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Has U.S. Antitrust Policy Protected Consumers from the Abuse of Market Dominance?

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Among the United States' most important exports are its market-oriented economic policies. The privatization and de-regulation of the transportation and communications sectors come quickly to the mind of this student of economic regulation. But why should the EU or other countries, for that matter, wish to emulate U.S. antitrust (competition) policy? It is obvious that an open, competitive economy is a worthwhile goal, but is an aggressive competition policy – "antitrust" policy, in U.S. parlance – necessary to assure that a market economy does not retrogress to the bad old days of the Robber Barons? I would suggest that empirical evidence on the effects of U.S. antitrust policy provides little supportive evidence for such a proposition.

The Sherman Antitrust Act

The United States launched its formal competition policy with the passage of the Sherman Act in 1890.[1] This statute was extremely brief and so vague that few could predict how it would be enforced. It contains only two major substantive provisions. Section 1 outlaws "every contract, combination, whether in the form of trust or otherwise, or conspiracy, in restraint of trade…" Section 2 asserts that it is illegal to "monopolize, or attempt to monopolize, or combine or conspire … to monopolize any part of the trade or commerce among the several States…"

Section 1 is clearly aimed at conspiracies in restraint of trade, such as price fixing or market sharing agreements, but it is often invoked in combination with Section 2 in abuse of dominance cases. Section 2 is the section which is used to attack single-firm monopolies or attempts to monopolize. The courts grappled for about 50 years with the problem of defining the term "monopolization." It is not the same as the mere achievement of monopoly power; one can enjoy a monopoly position in a market and still not run afoul of Section 2. But in 1945, a court decision surely narrowed this possibility substantially in the *Alcoa* case. Judge Learned Hand opined that Alcoa's aggressive capital expenditure policy was evidence of an illegal attempt to monopolize:

[1] 26 Stat. 209 (1890), as amended, 15 U.S.C. §§1-7.

"It was not inevitable that [Alcoa] should always anticipate increases in demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field."[2]

If simply expanding capacity is an "abuse of dominance," it will surely be difficult for companies with an overwhelming share of any antitrust market to succeed in a Section 2 case. U.S. case law may thus be read as providing the government with very lenient standards of proof for demonstrating that a firm has monopolized in violation of Section 2. For instance, the government charged IBM in a 1969 case with monopolization by citing, among other practices, IBM's provision of computers to U.S. universities at favorable prices so that students would emerge from their studies with a substantial knowledge of IBM machines.

Perhaps one important difference between U.S. antitrust law and competition policy in the EU or elsewhere is the focus in the U.S. upon how a monopoly position was obtained in the first place. To prove that a company has "monopolized" a relevant antitrust market, the government must demonstrate that the firm engaged in actions whose principal objective was the attainment of monopoly power. Under U.S. law, one cannot be prosecuted for "building a better mousetrap" and thereby obtaining a monopoly position in the production and sale of mousetraps. This contrasts with other countries' focus on the "abuse of dominance" once the monopolist is established. In *Standard Oil* (1911), one of the major issues involved John D. Rockefeller's agreements with the railroads which granted Rockefeller's companies preferential rates and even rebates on his rivals' shipments. In *United Shoe Machinery* (1954), the government focused on the structure of lease agreements and the tying of service and supplies to the equipment leases. In the more recent *Microsoft* case (2001), however, the principal government charges involved alleged abuses of a dominant position that had already been achieved, such as the tying of the Internet browser to the operating system.

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[2] *United States v. Aluminum Company of America,* 148 F.2d 416 (2d. Cir. 1945). This court served as the final court of appeal for this case because a quorum of the Supreme Court could not be assembled to consider it due to Court members' previous involvement with the case before joining the Supreme Court.

A Brief History of U.S. Monopolization Cases

The Sherman Act was passed in the late 19th century when the U.S. was in the midst of its Industrial Revolution. During this era, there was a great deal of public attention given to the "trusts," combinations or associations of independent competitors in a single organization. The Standard Oil Trust, the American Tobacco Trust, and the Sugar Trust were the most noteworthy examples. The first few major Section 2 monopolization cases were, not surprisingly, brought against these trusts. The government prevailed in two major cases, *Standard Oil* [3]and *American Tobacco*[4], which the Supreme Court upheld in the same year, 1911. Subsequently, in 1920, the government lost an attempt to convince the courts that U.S. Steel had monopolized the steel industry.

After the Supreme Court's *U.S. Steel*[5] decision, there was a considerable lull in Section 2 enforcement for understandable reasons. In the interwar period, the Justice Department used Section 2 of the Sherman Act to attack alleged monopolization by United Shoe Machinery, Alcoa and the motion picture companies, and the government eventually prevailed against these companies in the ten years after World War II. After that, there simply were not many candidates for Section 2 monopolization complaints because there were few industries in which the leading firm had two-thirds or more of industry output, the *prima facie* standard that emerged from the *Alcoa* case. The Department of Justice had a low-level investigation of General Motors in the 1960s, but nothing emerged from it. The Justice Department succeeded in persuading President Johnson to bring a monopolization case against IBM on the last day of his presidency in 1969, but this case was eventually withdrawn in 1982 after the government and IBM incurred enormous legal costs. Five years later, the Justice Department filed a case against AT&T, and –after a mere eight years –it succeeded in negotiating a consent

[3] *Standard Oil Co. of N.J. v. United States,* 221 U.S. 1 (1911).
[4] *United States v. American Tobacco Co.,* 221 U.S. 106 (1911).
[5] *United States v. United States Steel Corp.*, 251 U.S. 417 (1920).

decree that resulted in the divestiture of all AT&T local telephone operating companies from the parent company.

Between 1974 and 1998, there were no major U.S. monopolization cases filed by the government. This inactivity was likely due to the considerable resources being devoted to pursuing the *AT&T* and *IBM* cases. The case against AT&T was filed in 1974, but it was not until 1982 that it was finally settled by a consent decree filed in a Washington, DC, federal court. The *IBM* case was even more protracted. It was filed in early 1969, and it consumed enormous amounts of legal resources throughout the 1970s. Finally, after concluding that the government's 1969 charges had become irrelevant because IBM was no longer producing any of the products that it was offering when the case was brought, the Assistant Attorney General for antitrust enforcement decided to drop the case in 1982. This decision was an obvious embarrassment to proponents of antitrust who witnessed 13 years of the futile pursuit of an erstwhile giant –IBM –who was now in trouble because it lagged its competitors in developing the personal computer.

In 1998, the Department of Justice filed a case against Microsoft after the Federal Trade Commission (FTC) had deadlocked on bringing a similar case under a different statute, the Federal Trade Commission Act. The government succeeded in persuading a court that Microsoft's conduct constituted a violation of the Sherman Act. The judge in this case subsequently approved a break-up of Microsoft into two separate companies – one for the operating system and one for the Office suite of applications software. This remedy was rejected by an appellate court which not only sent the case back for further deliberations but also ordered that the lower-court judge be dismissed from the case for exhibiting a bias against Microsoft.[6] The Justice Department eventually entered into a consent decree with Microsoft that requires Microsoft to curtail certain selling practices and to provide applications software companies with access to certain interfaces required for use of their products with the Microsoft operating system.

[6] *U.S. v. Microsoft Corporation,* 253 F.3d 34 (DC Cir. 2001).

Since the *Microsoft* case ended, no new major monopolization cases have been filed by the U.S. government. Few were satisfied with the outcome of *Microsoft*, and there is now substantial public skepticism that new cases could prove beneficial to consumers. Just as important, however, is the lack of monopoly power in the U.S. economy. Market concentration in U.S. industries has been declining for decades. Except for monopoly positions protected by patent grants, it is difficult to find examples of sustainable monopoly in the U.S. economy. Even the Bell operating companies, whose monopolies originated in government regulation, now find themselves under withering competition from wireless carriers, cable television companies, and Voice over Internet Protocol (VoIP) services. It is difficult to abuse a dominant position if firms cannot achieve dominance in the first place.

The Impact of Successful Monopolization Cases on Consumer Welfare

In a 2003 article in the *Journal of Economic Perspectives*, Clifford Winston and I showed that there is no empirical evidence that U.S. antitrust policy has provided economic benefits to consumers.[7] Although some of our economist friends disagree with us, this conclusion is indisputable. There are no empirical studies which show that prices are lower, output is higher, or innovation has been stimulated by successful government prosecutions under the Sherman or Clayton Act[8], including the blocking of proposed mergers before they are consummated. This is not an overly-broad conclusion; it is simply a fact.

For the purposes of this Conference, however, I will not dwell on the scanty evidence on the effects of U.S. government prosecutions of price-fixing cartels or of recent merger policy. Rather, I shall focus on a review of the effects of successful Section

[7] Robert W. Crandall and Clifford Winston, "Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence," *Journal of Economic Perspectives*, Vol. 17 (4), Fall 2003, pp. 3-26.

[8] The Clayton Act was passed in 1914 and amended in 1950. It provides both the Justice Department and the Federal Trade Commission authority to challenge mergers that may substantially lessen competition or tend to create a monopoly(38 Stat. 730 (1914), as amended 15 U.S.C. §§12-27).

2 monopolization cases. My review of more than 100 years of Sherman Act cases identified 426 different occasions on which the government won. Of these cases, 336 were civil cases. Of these 336 civil cases, 172 resulted in "injunctive" or conduct remedies, 69 resulted in decrees which required compulsory licensing, and 95 resulted in structural remedies, such as divestitures.

In two separate articles, I examined the outcomes of most of the major cases which resulted in a government victories and sought empirical evidence on the effects of these victories on prices and output. I reviewed the evidence in ten cases that ended with injunctive relief and in eleven of the major cases in which the government won structural relief. The results were not encouraging.[9]

1. Structural Relief

The pre-World War II monopolization cases resulting in structural relief –such as divestiture – that I reviewed involved such diverse industries as petroleum refining, tobacco, aluminum, and motion pictures. The more recent cases involved shoe machinery, data processing equipment, newspaper publishing, network television broadcasting, and telecommunications. With only one exception, the *AT&T*[10] case brought in 1974 and settled by a consent decree in 1982, there is simply no convincing evidence that the government's victory resulted in increases in competition, lower prices, and/or greater output.

The early cases are perhaps the most surprising. The break up of the Standard Oil and American Tobacco trusts in 1911 had no perceptible effect on price and output for very different reasons. The Standard Oil decree was entered long after new oil discoveries by new market entrants had greatly weakened the trust's position. Whether

[9] The interested reader may find the details in Robert W. Crandall, "The Failure of Structural Remedies in Sherman Act Monopolization Cases, *Oregon Law Review*, Vol. 80 (1), Spring 2001, pp. 109-98 and Robert W. Crandall and Kenneth G. Elzinga, "Injunctive Relief in Sherman Act Monopolization Cases," in John B. Kirkwood (ed.), *Antitrust Law and Economics*, Research in Law and Economics, Volume 21, Elsevier, 2004, pp. 277-344.
[10] U.S. v. AT&T, Civ. Action No. 74-1698 (D.D.C. filed Nov. 20, 1974).

separating Standard Oil into 37 separate companies might have had an effect in earlier decades is a matter of conjecture, but it certainly is irrelevant. In the case of *American Tobacco*, the court ordered dissolution of the trust resulted in the creation of a stable oligopoly of three cigarette producers who did not compete aggressively in terms of prices. Indeed, three decades later, the government decided to bring yet another antitrust suit against the industry.

The government brought a number of antitrust cases against the dominant U.S. aluminum producer between 1912 and 1937, twice succeeding in obtaining divestitures of various Alcoa properties. The 1937 monopolization case was brought after the earlier decrees apparently failed to result in a competitive industry in the view of the government although it is at least arguable that the small size of the U.S. market during the Depression precluded effective competition. The 1937 case was eventually decided against Alcoa in 1945, but by that time the government was preparing to sell the aluminum capacity that it had built during World War II. The sale of these assets to new competitors essentially mooted the antitrust case, which was ended by a court decree that barred certain pricing practices by Alcoa. Despite the government asset sales and the decree, there is no evidence of an effect on the real price of aluminum between 1945 and 1965 after taking account of changes in input prices.

The 1948 *Paramount* [11]decision resulted in the divestiture of theaters from the five major motion picture distributors. Shortly thereafter, the advent of television had a devastating effect on theater admissions. Nevertheless, theater admission prices actually rose after the divestiture of the theaters, and the upstream distribution market became even more concentrated. Five years later, the government was victorious in a monopolization case against United Shoe Machinery.[12] A decree was entered against the company, requiring it to change its equipment leasing prices and to offer its machines for sale. Ten years later, a court judged the decree to have been a failure and required some divestiture of assets. This was accomplished in 1968, but thereafter a sharp rise in U.S.

[11] *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).
[12] *United States v. United Shoe Machinery*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954).

shoe imports resulted in a severe decline in U.S. shoe manufacturing. Nearly a quarter century of antitrust litigation and subsequent decrees had very little apparent effect on U.S. shoe manufacturers' prices of shoe making equipment.

The other cases, such as the network television cases of the 1970s, the 1952 *IBM* case[13], and a case against Kansas City newspapers[14] were similarly unsuccessful in creating more competitive markets and reducing prices. The network television cases may even have reduced output and increased prices because they prevented the networks from efficiently bearing the risk of program production. The *IBM* case involved data processing machines which would soon be obsolete because one of IBM's new products in the 1960s, namely, the computer. The case against the Kansas City newspapers was settled by a forced divestiture of the newspapers' television stations, but this divestiture did not reduce advertising rates nor encourage entry into newspaper publishing in Kansas City.

This leaves us with the one success story – the divestiture of AT&T's telephone operating companies in 1984 as the result of monopolization suit filed in 1974. This case was brought after the U.S. regulator, the Federal Communications Commission (FCC), had failed to require that regulated local carriers, such as AT&T's local companies, provide equal access to their local circuits for competing long distance carriers. When AT&T used this opportunity to deny or frustrate the new long distance entrants' connections to its local customers, the U.S. Department of Justice brought a monopolization suit against AT&T, a regulated company. In effect, one agency of government was trying to correct the failure of another agency to allow competition. The eventual result, after 10 years of litigation, was a consent decree in which AT&T agreed to divest itself of its local operating companies. AT&T remained a long distance carrier without local operations, and the divested local Bell companies were barred from providing long distance services. The decree required that the latter companies provide

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[13] United States v. IBM, Civ. Action No. 72-344 (S.D.N.Y. filed 1952).

[14] *Kansas City Star Co. v. United States*, 240 F. 2d 643 (8th Cir. 1957).

equal access to all long distance competitors, and –as a result –long distance rates began to fall.

The apparent success of the AT&T decree fades substantially when one compares U.S. experience with that of other industrialized countries that liberalized their telecommunications sectors. None has chosen vertical divestiture as the mechanism for assuring competitors equal access to incumbents' subscribers. All have simply achieved this result through a simple regulatory requirement that end-office or tandem switches accommodate all carriers' traffic on a non-discriminatory basis. Rates fell even more rapidly in Canada and in EU countries than in the U.S. after these rules were established. The U.S. could have had a similar result in the 1970s without the costs of divestiture and twelve years of disputes over the definition of "interLATA" long distance telecommunications in the emerging Internet age.[15]

2. **Injunctive Relief**

In many U.S. monopolization cases, a government victory is followed by behavioral or "injunctive" relief, rather than divestitures of assets or operations. This behavioral relief can take the form of proscribing certain business practices, mandating access to intellectual property, or even assisting a new competitor in its start-up phase. These requirements derive in part from the government's theory of the determinants of the original monopoly power. If a particular practice is viewed as restraining competition, it can be proscribed through a decree entered before the trial court. Alternatively, the government may feel that new measures are required to restore or create competition where monopoly has coalesced. In the cases studied, however, there is no evidence that the decrees had their intended effect.

I do not review these cases in any detail. Rather, I provide a summary of why the imposition of the various decrees did not have their intended effect. First, in two of the

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[15] For a more detailed review of the effects of the AT&T decree and subsequent legislation, see Robert W. Crandall, "The Remedy for the 'Bottleneck Monopoly' in Telecom: Isolate It, Share It, or Ignore It?" *The University of Chicago Law Review*, Vol. 72(1), Winter 2005, pp. 3-25.

cases, the government brought suit after the market had changed, rendering the decree unnecessary or irrelevant. In half of the cases, however, the government sought to ban behavior which was not anti-competitive. For example, it challenged and eventually succeeded n banning competitive behavior by grocery chains because this behavior disadvantaged smaller chains or independent stores. In other cases, it banned requirements contracts or vertical integration that was efficiency enhancing. In another, it required a dominant producer, General Motors, to assist a new entrant who could not succeed due to the small size of the relevant market.

In all of these cases, the antitrust remedies failed because the government could not diagnose the causes of monopoly accurately and prescribe antidotes for it. This was especially true in markets subject to fairly rapid technological change. This conclusion is particularly relevant to the current environment in which competition policy operates, as the recent *Microsoft* case attests.

Thus, with the exception of the case against AT&T – which should have been filed against the FCC, rather than AT&T – there is no evidence that any of the government's "successful" assaults on monopoly have borne fruit. The government did not bring about competition where none existed or none would have existed. Consumers did not benefit from the enormous resources spent on these cases by the government and the defendants. Markets had evolved before the government intervened and would have become more competitive regardless of whether the cases were filed. Concerns about long-lived monopoly power that were prevalent in the late 19th century and again in the 1960s have proved to be unfounded.

The Microsoft Case

My review of the older U.S. monopolization cases suggests that even when the government prevails, it is unable to fashion a decree that improves market performance. I have excluded the recent *Microsoft* case for an obvious reason: it is simply too early to

determine if the negotiated decree will lead to greater competition in the markets for computer operating systems or applications software. However, I believe that there is a fairly strong consensus that the U.S. decree is not likely to have a major impact on these markets.

As the case proceeded from the Federal Trade Commission to the Department of Justice and then through the courts, a common reaction of economists was that whatever the merits of the monopolization charge, it was difficult to see how a decree could be fashioned to improve the relevant markets' performance. The case eventually focused on Microsoft's reaction to the threat of "middleware" platforms that might emerge by way of new Internet browsers.[16] If owners of personal computers could use these new browsers, such as Netscape, to access applications software over the Internet, Microsoft's Windows operating system and its applications software, such as Microsoft Office, might come under a severe competitive attack. Microsoft's reaction to this threat was to develop its own Internet browser, Internet Explorer (IE), and to integrate it into its Windows platform. Much of the case turned on Microsoft's allegedly anticompetitive practices of selling its operating system bundled with its IE browser. While purchasers could install a competitive browser, the ease of using IE and its various functionalities made it difficult for other browsers to gain or maintain a market position. Moreover, the fact that Microsoft spent hundreds of millions of dollars on developing IE and then offered it at a zero "price" suggests to some an anticompetitive intent. To others, however, it appears that Microsoft simply responded to a competitive threat by improving the functionality of its operating system without increasing its price.

Whatever one's view of Microsoft's behavior surrounding the development of its IE browser in response to a competitive threat, how should competition authorities respond? Under U.S. case law, the government must show that a monopolist's action has anticompetitive effects. The defendant may then counter that the action or practice is efficiency-enhancing, *i.e.*, that integrating the IE browser into the operating system

[16] For an excellent discussion of these issues by the economic experts who participated on both sides of the ca se, see David S. Evans, *et.al.*, *Did Microsoft Ham Consumers? Two Opposing Views.* AEI-Brookings Joint Center for Regulatory Studies, Washington, DC, 2000.

improves the quality of the overall product. In response, the government must show that the anticompetitive harms outweigh the benefits. In the *Microsoft* case, the Court of Appeals found that the government had satisfied the first test in two respects –the failure of Microsoft to add IE to the "add/remove" functionality of the operating system and the commingling the browser and operating system code because Microsoft failed to provide justifications for these practices during the trial. The Appeals Court ruled, however, that Microsoft's decision to include in its (then) latest Windows operating system a feature that would override a customer's choice of a non-IE browser in certain circumstances was not shown to be anticompetitive by the government.[17]

I focus on these complicated matters to demonstrate how difficult it is to isolate and identify the practices that are anticompetitive in a market that features rapid technological change. How can one know if Microsoft's dominant market position would have been challenged by software developers using the middleware platform afforded by the new Internet browsers if Microsoft had not developed IE? Even as the Microwave case was winding down, Netscape still had a substantial presence in the market place. Why had no one developed a way to use Netscape, perhaps in conjunction with Linux, OS2, or Apple's Mac operating system, to reach programs written with Sun's Java programming language? After all, there were alternative ways to get to the Internet other than through the use of Microsoft's IE browser on its Windows operating system. Some observers of the computer industry had been predicting that through Java , users would increasingly be able to substitute "network computing" –using software accessed over the Internet –for Microsoft's Windows/Office combination. This simply has not happened, and it is difficult to prove that it would have happened even if Microsoft had not tied IE to its Windows operating system with its own Java "runtime" environment.

Not only is it difficult to know whether any of Microsoft's allegedly anticompetitive practices were the principal reasons for its continuing dominant position in the market for operating and applications software, but it is equally difficult to know how to fashion a decree that would correct for these effects. Should Microsoft be required

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[17] *U.S. v. Microsoft Corporation,* 253 F.3d 34 (DC Cir. 2001).

to re-engineer its operating system and remove the complementarities between IE and Windows? How can one be sure that this re-engineering would now permit the development of middleware competition? Should the government be permitted to experiment with various remedies to test its theory? Given the enormous value of the IT sector, such experiments could be very expensive indeed.

In fact, the government was not content with trying to stop or to counter Microsoft's anticompetitive practices. Microsoft had allegedly prevented software developers from using middleware to develop new, competitive applications software to counter the "applications barrier to entry" that prospective entrants faced in the operating system market. The government therefore asked the trial court to require Microsoft to divest its applications software operations from its operating systems business. The trial court agreed, but it was reversed on appeal. However, if there are strong complementarities between the design of operating systems and applications software, any such divestiture would risk substantial efficiency losses because the separate firms would not be able to exploit the complementarities between the operating system and applications as well as an integrated company. Undoubtedly, the newly independent operating system company would soon be developing a new suite of its own applications software, perhaps displacing the divested Office software much as Office had supplanted Word Perfect and Quattro Pro. If there is a bandwagon effect in software,[18] why wouldn't the bandwagon begin to roll again after divestiture?

Antitrust in Newly Deregulated Industries

As evidence accumulates that formal price and entry regulation of "public utility" industries has adverse effects on innovation and productive efficiency, policymakers begin to examine the benefits of relying on "*ex post*" regulation, such as competition policy, rather than the "*ex ante*" approach of formal price regulation. The U.S. has had

[18] See Jeffrey Rohlfs, *Bandwagon Effects in High Technology Industries*. Cambridge: MIT Press, 2001.

substantial experience in making such a shift, particularly in the transportation and telecommunications sectors.

The details of the transition from formal price regulation to competition policy depend upon the specific legislation in each case. In the U.S., for example, airlines were deregulated in 1978, but the formal authority for approving airline mergers remained in the Department of Transportation, not the Justice Department or the Federal Trade Commission. In the case of telecommunications, on the other hand, merger approvals must be obtained from both the Federal Communications Commission and the Justice Department.

A major consideration for designing U.S. transitions from *ex ante* to *ex post* regulation is that private parties may bring suits under the U.S. antitrust laws and recover treble damages from violators of these laws. Violations of *ex ante* regulatory rules are generally punishable by fines that are levied by the regulatory agency and are not available to aggrieved parties. Thus, the competitive battles that follow deregulation are particularly attractive to certain competitors and to trial attorneys.

The most recent and notorious example of the lure of treble damages occurred in the wake of the passage of the 1996 Telecommunications Act because that statute imposes a variety of requirements on the incumbent companies, including the sharing of their network facilities with competitors. The plaintiffs' bar and a variety of failing or failed entrants filed Sherman Act suits against the incumbent Bell companies for their alleged violations of the 1996 Act. After several; years of such litigation, and a variety of "settlements" involving millions of dollars of payments from the incumbent Bell companies, the Bell companies finally won a Supreme Court decision that concluded that the facilities-sharing obligations of the Telecom Act do not extend to the Sherman Act.[19] Firms with monopoly power are not generally required to share their facilities with competitors, and therefore any violation of the 1996 Act involving such requirements cannot be punished with treble damages under the Sherman Act.

[19] *Verizon v. Trinko, LLP*, 540 U.S. 398 (2004).

What Have We Learned?

Even in earlier and simpler times, attempts by the U.S. government to use antitrust policy to increase competition in markets with monopoly characteristics have often failed. The oil, steel, aluminum, and tobacco businesses were surely easier to understand than the rapidly changing IT sector of today where many of the battles over competition policy are now being waged. There might be a strong *a priori* case for a policy that bans specific anticompetitive practices in *all* markets – practices such as naked price fixing or market sharing. But it is much more difficult for the competition authorities to thrust themselves into a rapidly-changing sector where one or more firms enjoy transitory or even longer-lasting monopoly power and to prescribe a remedy that reduces or eliminates this market power. And even if the authorities are successful in this pursuit, they may so reduce the incentive to innovate that their intervention actually reduces economic welfare.

Before any other jurisdiction decides to follow U.S. precedent in government policy, it should – at the very least – review carefully the published empirical literature on the effects of that policy. For instance, the EU should have looked more carefully at recent U.S. telecom policy before launching its EU-wide mandate for network unbundling in the telecom sector. Why should Netherlands, Belgium, Luxembourg or Sweden require its telephone companies to provide access to their loops at regulated prices when each country has nearly ubiquitous cable television services who compete with the telecom companies in providing broadband Internet access? Nor would I suggest that European countries follow the U.S. lead in allowing class-action tort suits with contingency fees and jury trials in antitrust cases. By privatizing the enforcement of competition policy, the EU would move at least one step in this direction.

Perhaps the most succinct analysis of U.S. antitrust policy has been provided by a well-known U.S. economist:

"The tendency of antitrust policy to become a permanent inquisition on the conduct of the country's two or three hundred largest corporations, resulting in endless consent decrees, is understandable given the courts' hostility to dissolution and divestiture. Nevertheless, the tendency is unfortunate. It multiplies uncertainty respecting the law and rests on the doubtful assumption that civil servants are competent to make decisions assessing the welfare consequences of particular practices, *e.g.*, a patent exchange between two firms. Moreover, it may well be futile. For in the negotiation of a complicated consent decree governing the conduct of a firm, one may presume the passage of time will soon make the decree irrelevant and that, since the defendant knows more about his operations than the government, he probably had the best of the compromise in the first place."[20]

This view was written before the *Microsoft* case was filed. It was written before the *AT&T* case was filed. It was written even before the 1969 *IBM* case was filed. Indeed it was written nearly fifty years ago! In my opinion, this view has withstood the test of time very well.

[20] Donald Dewey, *Monopoly in Economics and Law*. Chicago: Rand McNally & Company, 1959, p. 309.