.* at 37.

Analyzing this example there is no reason for the parties not to settle an antitrust litigation, especially if we consider that generally the companies are risk averse.[341] Nonetheless, as de Vries alleged "[t]he road to good intentions is paved with hell." [342]

For instance, the parties could be optimistic about the future of the case and unable to reach an agreement.[343] If the parties are optimistic, then the likelihood of settlement is reduced. And this is one of the reasons why 20 to 30 percent of antitrust cases continue to be discussed in trial. Another reason could depend on separate concerns of the parties about the conclusions of this or other cases or maybe the plaintiff needs to be consistent with other suits. Furthermore, consent decrees need a court's ongoing supervision. Courts have to supervise the consent decree's implementation over time, and often over an extensive length of time.[344]

Sometimes this task was left to Regulatory Agencies.[345]

However, this antitrust tool remains attractive for the parties. Polisky and Rubinfeld show that prospect of settlement as an alternative to a final judgment both raises the expected returns to a plaintiff contemplating a suit and decreases the expected loss to a defendant in the event of a suit.[346]

Having shown the reasons for the success of settlements, we move toward the analysis that concerns the relation between the consent decree and the deterrent effect. In particular, it is important to define whether consent decrees have a deterrent effect and in what circumstances this effect can be overshadowed in favor, for example, of efficiency.

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[341] *Id.*, at 39. "If the parties are risk averse, greater uncertainty has the opposite effect, pushing them toward settlement. This is true because, irrespective of the parties' relative degrees of optimism, settlement provides certainty and replaces an uncertain outcome."

[342] Peter de Vries, *Horowitz, Decreeing OrganizationalChange: JudicialSupervision of Public Institutions*, 1983 DUKE L.J. 1265, 1307 (quoting Peter de Vries).

[343] For instance the plaintiff might think that the likelihood of a decision in his favor is 50% while defendant deems it is only 10%.

[344] *See* Anthony N.R. Zamora, *The Century Freeway Consent Decree*, 62 S. CAL. L. REV. 1805, 1815 (1989).

[345] *See* AT-T case and chapter IV.

[346] A. Mitchell Polinsky and Daniel L. Rubinfeld, *The Welfare Implications of Costly Litigation for the Level of Liability,* 17 J. LEGAL STUD. 151 (1988).

As Flinn noted, although on the one hand the decree can both enjoin the end practices restraining trade and seek to eliminate the factors causing the restraint by enjoining the defendants, on the other hand, a legitimate question regarding the public interest arises. In particular, the question is whether "private rights and public interest were adequately protected by the procedures followed by the parties in negotiating the decree."[347] A consent decree in fact might be inadequate to protect the third parties that deal with the defendants.[348] Competition law pursues not only efficiency, but also public interest.[349] The same Federal Trade Commission (FTC) pointed out the issue according to "the public interest is critical because it is what cabins the wide discretion that we otherwise wield to fashion remedial orders that only have to bear a reasonable relation to the unlawful practices found to exist."[350] However, this issue concerns in particular the European Commission, which does not have a procedure for judicial approval.[351] The Federal Trade Commission's public mandate is specified in Section 5 of the Federal Trade Commission Act.[352] Thus, it is something specified in the procedure.

Moreover, because implementing a remedy that is too broad runs the risk of distorting markets, it will be fundamental to guarantee sufficient, but not overbroad, remedies that are proportional to the offense.[353]

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[347] Flinn, *supra* note 320, at 1000-1002.

[348] *See* Robert W. Stedman, *supra* note 315, at 629.

[349] *See* Remarks of J. Thomas Rosch, *Consent Decrees: Is the Public Getting Its Money's Worth?*, April 7, 2011, XVIIIth St. Gallen International Competition Law Forum. Thomas Rosch especially inquires whether consent decrees properly serve the public interest. The question is "is the public (in the United States, the taxpayers) getting their money's worth out of our enforcement efforts when the Commission or the Antitrust Division decide to settle a civil antitrust matter?"

[350] *Id.* at 2.

[351] In the U.S. antitrust system, as we have described in the second charter, the Tunnel Act, 15 U.S.C. § 16(e) & (f) (2009), previews a specific procedure for judicial approval. Moreover, for the FTC an explicit requirement in its regulation to guarantee the public interest exists. Unlike the exam of FTC consent decrees, the Commission has not an explicit requirement in the European Regulation that ensure that commitment decisions under Article 9 serve the public interest before they are accepted and made binding.

[352] *See* Section 5(b) of Federal Trade Commission Act. In particular, this Section authorizes the FTC to institute a proceeding to require the cessation of unfair methods of competition or unfair or deceptive acts or practices if it "would be to the interest of public."

[353] Thomas O. Barnett, *Section 2 Remedies: What to do After Catching The Tiger By The Tail*, 76 ANTITRUST L.J. 31, 2010, 36.

Hence, on the issue to replace litigated decrees with consent decrees, there are many unaddressed questions. And deterrence is only one of these. An other one is analyzed in the previous chapter, and concerns regulation effects of consent decrees and the new role that antitrust agencies seems to play today.[354]

5. Against Settlements or Trials?

In 1984 Owen Fiss wrote perhaps the best known paper on settlements titled *Against Settlement*.[355] He criticized the widespread use of settlements, pointing out several reasons. Fiss compares a settlement to an agreement that represents "a truce more than a true reconciliation, but it seems preferable to judgment because it rests on the consent of both parties and avoids the cost of a lengthy trial."[356]

In particular, the author noted that in a settlement the bargaining process would be infected by the distribution of financial resources, as well as the ability of one party to pass along its costs. The gap in resources between the parties is able to influence the settlement in different ways. For instance, the poorer party might not be able to predict the outcome of litigation, and prefer a settlement as a way of accelerating payment, although he would get less than he could obtain in trial.

In my opinion the most interesting observation developed by Fiss concerns the role and the authority of the Courts, which risk to be compromised by the widespread use of consent decrees. According to Fiss, the job of the Courts "is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them;"[357] and this duty would not be discharged in case of settlement.

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[354] See chapter IV.

[355] Owen Fiss, *Against Settlements*, 3 YALE L.J. 1074 (1984).

[356] *Id*. at 1075.

[357] *Id*. at 1085.

As Fiss argued sometimes justice needs to be done, and the society needs an authoritative interpretation of law. [358]

Contrary, Samuel Gross and Kent Syverud saw a trial as a failed settlement.[359] And Learned Hand argued that "as a litigant I should dread a lawsuit beyond almost anything short of sickness and death.[360]" This statement is true if we think about the costs, time spent and probably the frustration of a lawsuit.[361]

Landes and Posner instead held that considering adjudication as a private good, settlements are consistent and opportune. Moreover, an economic competition between trial and alternative dispute resolutions might promote efficiency of the judicial system. Indeed, if public courts were not able to compete with a quick and cheap dispute resolutions, litigants would switch to alternative providers.

However, Landes and Posner similarly to Fiss upheld that the court system has also to provide rules and precedents, especially in a common law system, and private judges are inefficient in this task. Legal rules are public goods, and only courts can discharge this duty.[362] This statement seems coherent with Fiss's approach, according to which, "courts exist to give meaning to our public values, not to resolve dispute."[363] Furthermore, on the one hand the independence of the courts guarantees an impartial use of reason, and on the other hand dialogue guarantees that courts have to listen to all replying with reasoned opinion.

Hence, the question is: is it better to be against settlements or trials? A real answer does not exist. But we can try to analyze how different agencies resolved the same case applying a consent decree or a fine, evaluating the pros and cons of each solution.

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[358] *Id*. at 1087.

[359] Samuel Gross and Kent Syverud, *Getting to No: a Study of Settlement Negotiations and the Selection of Cases for Trial*, MICH. L. REV. 319-393 (1991)

[360] David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO L.J. 2619, 2621 (1995) (quoting learned Hand).

[361] *Id.* at 2621.

[362] *Id*. at 2626, "adjudication, which produces rules and precedents, is instrumentally useful because these provide a normative framework for future transactions."

[363] *Id*. at 2635 (*quoting* Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 122-24 (1982)).

6. Enforcement Action of Intel

To understand the concrete deterrent effect of consent decrees and its advantages appears useful to analyze a case across jurisdictions, in which the operative facts were virtually the same in each jurisdiction, but the solution of the antitrust agency was different. The Intel case might represent the perfect candidate for this study. Although, in Europe the EU Commission imposed to Intel a fine, in the U.S.A the FTC opted for a consent decree. Consequently, this case allows for a straightforward comparison of the treatment of a same case across jurisdictions.

6.1 EU Intel Case

In July 2007, the European Commission sent a Statement of Objections[364] to Intel, which outlined the Commission's preliminary view that Intel had violated Article 82 of the EC Treaty excluding its main rival, AMD (Advanced Micro Device)[365], from the x86 Computer Processing Units (CPU) market[366]. After three years of investigations the Commission found that Intel had engaged in two different anticompetitive conducts: (*i*) conditional rebates; (*ii)* and pay for delay agreements, so-called naked restrictions.

Intel, the leader of CPU market with an 80% market share, awarded major computer manufacturers rebates on condition that they purchased all or almost all of their

[364] A Statement of Objections is a formal step in Commission antitrust investigations in which the Commission informs the parties concerned in writing of the objections raised against them. The addressee of a Statement of Objections can reply in writing to the Statement of Objections, setting out all facts known to it, which are relevant to its defense against the objections raised by the Commission. The party may also request an oral hearing to present its comments on the case.

[365] In particular, on 18 October 2000, Advanced Micro Devices (AMD) submitted to the Commission a formal complaint under Article 3 of Regulation No 17/62, which was further supplemented with new facts and allegations in particular in November 2003.

[366] EU Commission, *Competition: Commission confirms sending of Statement of Objections to Intel* (Brussels, 27 July 2007), *available at* http://europa.eu/rapid/press-release_MEMO-07-314_en.htm?locale=en#PR_metaPressRelease_bottom.

supplies[367]. His business model indeed included the practice of offering OEMs (Original Equipment Manufactures) [368] rebate on the condition that the OEMs agree to buy from Intel all or nearly all of their ×86 CPU. CPU is the central processing unit better knows as microprocessor, and considered the brain of computer[369].

Intel's' conditional rebates inevitably reduced the OEM's freedom in the choice from whom to buy the ×86 CPUs, harming end-user consumers.

Consumers were injured also by the second antitrust conduct notified to Intel that concerned the so-called naked restrictions or pay for delay agreements. Through these contractual provisions Intel awarded major OEMs payments, which were conditioned on these OEMs postponing or eliminating the launch of AMD-based products and/or putting restrictions on the distribution of AMD-based products. Thanks to pay for delay agreements, Intel maintained its dominant position in CPU market. You were not able to find competing products to Intel in CPU market.

At the end of its investigation, the European Commission concluded that Intel had infringed Article 82 of the Treaty and Article 54 of the EEA Agreement "by engaging in a single and continuous infringement of Article 82 of the Treaty and article 54 of the EEA Agreement from October 2002 until December 2007 by implementing a strategy aimed at foreclosing competitors from the x86 CPU market." According to the European antitrust agency, Intel gave wholly or partially hidden rebates to computer manufactures (Dell, Hp, NEC, Lenovo) on the condition that they purchased all, or almost all, their x86 CPUs from Intel. Then, Intel made direct payments to computer manufactures (HP, Acer, Lenovo), to stop or delay the launch of specific products containing a competitor's x86 CPUs and to limit the sales channels available to these products. In the light of these pretty clear anticompetitive conducts, the

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[367] EU Commission, *Commission imposes fine of €1.06 bn on Intel for abuse of dominant position; orders Intel to cease illegal practices*, Brussels, (13th May 2009), *available at* http://europa.eu/rapid/press-release_IP-09-745_en.htm?locale=en.

[368] Dell, Hewlett Packard and Levavo are some OEMs, which assemble computers using both CPUs and several hardware and software components bought from different producers.

[369] *See* Paul Jones, *American Antitrust Jurisprudence Applied to European Commission v. Intel*, in 7 INT'L L. & MGMT. REV. 52 (2011); *see also,* Russell Zimmerer, *Antitrust Issues in the European Union: Intel*, 42 Int'l Law. 1199 (2008).

Commission condemned Intel to pay a fine of EUR 1,060,000,000, obligating the company to cease the identified illegal practices. In sum, the European Antitrust Agency chose to fine Intel instead to seek an agreement.

6.2 US Intel case

On the contrary, the U.S. antitrust agency found an agreement with the CPU leader to resolve its possible own anticompetitive conducts. In June 2008 the U.S. Federal Trade Commission (FTC) issued to Intel a subpoena, and on December 2009 the Commission filed a Complaint[370] alleging that Intel had engaged in a series of conducts[371], analogous to those pursued by Europe Commission. Intel was accused of preserving its monopoly in the market for x86 Central Processing Units (CPUs), and also creating a monopoly in the market for Graphics Processing Units (GPUs)[372]. In particular, the prices Intel would have charged were below an appropriate measure of costs, and it was likely to recoup these losses as a monopolist, leveraging its position in the uncontested market (those chips for which Intel was the only possible supplier) to promote its position in the contested market[373].

On 2010 the FTC reached a settlement with Intel that restricted Intel's conduct in commercial practices, predatory design and deceptive disclosure prohibiting. For example, Intel was forbidden from entering into agreements with its customers that

[370] The full FTC Complaint is *available at* http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf.

[371] Douglas H. Ginsburg & Joshua Wright, *supra* note 286. "A paradigmatic example of a recent misuse is the FTC's consent decree with Intel Corporation. That decree restricted Intel's ability to offer certain discount sto its customers, but those provisions at least arguably serve consumer welfare according to the FTC's economic theory of the case."

[372] *See* John Graubert and Jesse Gurman, *The FTC/Intel Settlement: One Step Forward, One Step Back?*, 25 ANTITRUST 8 (2011). ("For example, Intel allegedly offered market share or volume discounts to OEMs that discouraged them from using AMD CPUs by threatening to eliminate an entire (and sizeable) discount if an OEM fell below a specified level of purchases. As Intel remained at all relevant times a "must- have" supplier and the OEMs would still need to obtain a majority of their supply from Intel,' the Commission alleged that the loss of these discounts amounted to a substantial "tax" on purchases from alternative suppliers and that it was not possible for these competitors to match or make up these lost discounts.") *Id*.

[373] *See* Justin Whitesides, *The FTC's Competition Policy after the Intel Settlement*, 9 DEPAUL BUS. & COMM. L.J. 555, 565 (2011). In particular the Intel complaint concerned conduct four categories of conducts: 1) the chipmaker's exclusive agreements with computer manufacturers; 2) the deceptive software design; 3) the conduct in the GPU market, which includes tampering with interoperability, deceptive software design, and bundling to accomplish predatory pricing; 4) Intel's misrepresentations in the standard-setting process.

condition benefits on the customer's agreement to purchase all or most of its products rather than Intel's competitors. In addition, the consent decree required Intel to: 1) modify its intellectual property agreement with AMD, Nvidia, and Via (major Intel's competitors); 2) offer to extend Via's x86 licensing agreement for five years, which would have expired in 2013; 3) maintain a key interface (PCI Express bus), for six years in a way that would not limit the performance of geographic processing chips; 4) disclose to software developers that Intel computer compilers discriminate between Intel chips and non-Intel chips, and that they may not register all the features of non-Intel chips. Moreover Intel would have reimbursed[374] all software vendors who wanted to recompile their software using a non-Intel compiler[375].

About that the Chairman Leibowitz alleged that "[e]veryone, including Intel, gets a greater degree of certainty about the rules of the road going forward, which allows all the companies in this dynamic industry to move ahead and build better, more innovative products."[376] According to FTC the case showed that the FTC is "willing to challenge anticompetitive conduct by even the most powerful companies in the pastern-moving industries."[377]

Moreover, in November 2009, one month before the FTC's Complaint against Intel, this company paid AMD $1.15 billion to settle all their antitrust and patent disputes.[378] In November 2009, New York's Attorney General also filed an antitrust suit against Intel, and the parties reached a settlement that not required any changes in the Intel's conduct, but Intel would pay $6.5 million only to cover some costs incurred by the New York General in the litigation.[379] Finally, an antitrust Class Action was filed

[374] FTC has the power to impose a money relief.

[375] FTC, *In Matter of Intel Corporation*, docket no. 9341, Decision and Order, (October 29, 2010) *available at* http://www.ftc.gov/os/adjpro/d9341/101102inteldo.pdf.

[376] Jon Leibowitz, Chairman, Fed. Trade Comm'n, Press Release, *FTC Settles Charges of An- ticompetitive Conduct Against Intel* (Aug, 4, 2010), http://www.ftc.gov/opa/2010/08/intel.shtm.

[377] *Id*.

[378] Settlement Agreement Between Advanced Micro Devices Inc. and Intel Corporation, 11 November 2009, No. 05-441, available at http://download.intel.com/pressroom/legal/AMD_settlement_agreement.pdf.

[379] *See* Justin Whitesides, *supra* note 363, at 563.

against Intel[380], but the Delaware Court rejected the request to grant the case class action status, alleging that it had no jurisdiction over foreign conduct claims in a lawsuit that seeks monetary damages for U.S. consumers and business, who bought PCs with Intel CPU[381].

6.3 EU and US Intel Case in Comparison

Having analyzed the EU and US Intel cases and the different solutions adopted by the antitrust agencies involved, we can reflect on the deterrent effect of each decision. Even though European Commission imposed a fine, it does not imply that this solution was the most deterrent. In US the Intel antitrust behavior was prosecute not only by the FTC, but also by the private parties. First, New York's Attorney General prosecuted the same antitrust conduct in November 2009. The State Attorneys in fact can sue the company for an antitrust conduct on behalf of their citizens. Second, there was also the attempt of a class action by the private parties. Its failure was due to a procedural issue and not to the absence of an antitrust violation. The US class action cannot be certified when the antitrust conduct concerns a non-US company. The US courts have no jurisdiction over foreign conduct claims in lawsuit that seek monetary damages for U.S. consumers and business. However it is important to keep in mind that if a US company violates the US antitrust law the private can bring both collective action (class action) or individually action (private suit). Consequently, the US

[380] *In Re Intel Corp. Microprocessor Antitrust Litigation*, No. 05-1717, (D.C. of Delaware), 2007. "Class Plaintiffs allege that they have been injured and will continue to be injured by this conduct "by paying more for x86 microprocessors purchased directly from Intel than they would have paid and would pay in the future in the absence of Intel's unlawful acts, including paying more personal computers and other products in which x86 microprocessors are a component, as a result of higher prices paid for x86 microprocessors by the manufacture of those products."

[381] *Id.* at 9. The Court concluded that "Class Plaintiffs have not satisfied the jurisdictional prerequisites of the FTAI with respect to their foreign conduct allegations . . . As the Supreme Court has recognized, '[f]oreign commerce is prominently a matter of national concern," and therefore, it is important for the Federal Government to speak with a single, unified voice. (Japan Line, LTD v. County of Los Angeles, 441 U.S. 434, 448 (1979).

companies accused of an antitrust conduct risk compensating private parties for their injuries by paying out the treble damages.[382]

Finally, Intel agreed to pay AMD, its main competitor, 1.15 billion for settling all their antitrust and patent disputes.

Therefore, comparing the EU and US Intel case, we cannot analyze only the antitrust Agency intervention — namely a fine order or consent decree. We must consider that in the US the deterrence effect is due more to private actions than to public ones.

Although the consent decree not represent a *prima facie* evidence, the company knows the risk of the private actions and it is kept in mind in deciding to settle an antitrust case or on the contrary opt for a trial. The investigated company likely is aware of the risk of private actions in seeking a settlement with the Agency, and it will be willing to make significant sacrifices to prevent these actions. That the deterrence flowed especially from the private enforcement is fundamental.

As before pointed out in the analyzed Intel cases, the European Commission ordered Intel to desist its antitrust violation and imposed a huge fine. The FTC instead identified specific remedies for improving the competitive dynamics of the affected markets[383]. The US antitrust agency has the power to shape unique remedies tailored to the particular case. It includes also several forms of monetary relief. For example disgorgement for improperly obtained monopoly gains, restitution, and asset freezes,[384] in this case adopted.

In conclusion, the question is: which antitrust agency intervention has greater respect for the antitrust efficiency goal?[385] Translated in to economic words, which antitrust

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[382] In this case Intel's conduct harmed consumers and competition by way of "higher prices" for CPUs and GPUs.

[383] *See* Justin Whitesides, *supra* note 363, at 586 As Whitesides noted the FTC has a unique ability. The FTC has some flexible fact-finding tools: "When the Commission was established in 1914, it was not intended to duplicate the functions of existing agencies, but rather to bring to bear on the problem of antitrust and unfair competition the "specialized knowledge and export judgment, continuity of experience and political independence, flexible procedures and efficient fact-finding methods (hopefully) characteristic of the administrative process."(FTC v. Dean Foods Co., 384 U.S. 597, 635 (1966)).

[384] FTC v. Mylan Labs. Inc., 62 F. Supp. 2d 25, 36-37 (D.D.C. 1999).

[385] For FTC *see* Justin Whitesides, *supra* note 363, at 588. According to the author "the appropriate measure of anticompetitive effect for the FTC is the aggregate welfare standard. The standard would consider any market

intervention better improves consumer welfare?[386] The deterrent effect is important, but we cannot neglect that efficiency is the ultimate goal of antitrust intervention every time.

7. Conclusions

At the first glance, settlement and deterrence might seem antagonists. However, this is not true. Although consent decrees do not imply a fine, in the US they can have for companies worse economic consequences than a fine. This circumstance depends on the kind of remedies identified by the decree. If a company must break-up into a number of companies or provide to its competitors codes or other fundamental resources of its own business, probably the cost of this solution is not far from the cost of a huge fine. AT&T and Standard Oil are only some examples.

We have to take into account that for legal system it is fundamental to guarantee both the deterrent effect and its ultimate purpose.

If this purpose is to improve the efficiency, maybe to insist upon fines and heavy economic consequences that can cause the failure of a company is not the best solution.

Nevertheless, we must consider that if it is easier to elude the law enforcement or is less expensive to violate than comply with the law, probably the subjects affected by regulation would have an incentive not to observe rules. Furthermore, a tool as consent decrees could contain provisions that can go beyond the goals of antitrust law.[387] The remedies provide by the decree, as we have seen in the previous chapter, might regulate the entire market and outline its future.[388]

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distortion to be sufficiently damaging to warrant investigation, but it would not be so quick to conclude that monopoly price alone is sufficiently harmful, because such pricing can, in the long run, be social beneficial."

[386] *See* Robert Bork, *Antitrust and Monopoly The Goals of Antitrust Policy*, AM. ECON. REV. 242, 244 (1967).

[387] Douglas H. Ginsburg & Joshua Wright, *supra* note 286, at 4.

[388] *See* Chapter IV.

In short, the task at hand is to address to the following questions: what are the goals of antitrust law? Which is the main one? In other words, is it more important to guarantee deterrence or efficiency?

Rosch noted that in conducts as cartels, namely horizontal restrictions, deterrence is the primary goal of antitrust enforcement[389]. Therefore, is this case an order to desist from an antitrust conduct and sanction would be preferred with respect to the consent decree.

However, the goals of antitrust law have not only one interpretation, but they have several wide and flexible interpretations.[390] Each interpretation seems dependent on the specific circumstances of a case, and this could both improve efficiency of markets and compromise certainty of law and principle of legality. How can companies comply with the law if its boundaries are uncertain? Especially in common law systems judges have to provide rules of behavior to a community. If the judge's decisions anytime change depending on circumstances, where are rules and standards with companies must comply? Consequently, are companies, that are typically "risk adverse" incentivized to invest in markets with unclear or no rules?

Interesting is the view proposed by Alan Greenspan, according to which, "[t]he world of antitrust is reminiscent of Alice's Wonderland: everything seemingly is, yet apparently isn't, simultaneously . . . it is a world in which the law is so vague that businessmen have no way of knowing whether specific actions will be declared illegal until they hear the judge's verdict — after the fact."[391]

Flexibility is a double-edged sword. It supports and harms markets at the same time. The lack of a bright line rule and a widespread use of consent decrees imply an increase of social costs owing to uncertainty regarding companies to be prosecuted.

Therefore, what solution is recommended for markets and, in particular, consumer welfare? The antitrust system needs to seek an appropriate compromise that accounts

[389] Thomas Rosch, *supra* note 339, at 4.

[390] Douglas H. Ginsburg & Joshua Wright, *supra* note 286, at 8.

[391] Alan GREENSPAN, ANTITRUST, IN CAPITALISM: THE UNKNOWN DEAL IDEAL, 63, 66 (AYN RAND ED., 1967).

for the need of both deterrence and efficiency to protect the consumer welfare that Bork held is the only goal of the antitrust policy.[392]

A possible solution could be the use of the generic tool of equity, which is recognized in every branch of law and in the majority of legal systems.

Equity, argued one of the most important and antique economists, is a "correction of law whether it is defective owing to its universality."[393] Equity re-establishes the same equilibrium recommended in a market when no law is available.

Hence, both settlements and orders have different *pros* and *cons*, and to favor only for one of these solutions would be inappropriate.

The desirable solution is both to seek the best tool, on a case-by-case basis, evaluating the interests involved, and to provide, when it is feasible, a bright line rule. In sum, rules are important, as flexibility, and equity might establish on a case-by-case basis the priorities of markets, which needs not only flexibility and efficiency but also bright line rules to prevent opportunistic conducts and to assure a fair competition. Equity is a rule, but it is a flexible rule, and equity can adapt to manifold circumstances. Judges could dictate the same standards of equity for companies.

[392] Robert Bork, *Antitrust and Monopoly The Goals of Antitrust Policy*, AM. ECON. REV. 242, 244 (1967).

[393] ARISTOTLE, THE NICOMACHEAN ETHICS 146 (R.W. Browne trans., COX (Brothers) & WYMAN 1850).

VI. AT&T CONSENT DECREE—EFFECTS ON COMPETITION AND TECHNOLOGICAL INNOVATION

1. Introduction

Telecommunication has traditionally been a regulated industry of the U.S. economy, and the main idea was that because the market for telecommunication services was a natural monopoly, regulation was necessary[394] to protect consumers from abuse of monopoly power.[395] The Federal Communications Act of 1934, on the one hand, recognized that a single firm—AT&T—would "own and operate the entire telecommunications system,"[396] and on the other hand, established an independent U.S. government agency—the FCC [397] —to regulate and oversee the telecommunications industry, and in particular the monopolist AT&T.

Since the beginning, the main goal of regulator was to achieve efficiency in the different telecommunications markets by comparing costs and benefits of each policy. By doing so, regulation system strived to identify the policy, whose social benefits exceed its social costs.

In Europe, that approach bring to mind the European doctrine of proportionality,[398] according to which, cost-benefits of a rule are analyzed by the regulator to assess the net effect of a policy on consumers, manufactures, and the entire economy involved.[399]

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[394] Paul W. MacAvoy & Kenneth Robinson, *Winning By Losing: The AT&T Settlement and its Impact on Telecommunications*, 1 YALE J. ON REG., 2 (1984). The American telecommunications industry represents a sector of the economy that is strongly regulated. For istance, both the FCC and most state regulatory agencies strive to strike *just and reasonable* prices, and to assure the universal service. In particular, the agencies alleged that "to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and world-wide wire and ra- dio communication service with adequate facilities at reasonable charges."

[395] *See e.g.*, Theon Van Djik, *General or Specific Competition Rules for Network Utilities?*, 2 J. NETWORK IND. 93, 93, 95 (2001); Nicholas Economides, *The Telecommunications Act of 1996 and its Impact*, JAPAN AND THE WORLD ECONOMY 455, 458 (1999). The main idea behind regulation was that it was necessary because the market for telecommunications services was a natural monopoly, and therefore a second competitor would not survive. Regulation was imposed to protect consumers from monopolistic abuses.

[396] Herbert Hovenkamp, *Antitrust and Regulatory Enterprise*, COLUM. BUS. L. REV. 335,367 (2004).

[397] Federal Communication Commission, *What we do*, available at http://www.fcc.gov/what-we-do.

[398] *See e.g.* BRIAN HARRIS OBE QC, ANDREW CARNES, DISCIPLINARY AND REGULATORY PROCEEDINGS, 7 th ed., Jordans Publishing, (2013).

Having outlined the regulation effects of consent decrees in chapter 4,[400] here similarly to regulator in evaluating benefits and costs of a policy, I analyze cost and benefits of this antitrust tool by examining one of the most relevant consent decree imposed in a regulated industry—telecommunication.

I speak about AT&T case that many scholars,[401] economists[402] and courts[403] studied and analyzed to understand the concrete effects of antitrust intervention in regulated markets and the conflict area with regulatory agency.[404] The break-up of the Bell System probably represents the most important set of antitrust consent decrees even concluded with the breakup and regulation of the former Bell System.[405] As we will see, over the century three antitrust major consent decrees involved the Bell System. All based on monopolization theories.

In dealing with AT&T case, I attempt to address some questions, such as: what remedies a consent decree might impose? What are the factual effects of this antitrust instrument? Again, what are costs and benefits of consent decrees in the affected markets and economy as a whole? In short, my goal is to clarify and understand whether consent decrees aid rather than harm markets and what factual consequences it brings on economy as a whole.

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

[400] *See* Chapter three. *See also*, Gregory J. Sidak, *Remedies and The Institutional Design of Regulation in Network Industries*, L. REV. M.S.U.D.C.L. 741 (2003). "There is an intermediate institutional design for imposing remedies in network industries in the United States that has grown with the speed and tenacity ofa weed. It is the consent decree. The Antitrust Division (and to a lesser extent, the Federal Trade Commission) sues a company or group of companies for violating the antitrust laws. The case is then settled pursuant to a consent decree. In other words, issue-specific litigation leads to a negotiated, prospective regime of company-specific regulation."

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

[402] *See e.g.*, 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); 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).

[403] United States v. AT&T, 552 F. Supp. 131, 170 (D.D.C. 1982): United Shoe Mach. Corp., 258 U.S. at 456-57.

[404] Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, COLUM. BUS. L. REV. 335, 342 (2004). According to Hovenkamp, because antitrust intervenes only when regulation leaves off, the former plays a residual role. In particular, "Antitrust law [would take] a market's regulatory structure as given, warts and all, and tries to prevent injuries to competition that the regulatory process leaves untended. Competing with a regulatory regime or substituting its judgment for that of government officials is not antitrust's purpose."

[405] RICHARD EPSTEIN, ANTITRUST CONSENT DECREES IN THEORY AND PRACTICE: WHY LESS IS MORE (2007).

In Part II, I provide an overview of the case and I describe the main facts and antitrust issues involved. Then, in Part III, I identify the affected markets by the AT&T consent decree and the main FCC's regulations that involved those telecommunications markets during the last century. More in details, by analyzing AT&T's market shares, the price of the telecommunications products, and the total revenues of the U.S. telecommunications industry during and post the implementation of the 1982 consent decree, I compare costs and benefits of this antitrust decision. In sum, if social costs of the regulatory decision designed by judge Green, DOJ and AT&T in 1982 exceed its social costs, and whether the terms of the consent decree had achieved the greatest possible net increase in economic welfare.

Finally, I compare the effects of such antitrust decision with the effects of the Telecommunication Act of 1996 enacted by the FCC. This comparison might clarify in efficiency terms whether antitrust intervention is more recommended than the regulator's policy. Translated in economics words, if antitrust agency in certain circumstances is the best subject to regulate and develop competition on markets. Yet, the relation that between antitrust and regulation law exists.

We cannot neglect that telecommunications industry represents a crucial sector for the development of economy. It concerns technological innovation—the motor of growing of each economy. Hence, the changing of telecommunications regulation and its markets boundaries might concern not only competitive dynamics, but also the quality of our leaving. The third industrial revolution told by Rifkin[406] ascribes a fundamental role to telecommunications. He argues that "[i]nternet technology and renewable energies are beginning to merge to create a new infrastructure for a Third Industrial Revolution (TIR)."[407] Therefore, the role of telecommunications is crucial. By imposing rules to telecommunications markets, the antitrust agency became a protagonist of this revolution and its policy needs to be taken into account not only for antitrust purposes.

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[406] JEREMY RIFKIN, THE THIRD INDUSTRIAL REVOLUTION: HOW LATERAL POWER IS TRASFORMING ENERGY, THE ECONOMY, AND THE WORLD (Palvagrave Macmillan 2013).

[407] *Id*. at 2.

2. AT&T – Facts and Concerned Issues

On February 28, 1885 was formally born the American Telephone and Telegraph Company. Since that day, the controversial issue about the role of competition and antitrust in Telecommunication began. AT&T, a subsidiary of the American Bell Telephone Company, operated long-distance telephone lines to interconnect local exchange areas of the Bell companies. The original plan was to extend through the AT&T company the so-called electric telegraph lines to connect "each and every city, town, or place in said state, and each and every other of the United States, and in Canada and Mexico . . . and by cable and other appropriate means with the rest of the known world . . ."[408]

AT&T's capital stock valued $ 100.000. It had 1,000 shares owned by four shareholders. Then, the company structure quickly changed becoming a holding company that operated the long-distance network and was the parent company of Bell System.

Today, the AT&T capital stock is valued $ 183,813,710,000, and there are 21,816,753 million shares divided among 5,311,000,000 shareholders.[409]

In sum, the physiognomy of AT&T dramatically changed over years, and antitrust intervention contributed in this process that involved the entire telecommunication industry. In particular, antitrust intervention assisted this company during its growing and developing in the telecommunication world, which from a natural monopoly became a sector highly competitive. .
A relevant antitrust intervention was in 1949,[410] but the debate on the role of competition regulation in telecommunications began earlier in 1890s when expired the

[408] HARRY M. SHOOSHAN III, *supra* note 387, at 9.

[409] See NASDAQ data, *available at* http://www.nasdaq.com/symbol/t/stock-report.

[410] Robert B. Friedrich, *Regulatory and Antitrust Implications of Emerging Competition in Local Access Telecommunications: How Congress and the FCC can Encourage Competition and Technological Progress in Telecommunications*, 80 CORNELL L. REV. 646, 655 (1995).

first Bell patents allowing competitors to enter into local service.[411] The telephone industry entered a period of impotent competition, and AT&T lost ground to the competitors.[412]

However, by 1909 with the presidency of Theodore N. Vail, AT&T started a plan to restore Bell's dominant position by acquiring independent telephone companies involved, in addition to but control of Western Union. Whether independent companies resisted, AT&T left themselves without connection to the facilities of surrounding companies. In other words, the telecommunication giant refused to interconnect independent local exchange carriers to its long-distance network. By doing so, the market position of many independents became indefensible.

According to Vail, the telephone system needed for "universal, independent and intercommunication, affording opportunity for any subscriber of any other exchange…"[413] From its point of view there should be "one policy, one system [AT&T's] and universal service, no collection of separate companies could give the public the service that [the] Bell… system could give."[414] Furthermore, Vail alleged that the U.S. would have to pay a price for the telephone system.

In sum, Vail promoted for a private monopoly subject to regulation.

A number of independent telephone companies held out Vail's view, and used antitrust laws to contrast its private monopoly theory.[415] AT&T strategies in-fact attracted the attention of the Department of Justice. During those years, there were two important antitrust interventions. The Attorney general blocked temporarily a

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[411] Roger G. Noll, *The Role of Antitrust in Telecommunications*, 40 ANTITRUST BULL. 501 (1995).

[412] HARRY M. SHOOSHAN III, *supra* note 387, at 10. "By 1907, the Bell System had 3,132,000 telephones in service compared to about 2,987,000 for ten independents."

[413] *Id*., at 10.

[414] MILIND M. LELE, MONOPOLY RULES: HOW TO FIND, CAPTURE AND CONTROL THE WORLD'S MOST LUCRATIVE MARKETS IN ANY BUSINESS 44 (CROWN PUBLISHER 2005).

[415] On the definition of natural Monopoly *see e.g.*, Daniel F. Spulber, *Deregulating Telecommunications*, 12 YALE J. ON REG. 25, 31 (1995). "A given production technology is said to exhibit the property of natural monopoly if a single firm can supply the market at lower cost than can two or more firm." *Id*. According to Spulber, "traditional justifications for regulating industries, such as the presence of natural monopoly technologies, may no longer apply in the presence of technological change and competitive entry." Generally, the natural monopoly concept is credited to John Stuart Mill. JOHN S. MILL, PRINCIPLES OF POLITICAL ECONOMY 132-54 (W.J. Ashley, ed., Augustus M. Kelly 1961) (1848).

consolidation of independents in Ohio and the Interstate Commerce Commission[416] started an investigation to assess the monopolization conduct of AT&T.[417]

In 1913, apparently the Kingsbury Commitment resolved these disputes,[418] but AT&T granted a protection from competitor's entry and consolidated its control over the urban markets and local distance traffic.[419] Indeed, the vertical integration issue remained unresolved.[420]

In short, the Kingsbury Commitment was an agreement between AT&T and Attorney General,[421] according to which AT&T had to: 1) divest itself of Western Union, which it had acquired in 1908; 2) stop acquiring rivals; 3) not challenge the imposition of economic regulation. But those provisions were quickly evaded. Indeed, the DOJ having considered more than 100 acquisitions by AT&T authorized almost all of them.

Although a failure in practice, the Kinsbury Commitment of 1913 constituted the basis for an economic regulation of telecommunications by a national policy later replaced by the Federal Telecommunications Act of 1996.[422]

Today the issues involved in the telecommunication industry does not changed. Nowadays economists and scholars still reflect on the *pros* and *cons* of the vertical integration in this specific sector. The current debate on the Mexican telecommunications regulation is only an example.[423] Although on the one hand an

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[416] The interstate Commerce Commission was responsible for both the regulation of railroads of the day and regulation of telephone services and prices.

[417] BARRY G COLE, AFTER THE BREAKUP: ASSESSING THE NEW POST-AT&T DIVESTITURE ERA, 11-11 (Columbia Univ. Press, 1991).

[418] *Id*.

[419] *See e.g*. ELI M. NOAM, INTERCONNECTING THE NETWORK OF NETWORKS 20 (Massachusetts Institute of Tecnology, 2001).

[420] Roger G. Noll, *The Role of Antitrust in Telecommunications*, supra note 399, at 502.

[421] Here, the commitment was formalized by a letter rather than as part of consent decree.

[422] The Telecommunications Act of 1996, signed by President Bill Clinton, represented the most significant law in the American telecommunication industry. See Telecommunications Act, 104th Congress (1995-1996), S.652.ENR, available at http://thomas.loc.gov/cgi-bin/query/z?c104:S.652.ENR. The FTC alleged that the goal of the law was to " let anyone enter any communications business – to let any communications business compete in any market against any other."

[423] In Mexico, for example, the vertical integration in the telecommunication market is in a current debate. *See e.g*., Declaration of Economists and Antitrust Scholars on Behalf of Radiomóvil Dipsa S.A. de C.V. (Telcel), Case File No. DE-37-2006, (Oct. 2011), *available* at http://www.americamovil.com/amx/en/cm/news/2012/America_Movil_comments_to_OECD_FINAL_A.pdf

integrated company as AT&T achieved efficiency through economies of scale and scope—AT&T was the leading example of efficient vertical integrated company—on the other hand the telecommunication giant granted an inefficient anticompetitive extension of monopoly power into markets vertically integrated.[424]

In the 1949, the issue at hand was exactly the vertical integration[425] of common carriers and manufacturing. As Noll noted, a company needs to have market power in one market and ability to use that market to be motivated to engage in vertical foreclosure, which consists of two foreclose strategies: refusal to deal, and exclusionary pricing.[426] Conversely, a company that attempts a vertical foreclosure policy would fail without the ability to preclude competitive entry.

Before the 1949, Congress considered during the debate on the Communications Act of 1934, the idea to forbid common carriers from manufacturing equipment. However, the final bill did not implement a similar provision and asked FCC only to exam the issue and report back.[427]

Thus, in 1949 the Department of Justice filed a suit against the telecommunication giant alleging that AT&T and its subsidiary Western Electric monopolize the telephone equipment market.[428] According to the DOJ, AT&T excluded other competitors from that market earning monopoly profits[429] "though acquisitions and

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[424] Roger G Noll, *The Role of Antitrust in Telecommunications*, 40 ANTITRUST BULL. 501, (1995). As Noll pointed out, the issue "*was and remains whether an integrated company archives efficiency through economies of scale and scope, or profitable but inefficient anticompetitive extension of monopoly power into vertically related markets*." See INGO VOGELSANG & BRIDGER M. MITCHELL, TELECOMMUNICATIONS COMPETITION – THE LAST TEN MILES 16 (The AEI Press, 1997). As the authors noted "fundamental changes in the basic technologies that support telecommunications [were] altering the longstanding comparative advantage of vertically integrated firms. Economies of specialization [gave] some suppliers advantages in producing at a single layer of the hierarchy."

[425] On vertical integration, *see e.g.*, Roger G. Noll, *The role of antitrust in telecommunications*, 40 ANTITRUST BULL. 501, 502-520 (1995).

[426] *Id*. at 503.

[427] *Id*.

[428] See Fred W. Henck & BERNARD STRASSBURG, A SLIPPERY SLOPE, THE LONG ROAD TO THE BREAKUP OF AT&T, Greenwood Press, 57 (1988).

[429] *See e.g.*, BARRY G COLE, AFTER THE BREAKUP: ASSESSING THE NEW POST-AT&T DIVESTITURE ERA, Columbia University Press (1991).

terminations of purchasing contracts." The complaint [430] held that the telecommunication giant restrained trade, in violation of Section 1, 2 and 3 of the Sherman Act, in manufacture, distribution, sale and installation of telephones, telephone apparatus, equipment, materials and supplies.

In other words, the problem at stake was the so-called Bell System's bottleneck control over local telephone switches.

The U.S. telecommunications industry context is composed of three tiers of companies. AT&T is located at the fist layer, namely the nation's largest corporation, which through some fully or partly owned operating companies and its Long Lines department supplied about 90% of all domestic and international long-distance service. Western Electric, a subsidiary of AT&T, was the lager producer of telephone equipment, which supplied the material needs of the entire Bell System.[431]

General Telephone and Electronics (GTE) and United Telecommunications represented the second tier of corporations in telecommunications centers around a cluster of large that is vertically integrated telephone holding companies and that provided service to the less populated areas of the country. Finally, about 1,500 rural telephone companies constituted the third layer of the telephone industry, which serve approximately twenty-five percent of the country's geographical area.

It should be noted that in 1945 the percentage of American households with telephone service reached fifty percent, in 1955 seventy percent, and in 1969 ninety percent.[432]

These data are referred to the period before the breakup of Bell Company in 1982.

In sum, AT&T dominated all phases of the telecommunications marketplace. AT&T was the parent company and with its units—Bell Telephone Laboratories, Inc.,

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[430] The complaint is reprinted *in Consent Decree Program of the Department of Justice Hearings Before the Antitrust Subcommittee (No. 5) of the Committee on the Judiciary pt. I1 Vol. I, 85th Cong., 2d Sess. I, 54 (1958)*, at 1719. The complaint was primarily the result of a report by the Federal Communications Commission (FCC) following a four years investigation of the telephone industry in the United States.

[431] See e.g., 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).

[432] A Brief History: The Bell System, available at https://www.corp.att.com/history/history3.html.

Western Electric Co., and Bell Telephone companies—constituted the so-called *Bell System*.[433]

FIGURE A

AT&T Services:

Long Distance
Regional Carrier
Local Carrier
In-Home Network
End Device

For this reason, in 1949 action, Government[434] sought the separation of Western Electric from the Bell System and required to divest its 50 percent stock interest by Western in Bell Telephone Laboratories to contrast this issue (AT&T owned the other 50 percent).[435] Moreover, the action required compulsory licensing on a non-discriminatory basis of AT&T patents.[436]

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[433] Notes, Antitrust: Consent Decree: The History and Effect of Western Electric Co. V. United States, 1956 Trade Cas. 71,134 (D.C.N.J. 1956), 45 CORNELL L. Q. 88 (1960).

[434] AT&T, 552 F. Supp. at 135-36. The government argued that Bell System "had monopolized and cospired to restrain trade in the manufacture, distribution, sale, and installation of telephones, telephone apparatus, equipment, materials, and supplies, in violation of sections 1,2, and 3 of the Sherman Antitrust Act."

[435] *Id*. at 2. *See also*, Fred W. Henck & BERNARD STRASSBURG, A SLIPPERY SLOPE, THE LONG ROAD TO THE BREAKUP OF AT&T, *supra* note 416, at 57. "The relation of the operating telephone organizations, the Long Lines Department and the Bell System associated companies to AT&T would not be changed. They would, however, have to buy their equipment through competitive bidding."

[436] *United States v. AT&T*, 1982-2 Trade Cas. 164,979 at 73,074-075; *see also*, Report of the Antitrust Subcomittee of the House Committee on the Judiciary on the Consent Decree Program of the Department of Justice, 86th Cong., 1st Sess. 1, ix (1959), at 33-34.

In particular, the court was asked both divestiture of Western by AT&T through the separation of manufacturing company into three regional corporations, and divestment of the 50 percent stock interest in the Bell Telephone by Western.[437] According to Attorney General Tom Clark, "[t]he chief purpose of this action [was] to restore competition in the manufacture and sale of telephone equipment produced and sold almost exclusively by Western Electric at noncompetitive prices."[438] The complaint was a hard attack against the Bell system.[439]

Obviously, AT&T denied the allegations and argued for there were relevant advantages to a vertically integrated telephone holding companies. The telecommunication giant held that both federal and state agencies regulated all elements of Bell System and the disruption of the existing organization would not pursue any public interest.[440]

Because the 1956 Consent Decree did not call for divestiture or provide for any other structural relief required by government, that decree represented a major victory for AT&T. It contained seventeen provisions. Section 5 of the decree, for example, established that AT&T was "enjoined and restrained from engaging, either directly, or indirectly through its subsidiaries other than Western and Western's subsidiaries, in any business other than the furnishing of common carrier communications services."

Nevertheless, this Section was not applicable to several services among which furnishing services or facilities for the plaintiff or any agency thereof, or experiments for the purpose of testing or developing new common carrier communications services, and furnishing circuits to other communications common carriers. It means that the decree precluded AT&T from providing unregulated services.[441] Furthermore,

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[437] *See also*, Fred W. Henck & BERNARD STRASSBURG, A SLIPPERY SLOPE, THE LONG ROAD TO THE BREAKUP OF AT&T, *supra* note 416, at 57.

[438] Antitrust Subcommitee 1959, 33.

[439] Celillianne Green, *The 1982 AT&T Consent Decree- Strengthening The Antitrust Procedures and Penalties Act*, 27 HOWARD L.J. 1611, 1619-1626 (1984).

[440] *Id.* at 34.

[441] United States v. Western Electric Co., Civil Action No. 17-49, C.A. 82-0192. *See also*, Stanlet M. Besen & John R. Woodbury, *Regulation, Deregulation, and Antitrust in the Telecommunications Industry*, 28 ANTITRUST BULL. 39, 50 (1983).

it included the retention of the courts jurisdiction to modify or terminate the decree if circumstances had changed and ensured compliance with the decree.[442]

Many issues raised in the 1949 antitrust cases persisted. About twenty years later, a study of communications policy, carried out by President's Task Force on Communications Policy, observed that in the domestic common carrier industry "some maintain that independent manufacturers are deterred from attempting grater access [to Bell telephone companies] as a consequence of the industry's structure . . . ,"[443] and that "[i]n theory, the carrier's control of manufacturing could lead to a variety of undesirable consequences, such as uneconomic pricing, inadequate response to opportunities for innovation, and efficiency."[444]

However, the Report gathered only some *fragmentary evidence* leaving to the Justice Department and courts to value a new antitrust intervention.

In 1974, the DOJ filed a new antitrust suit against AT&T, Western Electric, and Bell Telephone Laboratories, Inc., which sough again to impose the divestiture of Western Electric. The DOJ and AT&T carried on a legal process which profoundly transformed the Bell System, well known as AT&T divestiture era. The three divestitures principals were Judge Harold Greene, William Baxter, and Charles Brown.

Judge H. Greene was the first one to assume his place on center phase.[445] The Greene's intent was to make the case a model of efficiency for courts. He believed that ongoing regulation of the Bell System was ineffective against a large integrated company.

In particular, he noted that "[o]ver the relative merits of regulation and competition. The evident adduced during the AT&T trial indicates that the Bell System has been

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[442] United States v. Western Electric Co., Inc., 1956 Trade Cas. (CCH) 68,246 at 71,143 (D.NJ. 1956). With respect to modification of consent decrees and retention of the court, *see also*, chapter two. This provision was relevant for the 1982 consent decree. Here, the form of settlement was immediately controversial, because AT&T asked for modifying the 1956 consent decree.

[443] President's Task Force on Communications Policy 1968, 39.

[444] *Id.*

[445] Originally, in November, 1974, the case was assigned to United States District Court, Judge Waddy. However, on June 22, 1978, AT&T case was assigned to District Court Judge Harold Greene because of Judge Waddy's death.

neither effectively regulated not fully subject to true competition. The FCC officials themselves acknowledge that their regulation has been woefully inadequate to cope with a company of AT&T's scope, wealth, and power."[446]

On January 15, 1981, the trial began and AT&T's defense involved around 300 witness, ten thousands of pages of documents, and over 24,000 pages of trial transcript.[447] Under contemporary antitrust law, the government to support AT&T's monopolization, had to establish both that AT&T had monopoly power over American's telecommunications, and that rather than compete through a superior quality product it intentionally acquired or maintained monopoly power.

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.[448]

A year later, the parties reached the famous settlement, approved by Judge Harold Greene that imposed the AT&T divestiture. The 1982 Consent Decree[449] was the first one where was applicable the Tunney Act[450] providing for public participation.

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[446] RICHARD EPSTEIN, ANTITRUST CONSENT DECREES IN THEORY AND PRACTICE: WHY LESS IS MORE, *supra* note 92, at 59.

[447] United States v. AT&T, 522 F. Supp. 131 at 140.

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

[449] See, BARRY G COLE, supra note 417 at 59. ("The lawsuit survived through two judges, three national administrations, four Congresses, and five Attorneys General before it was finally settled in 1982.") *Id*.

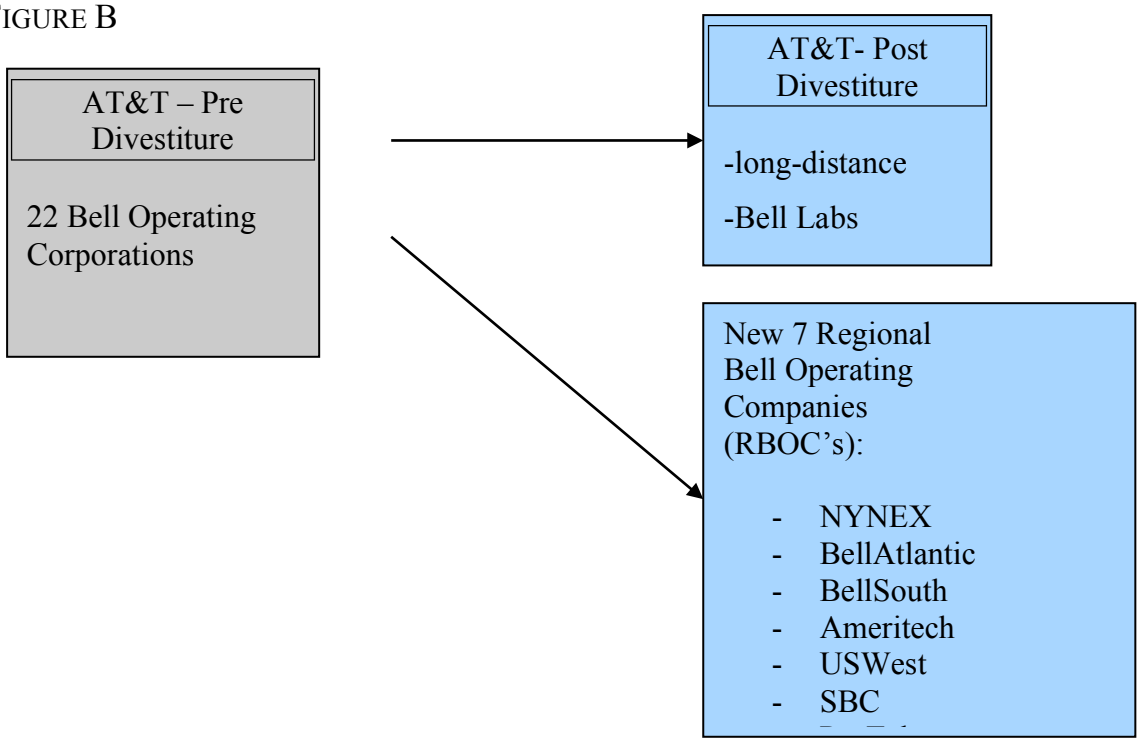
[450] ("Initially, both the Justice Department and AT&T took the position that the Tunnel Act did not apply because the settlement had come in the form of an agreement to modify the terms of the existing 1956 Consent Decree . . .Despite the initial controversy over form and procedure, it is the substance of the new decree that . . .intended to separate the competitive aspects of AT&T's business from the remaining elements of the Bell monopoly.") HARRY M. SHOOSHAN III, *supra* note 387, at 18. ("Because Judge Greene was uncertain whether the Tunney Act actually governed the proposal by the Justice Department and AT&T, he followed Tunney Act procedures without deciding whether the Act actually applied.") Thomas M. Mengler, *Consent Decrees Paradigms: model without meaning*, *supra* note 199, at 308. ("Application of the Tunney Act procedures to the 1982 AT&T decree negotiations provided for public participation and comment that was unprecedented in the negotiation of a consent decree.") Celillianne Green, The *1982 AT&T Consent Decree- Strengthening The Antitrust Procedures and Penalties Act*, supra note 117, at 1648.

Although AT&T kept its long-distance business, its manufacturing capability and its research arm, it surrendered its 22 local operating companies.[451]

The telecommunications giant had to divest its local Bell operating companies (BOCs), which were regrouped within seven new regional companies, each with its own geographic base, projected assets of $17 billion to $21 billion, and one long-distance company—the truncated AT&T. The divestiture intended to eliminate AT&T's capability to disadvantage rivals in the interchange or the equipment markets,[452] and it represented the largest court mandated breakup since 1911—namely the year of US Supreme Court's decision to breakup of Standard Oil.[453]

By doing so, AT&T was to operate exclusively in the long distance market, which would be open to competition from new carriers.

FIGURE B



[451] See, BARRY G COLE, supra note 417 at 8; Paul W. MacAvoy & Kenneth Robinson, *Winning By Losing: The AT&T Settlement and Its Impact on Telecommunications*, *supra* note 419 at 17-42; Celillianne Green, *The 1982 AT&T Consent Decree-Strengthening The Antitrust Procedures and Penalties Act*, *supra* note 427.

[452] *See e.g.,* HARRY M. SHOOSHAN III, DISCONNECTING BELL-THE IMPACT OF THE AT&T DIVESTITURE, *supra* note 387, at 5; Paul W. MacAvoy & Kenneth Robinson, *Winning By Losing: The AT&T Settlement and its Impact on Telecommunications*, *supra* note 419.

[453] *See* BARRY G COLE, *supra* note 417, at 5.

On the government side, the 1982 Consent Decree was driver by the assistant attorney general for antitrust, William Baxter. He was a well-known law professor at Stanford University, where he had thought about the case defining an appropriate resolution.[454] When he became the Assistant Attorney General of the Justice Department's Antitrust Division, Baxter had the chance to implement his resolution.

Baxter argued for prohibit AT&T from using its *bottleneck* regulated local exchange monopolies. Its solution was to "separate—quarantine—the competitive and potentially competitive from the monopoly portion of AT&T, and then to require the divested local exchange companies to provide all long-distance carriers equal access and service to their bottleck local facilities."[455]

The 1982 Consent Decree was mainly based on the Baxter solution. Its *quarantine theory* seemed a comprehensive and rapid solution to eliminate the issue of equal access and concerns about cross-subsidization.[456] Similarly to Judge Greene, Baxter believed that the breakup would remove AT&T's capability to disadvantage rivals not only in the interchange or the equipment, but also the interexchange markets.[457]

The final principal to take center stage was, the AT&T Chairman and Chief Executive Officer, Charles L. Brown, who succeeded deButts in February 1979. Beginning at age eighteen, Brown worked with AT&T for almost all his working life, and in April 1977 he became a President of the telecommunication giant.[458] Brown agued for 'A New Realism,' alleged that "[c]ompetition is here and it is growing. It's fact of life in our

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[454] "As viewed by Baxter, the 1982 decree was necessary because AT&T's control over the natural monopoly segment of the industry, local exchange service, had placed it in the position to leverage its power into other industry segments which depended on the local exchange network. For example, AT&T could leverage power by denying local service access to competitors, or discriminating in the quality of such access." Lawrence A. Sullivan & Ellen Hertz, *The AT&T Antitrust Consent Decree: Should Congress Change the Rules?*, BERKELEY TECNOLOGY L. J., *available at* http://www.law.berkeley.edu/journals/btlj/articles/vol5/Sullivan.pdf.

[455] See BARRY G COLE, *supra* note 417 at 7.

[456] About quarantine theory, *see e.g.*, J. GREGORY SIDAK & DANIEL F. SPULBER, DEREGULATORY TAKINGS AND REGULATORY CONTRACT, THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES, *supra* note 390, at 35ff.

[457] RICHARD EPSTEIN, *supra* note 92, at

[458] *See* BARRY G COLE, *supra* note 417 at 5.

business and has been for some time . . . AT&T is ready without preconceptions to explore alternative futures."[459]

The AT&T divestiture was not the only one relief of the 1982 consent decree. The decree established also that "[t]he Bell operating Companies are prevented from engaging in any 'non monopoly' business in an effort to eliminate their ability to abuse their position of dominance" and that "specifically barred the divested telephone companies from manufacturing or marketing customer premises equipment, from providing long-distance service, from providing directory advertising such as the Yellow Pages, and from offering services where they controlled the information content."[460]

In short, the main relief provisions established:

a) the AT&T divestment mentioned above;[461]

b) that the divested operating companies would provide equal access to all interchange carriers;[462]

c) AT&T permission to keep Long Lines, Western Electric, and Bell Laboratories;

d) the prohibition on AT&T entry into electronic publishing;

e) the retention by the operating companies of the right to sell or lease terminal equipment and of the Yellow Pages;

f) a repeal of the 1956 Consent Decree allowing AT&T to keep its patents and to provide unregulated services and equipment.

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[459] *Id.*

[460] *See e.g.* HARRY M. SHOOSHAN III, *supra* note 387, at 19. Moreover, Judge Greene "barred AT&T from using the Bell name or logo except in connection with Bell Labs, leaving that trademark in the hands of the divested local operatine companies." *Id.*

[461] The task of divestiture was huge. Richard Epstein, for example, defined it as a droconian relief. RICHARD EPSTEIN, *supra* note 92.

[462] Federal Trade Commission, Industry Analysis Division, Common Carrier Bureau, *Trends in Telephone Service* , (Sept. 1999), 6-1. ("For equal access to take place, the local exchange carrier had to convert their lines to equal access. The conversion of lines by local exchange carriers to equal access started in 1984. By the end of 1996, over 99% of the nation's lines had been converted.") *Id*. *See also*, FEDERAL TRADE COMMISSION, TRENDS IN TELEPHONE SERVICE, (1999).

Judge Greene established a number of conditions that the government had not requested. The settlement was a victory for the DOJ.[463]

However, I focus on the divestiture relief[464] and its pro or anticompetitive effects on affected markets. According to some scholars, divestiture was only an event, which sped up some things that were, however, going to occurred.[465]

A court assumed in the AT&T case a regulatory role.[466] Judge Greene's self-conscious effort to pronounce regulatory policy[467] was not, as I have discussed in chapter 3, without issues.[468]

By prohibiting the BOCs from participating in a wide variety of competitive markets, the divestiture agreement reduced the effective power of state regulators in regulating these markets. Moreover, in executing divestiture, the FCC "renounced the policy of burdering services in the federal jurisdiction of the states," and finally divestiture required the 'equal access' on local telephone companies.

In telecommunications the role of both competition and regulation has inevitably expanded. Regulation is complementary to competition. As Glen O. Robinson said,

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[463] *See* Stanley M. Besen & John R. Woodbury, *Regulation, deregulation, and antitrust in the Telecommunications Industry*, 28 ANTITRUST BULL. 39, 55 (1983).

[464] See e.g. HARRY M. SHOOSHAN III, *supra* note [–], at 56. According to the theory that supports the AT&T divestiture, "[o]perating companies control the 'bottleneck' of local access to subscribers. Hence, in the presence of binding regulation, they are likely to favor their own affiliated suppliers of interchange service and equipment. Severing the local distribution function from interchange service and equipment ends this vertical incentive to impede entry into the potentially competitive interexchange services and equipment markets. The justification for this separation must be that any joint economies of providing local exchange and interchange services are more than offset by the efficiency losses from Bell's Long Lines monopoly power in interexchange services and the one-time costs of the divestiture itself." However, as the author noted, there was no evidence on the existence of joint economies, and it was difficult to show that the divestiture was 'necessary welfare-enhancing.'

[465] A. Gray Collins, *Regulatory and Institutional Change*, in BARRY G COLE, *supra* note 417, at 97.

[466] Robert B. Friedrich, *Regulatory and Antitrust Implications of Emerging Competition in Local Access Telecommunications: How Congress and the FCC can Encourage Competition and Technological Progress in Telecommunications*, 80 CORNELL L. REV. 646, 685 (1995). ("Since 1982, AT&T and the BOCs have been subject to a two-tier regulatory scheme consisting of both FCC regulations and district court enforcement of the MFJ. This scheme has helped to create at least the appearance of competition in the long distance sector, but modem changes in telecommunications markets have obviated the need for the district court's role in the regulatory process.") *Id*.

[467] However, Judge Greene believed the goal of MFJ was to improve the industry competition, and regulation. See, BARRY G COLE, *supra* note 417, at 86.

[468] The FCC and several state regulatory commission, for example, hold that Judge Greene lacked the authority to enter the decree absent a finding by the regulators.

competition and regulation are like bread and butter.[469] For this reason the telecommunications policy of the regulator cannot be neglected in this study.

3. Affected Markets – FCC Regulatory Intervention

Having analyzed AT&T case and terms of the antitrust divestiture relief, I want outline the affected markets and the main FCC regulatory interventions during and after the AT&T antitrust lawsuit. The 1982 consent decree greatly assisted the FCC in carrying out its program in the common carrier telecommunication field. The Communication Act of 1934 specifies that the FCC have to prevent an overcharge or discrimination by communications carriers. Congress oversees that agency, which its regulatory challenge is both to update the present regulatory scheme to accommodate quick paced technological evolution and integration and, to protect the social welfare goals. The latter justifies the FCC's regulatory task of assuring the maximization of the overall quality and convenience of telecommunications, and the maximization of the availability and affordability of telecommunications services.

Here, I will compare *pros* and *cons* of divestiture consent decree, and whether that structural relief wanted by antitrust agency contributed to the growing of telecommunication markets rather than harmed that industry. More specifically, the role played by the AT&T consent decree in telecommunications markets, the relation between that consent decree and the FCC's intervention, and costs and benefits of each intervention.

The breakup of AT&T marked the end in telecommunication industry of the regulated *de facto* monopoly era.[470] Although AT&T continued for a time to dominate

[469] *See also*, Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, *supra* note 392, 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.")

[470] 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.

telecommunication markets, its market share, as show the Figure E, significantly decreased. But, let's see how antitrust and regulation intervention worked together during and after the AT&T case for promoting efficiency on telecommunication industry.

3.1 Telecommunication Industry

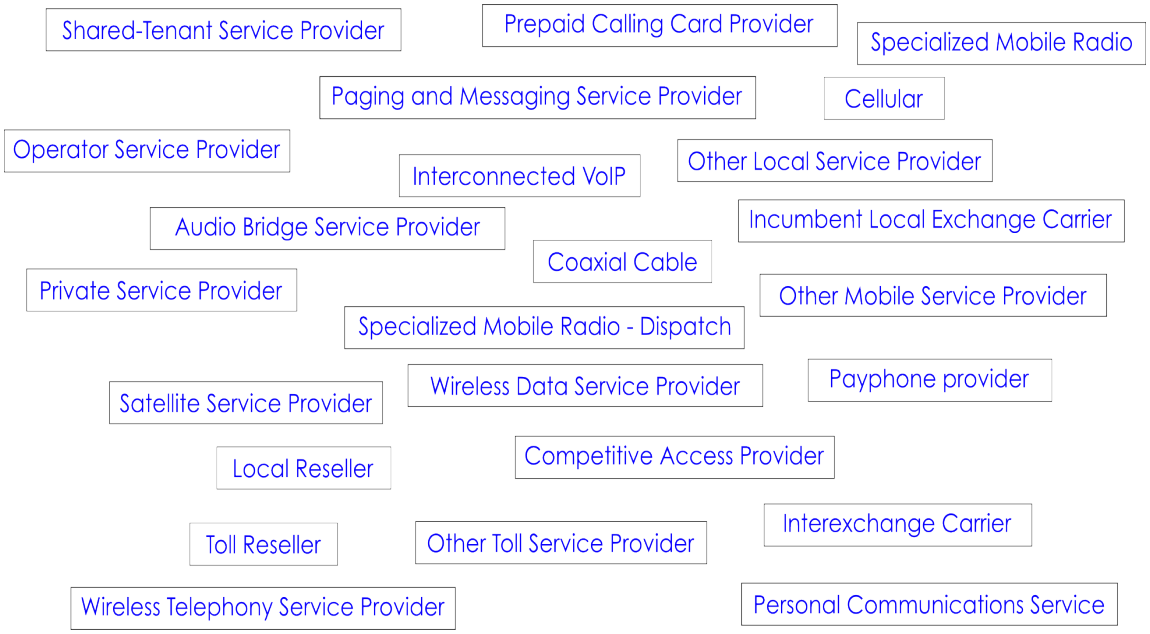
As I specified above, the U.S. telecommunications industry is regulated. Today that industry appears completely different than before the 1984—the year of AT&T divestiture. From 1984 to 1996, it encompassed the traditional areas of: long distance, regional carrier, local carrier, in-home network and end device.[471]

Conversely, today it includes advanced technology-based services, as wireless communications.[472] Here below some of those services:

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

[472] Wireless telecommunications are transmitted through a cell network. A series of adjacent hexagonal-shaped 'cells' composes the cell network, and each cell contains a radio transceiver that transmits and receives signals within a relatively small geographic area.

This cell structure is necessary to maximize the availability of wireless telecommunications, which traditionally have been broadcast over a very narrow band of available radio frequencies allotted to cellular providers by the FCC.



In sum, telecommunications industry encompasses day-by-day new products and services. For example, in the year of AT&T divestiture a number of independent conference call providers went into business of Audio Bridge Service Provider.[473] Cellular network, as well as Voip or internet phone service, has been a lot of growth in resent years, while in the U.S. fixed landline subscribers decreased every years.[474] Volgelsang noted that in 2008 there were over 4 billion mobile users and about 1.2 billion fixed line users[475] showing the overtaking of mobile against fixed line. Cellular

[473] An audio bridge is a piece of equipment that is used to do a telephone conference calls. An audio bridge serves as the point of termination for the connections that are to take place in the collective call. It creates a common hub where all the lines can connect and interact with ease.

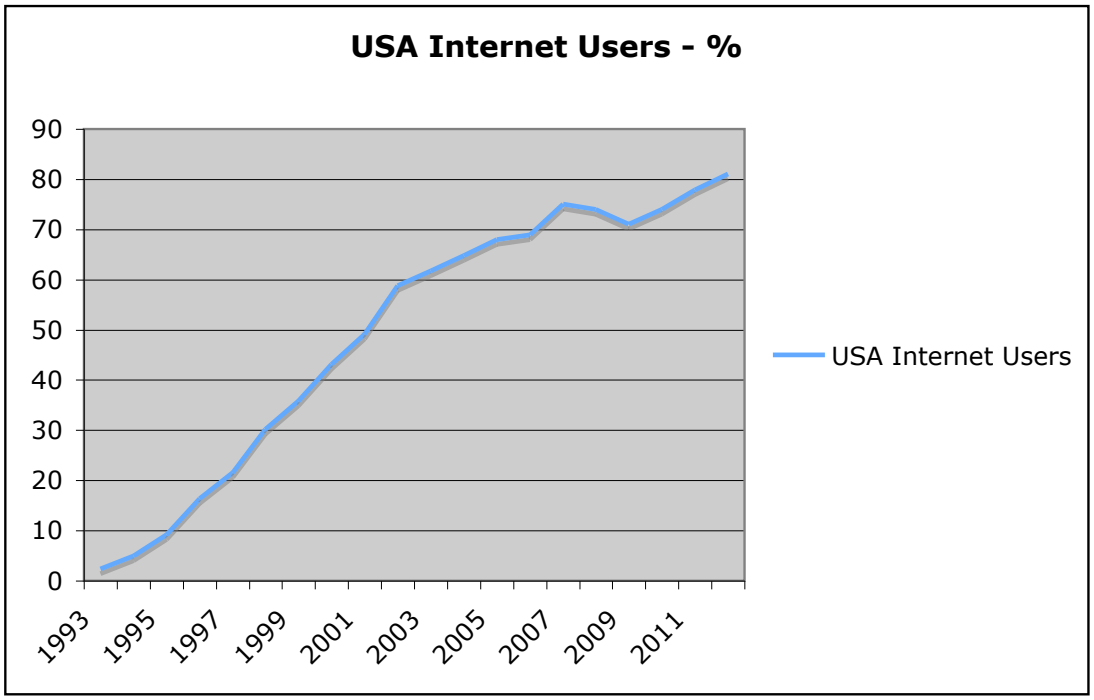
[474] Ingo Vogelsang, *The relationship between mobile and fixed line communications: A survey*, 22 INFORMATION ECONOMICS AND POLICY 4, 21 (2010). The main factor that explains the increased the fixed-to-mobile substitution seem to be "the demand substitution from large price reductions in mobile relative to fixed services and demand shifts from network effects and the relative quality increase." *See also*, Mark Rodini, Micheal Ward & Glen A. Woroch, *Going Mobile: Substitution between Fixed and Mobile Access*, 27 TELECOMMUNICATIONS POLICY 27, 457-476 (2003). Rodini, Ward and Woroch empirically evaluated the substitutability of fixed and mobile services for telecommunications access using a US household survey conducted over the period 2000-2001. Such analysis corroborated that the second fixed line and mobile services are substitutes for one another. According to this study, "[t]he promise of fixed-mobile competition turns, in part, on whether, under prevailing market demand and cost conditions, mobile alternatives prevent fixed-line carriers from exercising market power. As costs of mobile telephony continue to drop, allowing prices to fall and quality to rise, mobile becomes an increasingly attractive alternative to fixed-line service. Technically, mobile is a substitute because users can place and receive voice calls just as they do with fixed service."

[475] Ingo Vogelsang, *The Relation between Mobile and Fixed Line Communications: a Survey (2010*), *available at* http://businessinnovation.berkeley.edu/Mobile_Impact/Vogelsang_Survey.pdf.

phone market recorded a continuous increase in the number of customers and revenues, especially due to modern smart phones, which are able to provide many new services for their users. And, probably an overtaking of wireless communications will occur against mobile. Voip technology has better call quality, in addition to low cost of making phone calls portability, and flexibility of use.[476]

The last data described by Figure C show that internet users in the U.S. rapidly increased in about fifteen years. In 1994, there were 3 million internet users, and in four years this number has increased to over 100 million users, against telephony users that grew merely five percent per year in its first twenty years. [477] Hence, an overtaking of wireless communications is not only possible, but also tangible.

FIGURE C



Source: WordBank

[476] Federal Communication Commission, *Consumer Guide – Voice over Internet Protocol (VoIP)*, available at http://transition.fcc.gov/cgb/consumerfacts/voip.pdf. In particular, VoIP services convert your voice into a digital signal that travels over the Internet. If you are calling a regular phone number, the signal is converted to a regular telephone signal before it reaches the destination. The FCC regulates Voip services. In June 2005 the agency imposed 911 obligations on providers of interconnected VoIP services. Moreover, the FCC requires interconnected VoIP providers to comply with the Communications Assistance for Law Enforcement Act of 1994 (CALEA) and to contribute to the Universal Service Fund, which supports communications services in high-cost areas and for income-eligible telephone subscribers.

[477] Jerry Hausman & Howard Shelanski, *Economic Welfare and Telecommunications Regulation: The E-Rate Policy for Universal-Service Subsidies*, 16 YALE J. ON REG. 19, 20 (1999).

In sum, the U.S. telecommunication context is going through a relevant changing due to a number of factors. The first and probably most significant is the rapid technological change[478] in both key inputs of telecommunications and computer-based services and complementary goods.[479] For instance, thanks to telecommunication cost reductions internet was accessible to the general public. The rapid developing and versatile technologies of telecommunication, transformed the product of telecommunication industry from a simple and easily regulated, "into a constantly and unpredictably proliferating and evolving collection of services provided with a correspondingly diversified and evolving collection of technologies by an ever-expanding, diverse set of providers."[480]

In 1995, there was the impression that the technological revolution in the telecommunication industry brought to view traditional communications like telephone transmitting voice and data communications to fixed location as antiquated.[481]

From the 1930s to 1981, as we have pointed out, AT&T dominated the entire telecommunication industry in the United States.[482] Because the physical limitations of telephony at that time, telephone service was considered as 'natural monopoly,' and

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[478] *See e.g.*, INGO VOGELSANG & BRIDGER M. MITCHELL, TELECOMMUNICATIONS COMPETITION – THE LAST TEN MILES 5, *supra* note 412. "The dynamics of that changing landscape are driven by advances in tecnology and market entry by many types of firms." INGO VOGELSANG & BRIDGER M. MITCHELL, TELECOMMUNICATIONS COMPETITION – THE LAST TEN MILES, *supra note* 412, at 21-27. There were three broad developments that profoundly altered the Local Exchange Carriers marketplace—fiber optics, wireless telephony, and digital electronics.

[479] See, BARRY G COLE, *supra* note 417 at 66. Sharon L. Nelson, for instance, provided among her several predictions, the idea that advanced telecommunication would become significantly and increasingly important in local life. Similarly, Ithiel deSola Pool provided several predictions in his book, entitled *Forecasting the Telephone: A Retrospective Technology Assessment of the Telephone*.

[480] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), PRICE CAPS FOR TELECOMMUNICATIONS POLICIES AND EXPERIENCES, available at http://www.oecd.org/sti/ieconomy/1909801.pdf, at 17 (1995).

[481] Robert B. Friedrich, *supra* note 409.

[482] ("Before the 1984 divestiture, AT&T was thought to exert market power in two different ways. First, it was feared that AT&T-controlled monopolies in local telephone service would subsidize otherwise competitive long distance service, or that AT&T would discriminate against rival long distance carriers by providing inferior access to end users (Brennan (1987)). Second, it was feared that AT&T would wield market power in the long distance market directly by charging supra- competitive prices.") FEDERAL TRADE COMMISSION, MEASUREMENTS OF MARKET POWER IN LONG DISTANCE TELECOMMUNICATIONS, *supra note* 459, at 1-2.

AT&T had approximately 90 percent market share of local access lines and more than 90 percent of the long-distance revenue. Moreover, AT&T used almost exclusively equipment of Western Electric its equipment division, and its local Bell System Operating Companies supplied local telephone service to over 80 percent of the nation's population.[483]

In 1982, telecommunication industry significantly changed. The antitrust consent decree, as we have seen, imposed divestiture to AT&T and fundamental changes occurred since that decision in the structure of telecommunications industry. As Ingo Vogelsang and Bridger M. Mitchell specified:

> "[s]everal developments have increased the ability of firms to enter markets in which the LECs formally enjoyed a monopoly. Entry barriers have been lowered by regulatory actions. Advances in technology have expanded the number of potential entrants and players. And substitutes for the LECs' products and services have proliferated." [484]

In short, here the main issue is: How an antitrust decision is able to change the futures of industries and influence technological innovation? Has AT&T decision contribute in the profound changing of telecommunication industry? And if it Yes, how?

The analysis of the AT&T case might answer these questions by analyzing effects of this well-known antitrust decision.

Having described the facts of the case in Part II and the current background of the telecommunications industry, I exam the mainly affected markets by 1982 consent decree—namely long and local distance telecom market, and how that decree contributed in the telecommunications industry changing. The Bell Operating Companies (BOCs) maintained exclusively the local distance market, whereas Long Line division of Bell System performed in the long distance market.

3.2 Long and Local Distance Market

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[483] *See e.g.* HARRY M. SHOOSHAN III, *supra* note 398, at 24.

[484] INGO VOGELSANG & BRIDGER M. MITCHELL, TELECOMMUNICATIONS COMPETITION – THE LAST TEN MILES, *supra note* 412, at 28.

In the telecommunication industry operate distinct type of telecommunication services providers, among which: interchange carriers (IXC); local exchange carriers (LEC) cellular operators; information services providers (or enhanced services providers); and competitive access providers.[485] Interchange Carrier (IXC) provide both long-distance services between LATAs (Local Access and Transport Areas)—namely Inter-LATA communication—and intra-LATA long-distance services.[486] Local Exchange Carriers (LECs) provide telecommunications services to end users. These services are called "carrier access," which are almost all regulated by the FCC or state regulatory commissions. Regional Bell Operating Companies (RBOCs) and GTE were the largest LECs that transported telephone calls between customers' premises and the long distance network.[487] The original seven RBOCs today are only three: AT&T, CenturyLink, and Verizon, and it is due to the trend toward consolidation that concerned telecommunications industry in the last ten years.[488]

For access to their customers, long distance companies rely on the loops, switches, and transport facilities of local telephone companies, and a portion of costs of local telephone companies flows from long distance companies accessing their network. [489]

In other words, local telephone companies sell "switched access,"[490] which is composed by three main price elements (carrier common line, local switching, and local transport), to long distance companies. The carrier access costs represent nearly 40 % of all long distance costs. Hence, the first element of price, carrier common line, covers the part of the local.

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[485] *Id*. at 19.

[486] Intra-LATA means telecommunications services, revenues, and functions that originate and terminate within the same LATA.

[487] INGO VOGELSANG & BRIDGER M. MITCHELL, TELECOMMUNICATIONS COMPETITION – THE LAST TEN MILES, *supra note* 412, at 19. In rural areas hundreds of small independent LECs exist.

[488] *See e.g.,* Press Release, European Commission, Speech of Joaquín Almunia, IBA 17th Annual Competition Conference (Florence, Sept. 13, 2013), http://europa.eu/rapid/press-release_SPEECH-13-697_en.htm. Federal Communications Commission, *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 107 (Dec.29, 2006).

[489] Federal Communication Commission, *Trends in Telephone Service*, available at http://transition.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend605.pdf, at 1 (June 21, 2005).

[490] INGO VOGELSANG & BRIDGER M. MITCHELL, TELECOMMUNICATIONS COMPETITION – THE LAST TEN MILES, *supra* note 412, at 30. ("In late 1994 total revenues of the competitive local service industry were estimated at $620 million per year, about $160 million of which came from switched services.") *Id*.

In 1971, on the one hand the FCC's Specialized Common Carrier decision stimulated competition into the long distance market,[491] and on the other hand in 1982 the antitrust agency imposed the breakup of AT&T's long distance operations and the creation of seven new regional local telephone companies. To allow for equal access by any long distance company, the decree imposed to new local telephone companies to install swiching equipment.[492] By doing so, AT&T's rivals were able to introduce services in competition with AT&T.

The direct effect of the AT&T divestiture was competition in long distance, and information services, while in local telephony it kept the regime of regulated monopoly.[493] 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%. Yet, the market share (in minutes of use) of AT&T fell from 85 to 53% at the end of 1996.[494] Prior to 1984, AT&T provided, though a market share of around 90%, almost intestate long distance service, while after the 1982 consent decree the number of competitors in the long distance market significantly increased. For instance, as shows the Figure E, MCI-Worldcom, Sprint and Frontier entered in that market increasing year by year its own market share.

In sum, the most important indicators of competition—price and market share—shown that the antitrust intervention improved efficiency of long distance market. Since 1995, because FCC declared AT&T 'non-dominant' in that market,[495] there was no more

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[491] *Id*., at 1-1.

[492] Robert B. Friedrich, *supra* note 409, at 657. Prior to the 1982 consent decree, AT&T had successfully frustrated rivals' intentions to enter in the long distance market providing competitive long distance service and telecommunications equipment.

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

[494] 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).

[495] Motion of AT&T Corp. To Be Reclassified as a Non-Dominant Carrier, Order, 11 F.C.C. Rcd. 3271 (1995). The FCC had a system of regulation that classified carriers 'dominant' depends on their ability to exercise market power. The carriers considered dominant were subject to additional regulation in order to prevent abuse of its market power.

need to regulate their rates.[496] Yet, technological developments, occurred since the divestiture of AT&T, contributed to reduce barriers to entry in the LECs' market and consequently improved competition.[497] Conversely, AT&T's local telephone companies provided about three-quarters of the nation's local telephone service and almost all-intestate long distance service. The transition of local market to effective competition due to the nature of the product and the associated economics will not be as easy or as quick as in the long distance market. As Hovenkamp recognized there was "still a great deal of regulation of local service."[498]

In parallel of the antitrust consent decree, in 1984 the Federal Communication Commission[499] and Federal-State Joint Board enacted sweeping changes in the way that local telephone companies charged for their services. A new uniform method for local telephone companies to charge long distance carriers for the originator and termination of intestate traffic on their local networks replaced the prior method of sharing revenues.[500] Because the latter method was largely an internal process for AT&T, it allowed the telecommunication giant to charge prices above true economic cost for long distance calls and share the revenues with local telephone companies. Consequently, revenue sharing contributed to inefficiently high long distance rates,

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[496] 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). Among the effects of the reclassification of AT&T there were that the telecommunications giant was free from price-cap regulation, it was released from other annual reporting requirements, including financial report, an annual rate-of-return report, a depreciation report, and an access minutes report.

[497] INGO VOGELSANG & BRIDGER M. MITCHELL, *supra* note 423, at 21-27. ("Three broad developments are profoundly altering the LEC marketplace in particular: fiber optics, wireless telephony, and digital electronics.") *Id*.

[498] 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. Robert B. Friedrich, 689 (1995).

[499] In 1934, Telecommunications Act instituted the Federal regulation and established the Federal Communications Commission. In 1934, it was widely believed that telephone service was a 'natural monopoly,' but the ability of this monopoly to engage in anticompetitive behavior was well understood.

[500] FEDERAL COMMUNICATIONS COMMISSION, TRENDS IN TELEPHONE SERVICE, 1-2 (Sept. 1999), *available at* http://www.fcc.gov/reports/trends-telephony-service-1999-1st-report. Robert B. Friedrich, *supra* note 409, at 689. ("In keeping with the view that local access telecommunications is a natural monopoly, the FCC and state regulatory agencies have traditionally regulated local access prices on a rate-of-return basis. In recent years, the FCC has moved away from rate-of-return pricing for interstate local access, as evidence continues to mount that such pricing is no longer appropriate.") *Id*. *See also*, Chunrong Ai & David E. M. Sappington, *The Impact of State Incentive Regulation on the U.S. Telecommunications Industry*, 22 J. REGULATORY ECON. 133, 135 (2002).

which were liable to suppress demand for long distance calls and induce large corporation to bypass the public switched network.

The FCC argued that the method of revenue sharing was suitable in monopolistic industry, and it was "not compatible with a competitive long distance industry."[501] The new uniform method introduced to charge long distance carriers for the origination and termination of intestate traffic on their local network had an important influence on the telephone industry.[502] It affected the price of long distance service fell and the volume of long distance calling surged.

In short, the FCC regulates interstate services (interstate carrier access and interstate long distance), and States regulate prices for intrastate services (local services intrastate carrier access and intrastate long distance). Yet, the FCC regulates AT&T prices directly since it held a dominant position—namely sufficient market power.[503]

During these years, the FCC was not the only one that widely recognized that competition is more suitable than natural monopoly in a technologically dynamic industry like telecommunications. Competition is able to stimulate important gains in the size of telecommunication market, and benefit consumers improving innovation, and higher quality of products at reduced prices. The liberalization and competition of markets significantly changed the telecommunication regulation. The primary role of regulators like the FCC was to promote and increase competition in communication markets. This role or goal of regulator does not sound different from the antitrust agency purpose. In the telecommunications industry, regulators face important choices in trying at same time to get traditional regulatory goals and encourage technological innovation by increasing competition.[504]

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[501] FEDERAL COMMUNICATIONS COMMISSION, TRENDS IN TELEPHONE SERVICE, *supra* note ___, at 1-1.

[502] *Id.* at 1-2. The FCC introduced as part of implementation of the 1996 Act "further interstate access charge reform."

[503] As Posner and Landes specified, market power means the ability of a company or a group of companies "to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded." William M. Landes & Richiard A. Posner, *Market Power in Antitrust cases*, 94 HARV. L. REV. 937 (1981).

[504] Robert B. Friedrich, *supra* note 409, at 694.

Price-caps became a widespread instrument of regulation of this industry. For example, in May 1989, the FCC moved to price-cap regulation for AT&T.[505] Similarly, the price cap scheme was applied to Telecom Australia, and a number of other countries considered its implementation.[506] Price cap regulation means that the regulated firm can charge any price below a regulated price-cap that is periodically adjusted to reflect changes as inflation—namely exogenous cost factors.[507] It limits increases in the average price of telecommunication services to no more than the increase in an inflation index minus a specific amount attributed to as a "X" factor.[508] But price cap regulation need to be analyzed in term of their cost-effectiveness in achieving the objectives of regulatory policy in an individual country.[509] As Noll observed, in the US price cap regulation reduced "but not [eliminated] the distortion affecting vertical integration."[510] However, in 1993 the FCC argued that there was

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[505] FEDERAL TRADE COMMISSION, MEASUREMENTS OF MARKET POWER IN LONG DISTANCE TELECOMMUNICATIONS, *supra note* 459, at 9. ("The specific form of price-cap regulation adopted for A T divided services into three 'baskets' depending on the perceived level of competition in the service. " Basket 1" includes residential and small business services, international services and operator assisted and calling card services; 'Basket 2' is limited to 800 number services; and " Basket 3" contains all remaining services, principally those offered to large businesses. Each basket has its own price-cap (and sometimes a floor) that increases with inflation, decreases with a productivity factor and varies directly with " exogenous " changes in costs, mainly carrier access charges.") *Id. See also*, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), PRICE CAPS FOR TELECOMMUNICATIONS – POLICIES AND EXPERIENCES, available at http://www.oecd.org/sti/ieconomy/1909801.pdf, at 13 (1995).

[506] ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), PRICE CAPS FOR TELECOMMUNICATIONS – POLICIES AND EXPERIENCES, *supra* note 494, at 35-39.

[507] According to Friedrich, "the FCC must establish price caps for essential core services to protect rural customers during the period of transition to wireless networks. Robert B. Friedrich, *supra* note 409, at 693.

[508] *Id*., at 29. ("The price cap formula ensures that the average price of telecommunication services falls in real terms by at least the amount of the "X" factor. In so doing it ensures that productivity gains are shared with customers in the forma of lower real price.") *Id.* In addition, the price cap regulation ("allows the increased pricing flexibility required for competitive behavior.") *Id.*, at 30. Finally, ("the ability to earn higher profits provides the potential rewards for the risk taking and considerable expense of technological change and innovation.") *Id*.

[509] FEDERAL TRADE COMMISSION, INDUSTRY ANALYSIS DIVISION, COMMON CARRIER BUREAU, TRENDS IN TELEPHONE SERVICE, (Sept. 1999), p. 1-2. ("In mid-1997, as part of its implementation of the 1996 Telecommunications Act, the FCC introduced further interstate access charge reform. Prior to the 1997 reform, local carriers continued to recover part of their fixed costs in per-minute charges (from long distance carriers) and part from end users (in SLCs.) Presubscribed inter exchange carrier charges (PICCs) were created in order to allow local carriers to recover the remaining portion of their fixed loop costs from long distance carriers on a per-line, instead of a per-minute, basis. Cost recovery on a per-line basis not only reduces the remaining inefficiency in the pricing of long distance access, but allows local companies to recover costs in a competitively neutral manner, consistent with the goals of the 1996 Act.") *Id*.

[510] Roger G. Noll, *The Role of Antitrust in Telecommunications*, *supra* note 424, at 519. Noll specified that "[t]he most important observation about price-cap regulation is that if the cap is a binding constraint, the firm has unexploited market power. If this market power can be used to exclude competition in another market in the

sufficient competition and in 1996, as I anticipated, the regulatory agency reclassify AT&T on the grounds of evidence of entry barriers. The FCC recognized that "domestic competition prevents AT&T from leveraging control over its domestic network to shut out competition on the international segment. In short, it is no longer plausible to view AT&T as controlling bottleneck facilities"(1996: ¶6).

In the same year, the FCC enacted the Telecommunications Act of 1996 analyzed in the following paragraph. The main goal of this Act was to protect a fully competitive system that would have covered also the local services by reducing regulatory barriers to entry.

3.3 The Telecommunication Act of 1996

Several FCC's decisions and regulations have been mentioned above.[511] Here, I focus on the Telecommunication Act of 1996.

As I pointed out above, regulation is complementary to competition. Therefore, often the FCC and the FTC work together. The AT&T case represents only an example of that collaboration between the two agencies and the completer role of regulation to competition.

Since the 1982 consent decree, the telecommunication industry has witnessed a progressive deregulation. In 1984, the AT&T breakup opened competition in long distance market, whereas in local telephone the regulated monopoly persisted. The latter realized significant profits. The Telecommunications Act of 1996[512] attempted to promote the competition also in local exchange markets.

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vertical chain, the firm's profit potential is enhanced. Price-cap regulation, assuming it is durable and the pricing formula is not changed, eliminates potential gains from padding costs, charging the regulated firm high input prices, and shifting costs from unregulated to regulated markets. But by leaving some monopoly profits on the table, it retains an enhanced incentive for anticompetitive integration." *Id*. *See also*, Roger G. Noll and Lewis A. Rivlin, *Regulating Prices in Competitive Markets*, 82 YALE L.J. 1426 (1973).

[511] Federal Communication Commission, *What we do*, available at http://www.fcc.gov/what-we-do.

[512] The Telecommunications Act was signed by President Clinton, on February 8, 1996. Here, the Congress took radical steps to restructure the U.S. telecommunications industry.

That Act was the FCC's reply to the ongoing rapid technology change.[513] It "crystallized changes that had because of technological progress." The origin cause of regulatory change indeed is almost always the technology progress. New technologies as wireless access, fiber optics, and digital electronics redrew the boundaries of telecommunication supplies providing new opportunities for entry into local market. As Hausman and Shelanski noted, since the Telecommunications Act, internet usage is more than doubled.[514]

The 1996 Telecommunications Act represents the first major reform since the 1934 Communications Act that attempted a restructuring of the US telecommunications sector. It completely deregulated the telecommunications industry, by envisioning one competitive open market for long distance, local, wireless and cable services. Each local exchange carrier could now offer video, sell long-distance services outside its region, and sell within its region if it could prove that the region was open to competition.[515] The long distance players and the cable companies were also allowed to offer local service.[516] The FCC recognized that the goal of the law was to "let anyone enter any communications business–to let any communications business compete in any market against any other." [517] Moreover, the 1996 Act stated the 'universal services provisions' to ensuring that "certain advanced telecommunications and information services were accessible on an equitable and affordable basis throughout American society."[518] Section 254 of the Act established the governing

[513] Nicholas Economides, *supra* note 482, at 455. *See also,* Alfred E. Kahn, Timothy J. Tardiff, Tennis L. Weisman, *The Telecommunications Act at three years: an economic evaluation of its implementation by the Federal Communications Commission*, 11 INFORMATION ECONOMICS AND POLICY 319, 320 (1999).

[514] Jerry Hausman and Howard Shelanski*, Economic Welfare and Telecommunications Regulation: The E-Rate Policy for Universal-Service Subsidies*, 16 YALE J. ON REG. 19, 20 (1999).

[515] For example, the 1996 Act obligated the LECs to offer all carriers interconnection to their facilities and thereby to access bottleneck resources. By doing so, the new entrants had good chances to successfully compete in the local markets.

[516] *Communications Policy and the Public Interest: The Telecommunications Act of 1996,* Patricia Aufderheide, 1999.

[517] INGO VOGELSANG & BRIDGER M. MITCHELL, TELECOMMUNICATIONS COMPETITION – THE LAST TEN MILES, *supra note* 467, at 36.

[518] Jerry Hausmant and Howard Shelanski, *Economic Welfare and Telecommunications Regulation: The E-Rate Policy for Universal-Service Subsidies*, 16 YALE J. ON REG. 19, 21 (1999).

principle according to which, the US consumers should have access to telecommunications services "at just, reasonable, and affordable rates."[519]

But, what was the effect of the Commission's decision on consumer welfare? According to Hausman and Shelanski, although a less costly alternative that assured distributional goals of the universal services of the Act was available, the FCC opted for a costly method.[520]

In sum, both the 1982 consent decree and the FCC regulation strived to promoted competition in telecommunications sector. The former affected in particular the long-distance market, whereas the latter concerned the local market.

Hence, can we assume that antitrust agencies play a role of regulator in the single markets in competition or collaboration with regulators as the FCC? If yes, is this role recommended to improve competition and efficiency in markets?

The FTC and FCC have similar goals—promote competition and efficiency into markets. Maybe, a constant dialogue and a spirit of collaboration between two agencies facilitate the reaching of such goals and might represent the key of success for both agencies.

4. Cost and Benefits of Consent Decrees

More than thirty years after the AT&T's divestiture, the telecom debate on the *monopoly bottleneck* in local distribution network persists. Today it concerns several countries, which are exploring rules similar to AT&T decree by requiring a structural separation of the leader of the national telecommunications industry. Mexican telecommunications regulation is only an example.[521]

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[519] Telecommunications Act, 104th Congress (1995-1996), S.652.ENR, Sec. 254. Universal Service, (b).

[520] Jerry Hausmant and Howard Shelanski, *supra* note 507, at 51.

[521] *See e.g.*, Rodrigo G. Garcia, Media Reform in Latin America: Experiences and Dabates of Communication Public Policies, *available at* http://academic.wwwss2.a2hosting.com/ojs/index.php/polecom/article/view/16 (2013); http://online.wsj.com/article/BT-CO-20130610-709564.html.

At the first glance, having eliminated the operating companies' incentives to deny AT&T's competitors access to their local monopoly bottleneck facilities, which were essential for originating and terminating long distance calls, we can assume that the divestiture of 1982 increased competition of telecommunication industry.

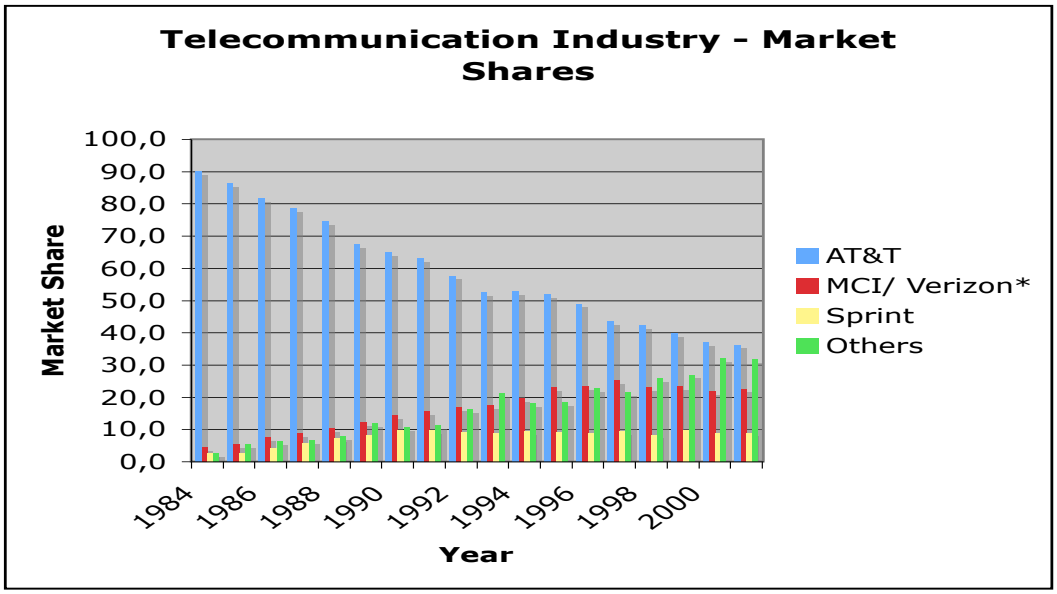
In particular, the decision decreed by Judge Greene, on the one hand, accelerated the growth of the entrants' long distance market shares and, on the other hand, brought down long distance rates for the U.S. consumers.[522]

According to a study of FTC "[w]hile AT&T's share of the long distance market's revenues in 1982 was 95 %, by 1987 its market share had fallen to 80%, and about 60 % in 1992.[523] As the figure C below shows, by 1991, MCI's and Sprint's revenue market shares had climbed to 17 % and 10% respectively, and the two next largest firms, WilTel and Cable & Wireless, had market shares of somewhat less than 1 % each.

[522] *See* Robert W. *Crandall, The Remedy for the "Bottleneck Monopoly" in Telecom: Isolate It, Share It, or Ignore It?*, 72 U. CHI. L. REV. 3 (2005).

[523] Federal Communications Commission, *Statistics of Communications Common Carriers* (1992), *available at* http://www.fcc.gov/reports/statistics-communications-common-carriers-1992.

FIGURE C



Source: FCC Report 2003[524]. * MCI: It was founded in 1963 and it was purchased by WordCom in 2000 and in 2006 the company was bought by Verizon

Since the divestiture, industry output, measured by the number of calling minutes, has nearly tripled. Even though AT&T's share has declined to 60 %, its output has increased by two-thirds over 1984 levels."[525]

However, the analysis of economic causality is hard. Divestiture itself is only one major factor among a multitude of otherexogenous and entirely random events, among which low inflation, tax reform, technological change, high growth, and several regulatory decision.

To evaluate competition most economists use many possible measurements, in addition to market share at the point in time and over, including evaluating entry barriers, capacity of alternative suppliers and price movements are important indicators of competition in a market.

[524] *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*.

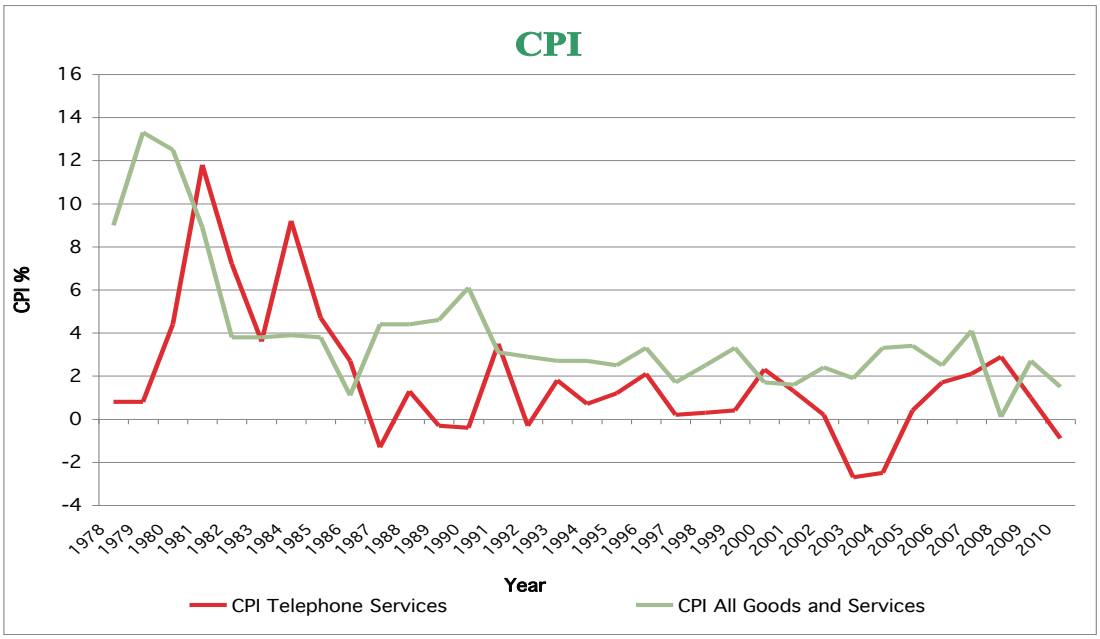
[525] FEDERAL TRADE COMMISSION, MEASUREMENTS OF MARKET POWER IN LONG DISTANCE TELECOMMUNICATIONS, *supra note* 459, at 4.

Roger G. Noll and Susan R. Smart, by analyzing the annual rate of Change for Various Price ("CPI") Indexes, noted that from 1940 to 1970 local residential rates increased really slowly, while since 1970, the rate of increase had been much more rapid.[526]

Noll and Smart noted also that "[t]he primary effect of divestiture and federal deregulation was reduced prices for customer equipment and for services that were becoming competitive."[527]

The following table shows the CPI for telephone services from 1978 to 2010.[528] The CPI for telephone services is based on *market basket*, which represents the telephone-related expenditures of a typical urban household, including land-line telephone service and wireless telephone service. Conversely the overall CPI measures the impact of inflation on consumers.

FIGURE D



Source: FCC Report 2011[529]

[526] *See* G. Noll & Susan R. Smart, *Pricing of Telephone Services*, in BARRY G COLE, supra note 417 at 187-188.

[527] *Id.*

[528] *Universal Service Monitoring Report*, CC Docket No. 98- 202, 2011 (Data Received Through October 2011), prepared by the Federal and State Staff for the Federal- State Joint Board on Universal Service in CC Docket No. 96-45, table 4.2.

[529] FCC data. *See*, FEDERAL COMMUNICATION COMMISSION, UNIVERSAL SERVICE MONITORING REPORT, CC DOCKET NO. 98-202, available at http://www.fcc.gov/reports/monitoring-report-december-2011 (October 2011),

During the decade from 1978 to 1988, by analyzing the CPI for telephone services two major rate shocks occurred. From 1980-1982 occurred the first shock, and from 1984 until 1986 the second one. The first shock, as Noll and Smart argued, "probably had very little to do with federal policy changes,"[530] whereas the second rate shock was due to both divestiture and FCC policies. The period 1984-1986 was the real reaction in post-divestiture price changes.[531]

Thought 1998 to 2010, the price of telephone service has increased less rapidly than the prices of most of these categories when viewed over a long period of time. Finally, Figure G shows that the total telecommunications revenue rose from $160 billion in 1992 to over $272 billion in 1998.

In particular, according to the FCC reports, cellular industry's annual revenues increased from less than $1 billion in 1984 to over $33 billion in 1998.[532] Similarly, the number of subscribers significantly increased from 91,600 subscribers in 1984 to over 69,209,321 in 1998. Again, as the telecommunications industry had over 134,000 employees as of December 1998, as compared to about 1,000 in 1984.

However, from 2007 to 2009 the total telecommunications revenue slightly decreased—from 299,451 millions of dollars to 281,052 millions in 2009 (*see* Figure E).[533] But, we have to take into account that the communications sector expanded very rapidly, and that in those years the U.S. economy was hit by the financial crisis.

4-4: FEDERAL COMMUNICATION COMMISSION, TREND IN TELEPHONE SERVICE 13-4 (Sep. 1999), *available at* http://transition.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend199.pdf.

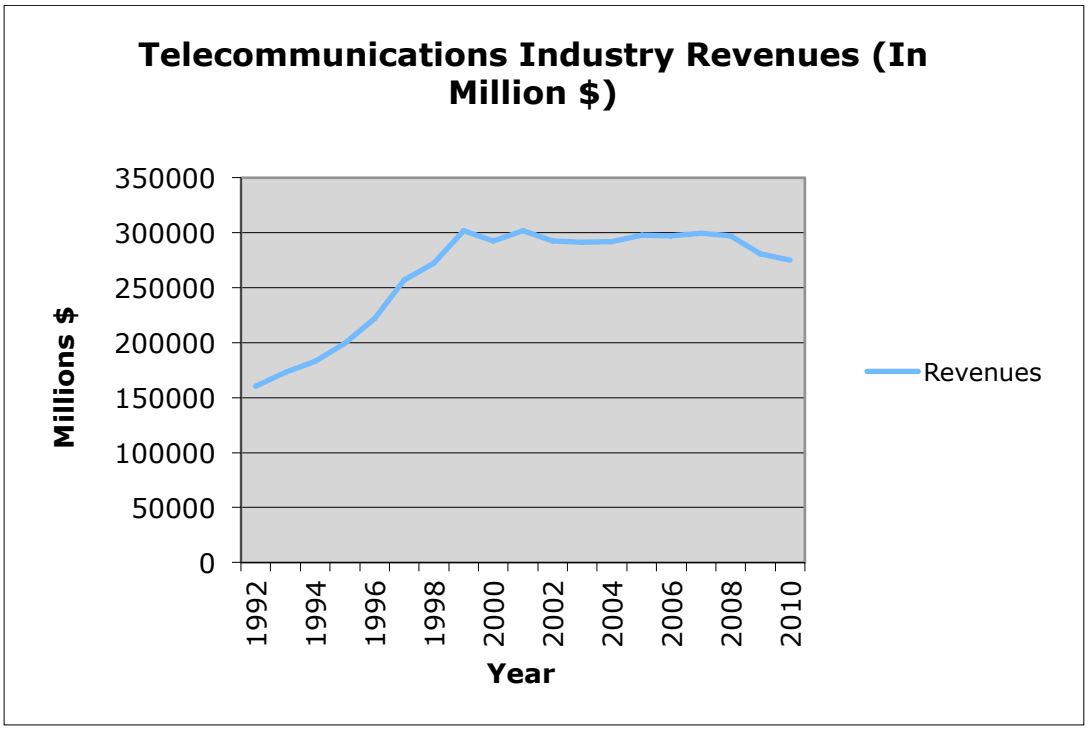
[530] *See* G. Noll & Susan R. Smart, *supra* note 515, at 189.

[531] *Id*., at 191.

[532] Industry Analysis Division, Common Carrier Bureau, Trends in Telephone Service,Federal Trade Commission, (Sept. 1999), p. 2-1.

[533] Data from FCC, MONITORING REPORT TABLE (2011), *supra* note 517, at Section 1, table 1.1.

FIGURE E



Source: Federal Trade Commission data.[534]

In sum, the most important economic indexes, revenues, price of products, and market shares, witness that the 1982 consent decree promoted competition and efficiency in the market.

Nevertheless, not everybody agreed on positive and procompetitive effects of the 1982 consent decree. Crandall, for example, argued that the break-up of AT&T, which isolated in 1984 the bottleneck was not necessary, and that "its unfortunate heritage is that it created a vertically fragmented industry structure that is not sustainable today."[535] According to Crandall, the mandate of sharing local telephone network imposed by that consent decree does not promote competition in telecommunication

[534] FEDERAL TRADE COMMISSION, UNIVERSAL SERVICE MONITORING REPORT, CC DOCKET NO. 98-202, 1-7 (Oct. 2011); Industry Analysis Division, Common Carrier Bureau, *Trends in Telephone Service*, Federal Trade Commission, 19-4 (Sept. 1999).

[535] Robert W. *Crandall, supra* note 220, at 2.

services. In particular, the telecommunication industry is characterized by an on-going and rapid changing technology, and it would make the structure relief not only unnecessary, but also unworkable.[536] Similarly, Epstein held that the AT&T case represents "the most vivid illustration of a consent decree gona wrong."[537]

5. Conclusion

As Hausman and Shelanski noted, "[t]he current expansion of the communications and information sectors is unprecedented and unforeseen in scale . . . doing business are changing rapidly with new communications technologies, which themselves are coming to represent an ever growing percentage of American gross national product."[538]

Thus, what does it mean? The U.S. Telecommunications industry was and is going though a significant change. The development of new technologies is the main cause. But, what had allowed the greatly technology development? Competition or rather natural monopoly policy had contributed in changing telecommunications industry?

Perhaps, learning from AT&T case we can reflect on the consequences of similar structural consent decrees. The benefits of this antitrust tool seems overwhelmed its costs. Furthermore, by comparing effects of the antitrust consent decree with effects of Telecommunication Act imposed by the FCC, probably the antitrust policy had archived, in economic terms, more benefits than the intervention of the regulator. However, markets constantly change and to repeat the same remedies make no sense. It is shown by the current trend toward consolidation in the telecommunications

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[536] *Id*. *See also*, 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).

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

[538] Jerry Hausmant and Howard Shelanski, *Economic Welfare and Telecommunications Regulation: The E-Rate Policy for Universal-Service Subsidies*, 16 YALE J. ON REG. 19, 20 (1999).

industry. Market remedies need to be adapted to the specific circumstances, which are never the same.

The FCC regulation seems 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 needs to impose a regulation that involve the entire market and implies more steps and a longer procedure. Time in markets like telecommunications that constantly change is fundamental. Perhaps a quickly and targeted intervention to contrast a market failure is preferred than a late regulation. The European Commission recognized the ability of commitment decisions to ensure a flexible alternative to rapid restore competition, especially in fast-moving digital markets.[539]

Hovenkamp on the relation between the antitrust and regulation intervention argued that "[t]he most important principle for antitrust in the regulated industries is first, do no harm. While judges might blanch at the atrocities that governments have committed in the name of regulation, antitrust is not the appropriate vehicle to provide a cure. Rather, it has the much humbler task of preserving competitive incentives that are consistent with the regulatory regime that has been created, whatever the regime's internal merits."[540]The Hovenkamp assumption might be true, if we do not consider the regulation effects of antitrust consent decrees. In the antitrust policy, two possible scenarios exist. In the first one, antitrust agencies have not regulation powers; hence 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. This second scenario seems more flexible and respectful of changes in markets.

In sum, we can argue that efficiency and consumer welfare are better protect by increasing the spirit of collaboration among antitrust and regulator agency. On the one hand, the antitrust agency is able to impose a quick structural or behaviour remedy to

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

[540] Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 COLUM. BUS. L. REV. 335, 377 (2004).

regulated markets, and on the other hand, the regulator like the FCC has a unique and important expertise on its sector. By putting together both functions we might reach the best result in procompetitive terms. Competition is important, but between two agencies that strive to strike same goals it make no sense.

VII. US CONSENT DECREES V. EU COMMITMENT DECISIONS

1. Introduction

This study starts from the assumption that a more expert US antitrust context might aid the European antitrust agencies in understanding the use of a crucial antitrust device—commitment decisions. In 1906, the US judge settled the first antitrust lawsuit through a consent decree. Although the European legislator enacted the commitment decision provision in 2003, the Commission, as Richard Wish observed, started before that provision to use informal commitment decisions to settle antitrust cases.[541]

Commitment decisions and consent decrees are quite similar. Nevertheless, some aspects of this antitrust tool are peculiar to its own context—hence to the EU and US antitrust system.

Therefore, first of all this study provides a brief overview of the US antitrust system going through main protagonists, regulations, and public and private enforcement of the US antitrust law. And then, it analyzes some interesting issues that concern the US antitrust device.

In short, the purpose of this study is to examine the most interesting aspects concerning the US consent decrees through an European perspective, without neglecting the specific context in which consent decrees are applied.

Hoping to have achieved that goal by providing an exhaustive overview of the US antitrust system and going through the most interesting aspects of consent decrees, I

[541] *See e.g.* R. Whish, *Commitment decisions under article 9 of the EC Modernisation: some unanswered questions, in Liber Amicorum in honour of Sven Norberg*, (edited by) M. Johansson, N. Wahl, U. Bernitz, Bruylant, 2006, pp. 555 e ss. The prior regulation—n. 17/62—did not establish the chance to settle a case through commitment decisions. However, "[d]espite this there were a number of cases in 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." *Id*.

conclude my research-work providing a comparison between the US consent decrees and the EU commitment decisions practice. This comparison aids to reflect on the widespread use of this antitrust device and its consequences. However, because the meaning of commitment decisions could be for someone unclear, I briefly explain what this term implies and the crucial characteristics of the EU commitments decisions.

2. The EU Commitment Decisions – Brief Outlines

Although the EU lawmaker enacted the commitment decisions provision in 2003—Article 9(1), of the Regulation 1/2003—similar decisions appear in the EU antitrust context many years before. In 1984, the EU Commission settled the IBM case through an agreement—later labeled commitment decision.[542] Here, the EU watchdog investigated about a possible bundling conduct of IBM that involved hardware and software (the central processing unit and the IBM System/370 operating system).[543] In 1984, that case was settled by a formal decision adopted by the Commission, where IBM undertook the commitment to disclose information subject to intellectual property rights to its European competitors, reserving the possibility to charge a reasonable and non-discriminatory royalty.[544]

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[542] Philippe Chonéa, Saïd Souamb & Arnold Vialfont, *On the Optimal Use of Commitment Decisions Under European Antitrust Law* (Oct. 2013), *available at* http://www.crest.fr/ckfinder/userfiles/files/Pageperso/Chone/Commitments%20in%20Antitrust_IRLE_ReSub2_Version2.pdf, at 2. Under Regulation 17/62, the Commission settled several cases through informal agreements embodied in undertakings. These agreements included promises made by companies to the Commission to adopt or not adopt a particular behavior. IBM (1984), Coca-Cola (1989), Microsoft (1994), ACNielsen (1996), and Digital Equipment (1997) are some of the most important Article 82 EC cases settled through undertakings were.

[543] Case IV/29.479, IBM (1984).

[544] Thomas Hehn & Alex Lewsi, *Interoperability Remedies and Innovation: a Review of Recent Case Law*, working paper at 13, *available at* https://workspace.imperial.ac.uk/business-school/Public/IP-Research-Centre/Interoperability%20remedies%20and%20innovation-%20a%20review%20of%20recent%20case%20law.pdf. *See also*, Francois Leveque, *The Application of Essential Facility and Leveraging Doctrines to Intellectual Property in the EU: The Microsoft's Refusal to License on Interoperability,* working paper at 8 (2004), *available at* http://www.cerna.ensmp.fr/Documents/FL-WP-ComVsMS.pdf.

Later the modernization process of the European antitrust law introduced the article 9, which formally recognized commitment decisions—translated in U.S. terms *consent decrees*.[545] Article 9 of the Regulation 1/2003 establishes that:

> [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.[546]

Thus, thanks to the commitment decisions provision antitrust remedies arranged by parties—antitrust agency and investigated parties—became legally binding.[547] If parties do not respect the terms of the commitment decision, namely remedies identified by parties involved in the antitrust case, there are significant consequences. By imposing to Microsoft a fine of 561 millions of euros,[548] the European Commission shown to take seriously into account the hypothesis in which the investigated company does not comply with commitments established in the decision.

Moreover, Recital 13 of the Regulation 1/2003 specified that only if "no longer grounds for action by the Commission without concluding whether there has been or still is an infringement,"[549] parties might settle the antitrust case through a commitment decision. Hence in some antitrust cases commitment decisions are precluded.

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[545] *See e.g.*, George Stephanov Georgiev, *Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlement in EU Law*, UTAH L. REV. 971 (2007).

[546] 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.

[547] *See e.g.,* Florian Wagner-Von Papp, *Best and Even Better Practices in Commitment Procedures After Alrosa: the Dangers of Abandoning the "Struggle for Competition Law*," 49 COMMON MARKET L. REV. 929, 929 (2012). In particular, ("[a]rticle 9 of Regulation (EC) No. 1/2003 empowers the Commission to accept commitments offered by the undertakings after a preliminary assessment, provided that these commitments meet the Commission's concerns. If the Commission accepts the commitments, it makes them binding on the undertakings and concludes that there are "no longer grounds for action"). *See also*, Kostis Kostopoulos, Commitment Decisions: *The New Kind of Settlement in the European Competition Law. Application in Air Transportation*, 34 AIR AND SPACE L. 13 (2009).

[548] *Press Release*, Antitrust: Commission fines Microsoft for non-compliance with browser choice commitments (March 6, 2013), http://europa.eu/rapid/press-release_IP-13-196_en.htm.

[549] Christopher J. Cook, *Commitment Decisions: The Law and Practice under Article 9*, 29 WORLD COMPETITION 209, 210 (2006).

This antitrust solution, as well as consent decrees,[550] is attractive for both EU Commission and investigated parties. The former, because commitment decisions allow antitrust agency to quickly restore competition to the markets ending the anticompetitive conduct, often will opt for this settlement solution. In addition, Commitment decisions entail a more efficient use of antitrust agency's resources. The latter, because ending an antitrust investigation through a commitment decision means that no fine is imposed, are particularly attracted by commitment decisions.

Until April 2006, the EU Commission has adopted only two commitment decisions—*Bundesliga*[551] and *Coca Cola*.[552] Despite at the beginning this practice was quite uncommon it became, also in Europe, an invaluable tool for enforcing antitrust law. In 2006, *De Beers*,[553] *FA Premier League*,[554] and *Repsol*[555] antitrust cases were settled under article 9.[556] And today commitment decisions represent a fundamental tool to resolve in particular abuse of dominant cases.[557]

Similarly to the US consent decrees procedure, article 27(4) of the Regulation 1/2003 established that "[w]here the Commission intends to adopt a decision pursuant to Article 9 . . . it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action." This provision allows interested third parties to "submit their observations within a time limit which is fixed by the Commission." In any case the fixed time can be

[550] *See e.g.*, George Stephanov Georgiev, *supra* note 545.
[551] Case COMP/C-2/37.214, Commission Decision of 19 January 2005, 2005 OJ L 134/46.
[552] Case COMP/A.39.116/B2, Commission Decision of 22 June 2005, 2005 OJ L 253/21.
[553] Case COMP/E-2/38.381, De Beers/ALROSA, Commission press release IP/06/204, 22 February 2006.
[554] Case COMP/38.453, Premier League Football (FAPL), Commission press release IP/06/356, 22 March 2006
[555] Case COMP/B-1/38.348 Repsol CPP SA, Commission press release IP/06/495, 12 April 2006.
[556] Christopher J. Cook, *supra* note 549, at 214.
[557] *See e.g.*, Yves Botteman & Agapi Patsa, *Towards a more sustainable use of commitment decisions in Article 102 TFEU cases*, 10 ANTITRUST L. ENFORCEMENT (2013).

less than one month.[558] This part of the commitment decision procedure is also known as *market test*.[559]

The observations of the interested parties influence the final decision of the Commission and are particularly relevant. The comments of the third parties can substantially change the terms of proposed commitments. In the recent Google case,[560] for example, after the negative feedback received from the market test, the EU Commissioner for Competition Almunia asked Google to "significantly improve"[561] its commitments.

Finally, the commitment decisions procedure establishes that the final version of the commitments approved by the Commission need to be published under Article 30 (1) of Regulation 1/2003. After the publication, the antitrust agency's task is not ended. The Commission must monitor the implementation of the commitments after their formal adoption. This monitoring phase carried out by the Commission represents a crucial moment "for the ultimate success of the Commission's intervention."[562]

3. How Widespread the US Consent Decrees and EU Commitment Decisions Are?

In the US, most of civil antitrust lawsuits are settled. The FIGURE A shows the correlation between the FTC consent orders and the total amount of its decision.

In 2007, nine cases out of eleven were settled though consent orders, whereas in 2013 all of FTC proceedings ended with a consent order.

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[558] *See e.g.*, Commitments proposed by Google (Apr. 3, 2013), *available at* http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_8608_5.pdf

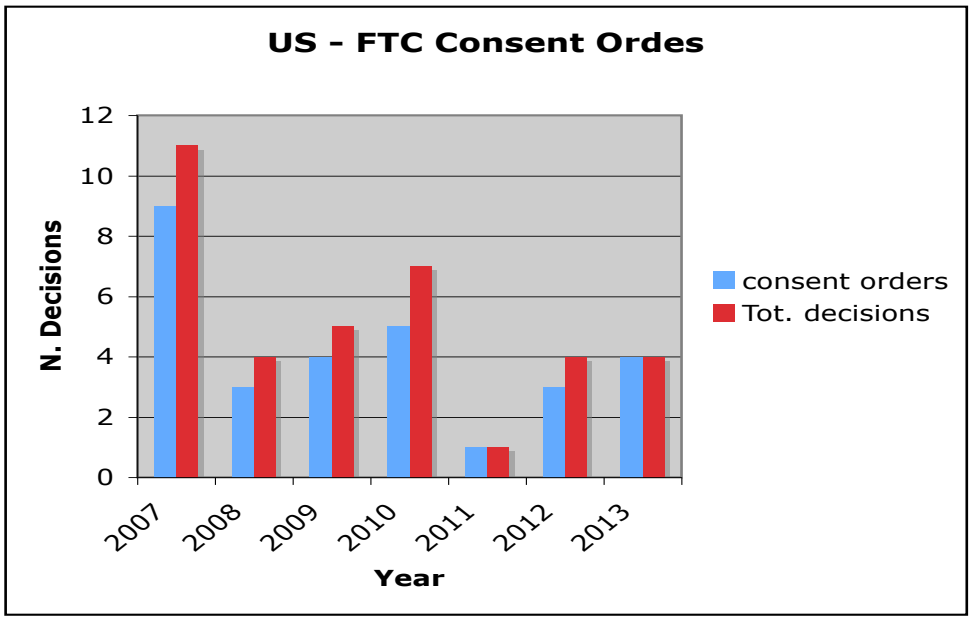
[559] European Commission, *Antitrust, Manual of Procedures*, at 7/13 (March. 2012) *available at* http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf. ("After receiving the Preliminary Assessment, the undertaking under investigation will have normally one month to react and to submit a text of a commitment proposal that can be market tested.")

[560] *Google* COMP/C-3/39.740 (Nov. 30, 2013), *available at* http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_502_8.pdf

[561] Joaquin Almunia, *The Google antitrust case: what is at stake?* (SPEECH/13/768 01/10/2013), *available at* http://europa.eu/rapid/press-release_SPEECH-13-768_en.htm.

[562] European Commission, *Antitrust, Manual of Procedures*, *supra* note 555, at 13/13.

FIGURE A

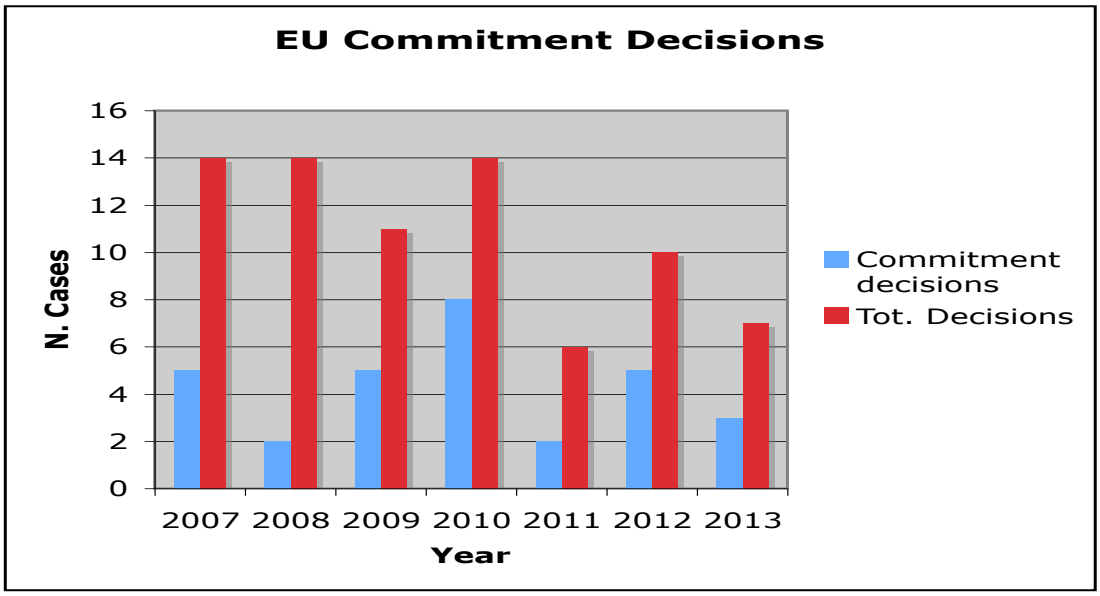


(Source: FTC data)[563]

Thus, this antitrust device is crucial in the FTC policy. Although in Europe the proportion between the commitment decisions and total decisions is not the same, the European Commission adopts this antitrust tool quite often. In 2007, five out of fourteen antitrust cases were settled by commitment decision, while in 2013 these latter concern three out of seven proceedings. Therefore, in Europe, as well as in the United States, the trend toward the adoption of commitment decisions does not change much over years. Almost half in Europe and eighty percent in the US of antitrust proceedings were settled with a negotiation solution between the parties—investigated firms and antitrust agency.

[563] Federal Trade Commission, *Nonmerger Enforcement Actions*, http://ftc.gov/bc/caselist/nonmerger/index.shtml.

FIGURE B

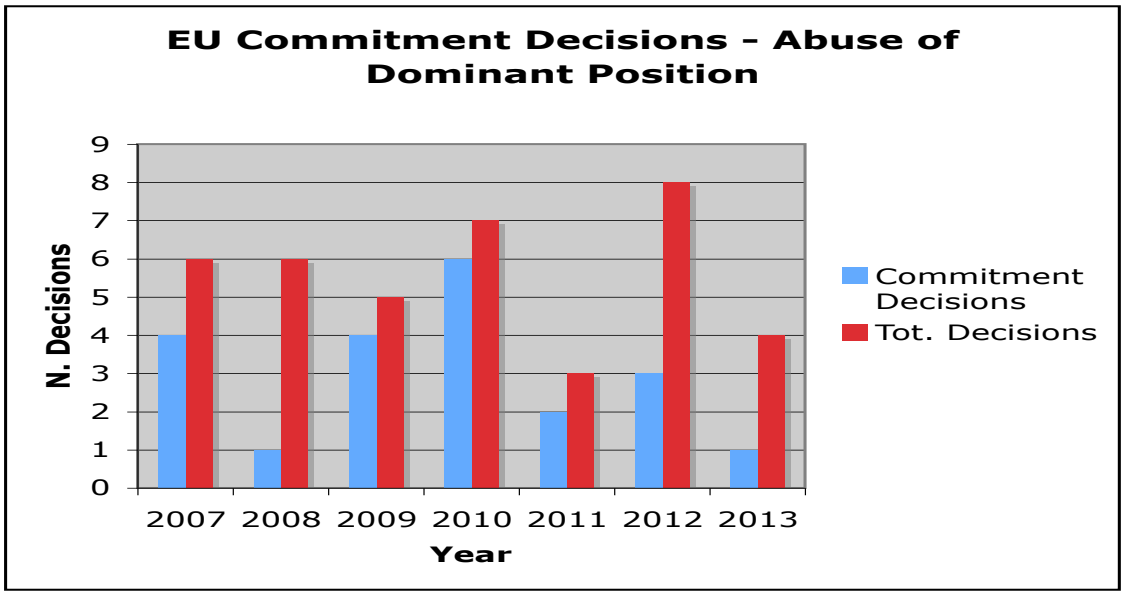


(Source: EU Commission data)[564]

In Europe commitment decisions, as demonstrated in Figure C, concern especially abuse of dominant position proceedings (art. 102 TFUE), translated in the US antitrust terms, cases of monopolization. In 2007, six out of seven cases of abuse of dominant position have been settled through commitment decisions. However, this proportion is no longer present. In 2013, indeed, there was only one commitment decision against three sanctioned decisions showing that currently the Commission prefers a fine to a negotiated solution.

[564] EU Commission, *Annual Reports on Competition Policy, available at* http://ec.europa.eu/competition/publications/annual_report/index.html. *See also*, European Commission, DG Competition website, http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=1.

FIGURE C

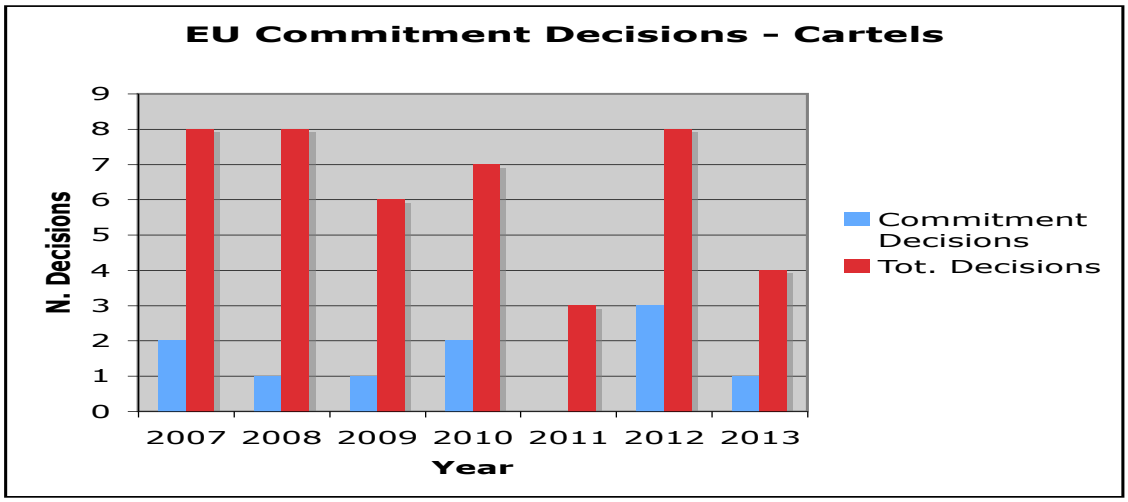


(Source: EU Commission data)[565]

The statement is especially true if we consider cartel proceedings. As shows the Figure D below, the use of this antitrust device in EU cartel cases is and was circumscribed. In 2007, two out of eight cartel cases have been settled though commitment decisions, while in 2011 the EU Commission fined all cartel cases.

In short, in Europe around half or three-quarters of abuse of dominant position cases and about third of cartel cases ended with a negotiated solution—the commitment decision.

FIGURE D



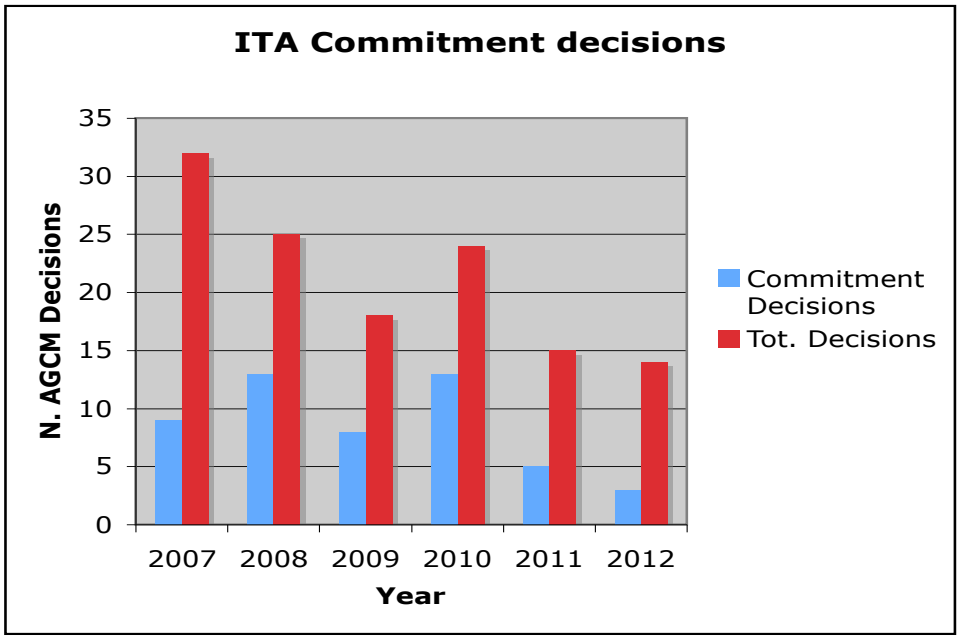
[565] *Id.*

(Source: EU Commission data)[566]

In the US, the analysis between consent decrees taken in monopolization and cartel cases does not make sense. As I highlighted in Chapters V, in the US consent decrees concern only civil proceedings. Thus, the consent decree is precluded in antitrust crime proceedings, as cartels.

Now, moving to exam the antitrust practice in a few EU Member States, commitment decisions register in the singular state a different trend than Europe. In Italy, for example, if in 2010 more than a half of antitrust proceedings have been settled though commitment decisions, in 2012 that trend was not the same. The Figure E, shows that in 2012 only three cases out of fourteen—around twenty percent—ended with commitment decisions.

FIGURE E



(*Source: AGCM data – AGCM Annual Relations)*[567]

Hence, the EU Commission practice does not take into account the trend of each Member States, which seems generally different. In UK, the commitment decisions

[566] *Id.*
[567] AGCM, Annual Reports , *available at* http://www.agcm.it/relazioni-annuali.html.

practice is uncommon. The first UK commitment decision is dated in March 2006,[568] and we need to wait until January 2011 for seeing another one.[569]

Therefore, generally in Europe antitrust agencies seem more cautious than the US agencies in adopting commitment decisions. Some countries like Italy, after having welcomed the commitment decisions practice, have backtracked preferring a fine solution to commitment decision. [570]

3. Final Considerations

First, the antitrust law was born in the US, where it has more than a century of history. In 1906, the US antitrust agencies started to settle its cases through consent decrees.

Second, the use of consent decrees in the U.S. became over years even more widespread, and their regulation effects are undoubted. 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. As Epstein recognized consent decrees introduced a third layer of regulation.

Third, typically consent decrees establish significant structural or behavior remedies. By doing so, the deterrent effect of antitrust law does not compromised.

In sum, this important antitrust device competes with fine in drafting antitrust policy, and whereas in Europe fine seems be preferred, in the US consent decrees represent the main antitrust device. Thus, the issue at hand is: is it better opting for consent decrees/commitment decisions or a fine solution in the antitrust enforcement?

A real answer does not exist, but we can seek at the end of this study to provide some points of reflection.

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[568] *See*. The Handbook of Competition Enforcement Agencies, 2011, in «Global Competition Review», www.globalcompetitionreview.com. That case concerns an OFT proceeding against TV Eye. *Press release* 2006, *OFT release TV Eye from binding commitments* (Mar. 23, 2006) www.oft.gov.uk.

[569] On January 13, 2011, the OFT issued a *notice* declaring to accept the commitments proposed by the investigated parties in the proceeding concerning the motors insurance. *Press release* 2011, *Motor insurers agreed to limit data exchange after OFT investigation* (Jan. 13 2011), www.oft.gov.uk.

The US antitrust paradigm based on these decrees shows strengths and weaknesses of the European model. In the US, consent decrees impose significant market changing, by defining their boundaries and dynamics.

The consent decree represents a flexible tool to quickly resolve a market failure. Probably, the alternative regulator intervention would intervene 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. Commitment decisions lacks of some crucial futures flow from its antitrust context.

First, in Europe antitrust private enforcement lacks. Second, the European Commission is the 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 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 chance. Sometimes they fail, requiring intervention on the government. Is the European Commission the best authority to aid markets for improving competition? In the US judges and FTC seem so. However, as I noted above, the US antitrust context diverges from the European one.

Hence, Europe has to decide if following the US paradigms gaining from the US history, or opting for a new paradigm that take into account both the US and member states experiences seeking to find the best solution for markets. In doing so, we need to take into account the needs of markets—flexibility, efficiency, and consumer welfare.

Now, it is up to Europe to make the most suitable decision to compete with the US model, which from a century has both antitrust law and the first worldwide economy.

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