

Restoring Accountability and Oversight in the Antitrust Settlement Process

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Introduction

The enforcement of the antitrust laws is supposed to be a traditional task of the courts in the United States. However, the line between lawful and unlawful restraints of competition is not easily drawn. The courts struggle to assess the competitive effects of restraints, in particular outside the area of per-se unlawful restraints. Still, we are inclined to comfort ourselves by the seemingly acceptable outcomes of enforcement, achieved with the support of expert bodies like the Antitrust Division of the Department of Justice (DOJ) and later the Federal Trade Commission (FTC). Nevertheless, the authorities' resources to litigate cases in full are limited. A full litigation, with extensive discovery, with hearing of witnesses, and possibly with receipt of briefs of amicus curiae, may reveal tons of information, but the necessary knowledge for a sound, lasting decision ("root knowledge") may still not be acquired.¹ Even if it would be theoretically possible to acquire "root knowledge", a rational actor will not try to acquire it if his efforts are subject to information and search costs.² Bounded rational agents, i.e. also courts and authorities, generally experience limits in formulating and solving complex problems and in processing (receiving, storing, retrieving, transmitting) information.³ Enforcement results, therefore, vary, rendering Type I (false positives) and type II (false negative) errors. Given the circumstances, consent decrees – although probably more vulnerable to errors due to limited analysis – proved helpful to obtain fast relief and reduce the costs of enforcement; amicable settlements enjoy great success in

¹ See Charles E. Lindblom, *The Science of "Muddling Through"*, 19 Pub. Admin. Rev. 79 (1959).

² Cf. Robert D. Cooter & Daniel L. Rubinfeld, *Reforming the new Discovery Rules*, 84 Geo. L. R., November 1995, 61.

³ See Oliver Williamson, *The Economics of Organization: The Transaction Cost Approach*, 87 American Journal of Sociology, 548, 553 (1981) (citing Herbert Simon, A Behavioral Model of Rational Choice, in *Models of Man* (1957)).

antitrust enforcement. The obvious advantages of the consent decree over traditional antitrust enforcement by litigation come along with serious inherent flaws. Quite often, the settlement process is accused to be vulnerable to undue political influence and possibly corruption.⁴ The Tunney Act⁵ addressed these concerns by opening up the results of the settlement process to interested third parties and by requiring the government to reveal its justifications for settling the case.⁶ However, the Tunney Act fails to guarantee an informed decision of the court on the public interest of the proposed consent decree, and, consequently, fails also to deter participants from drafting inadequate settlements.

This paper is focused on the disregard of public interest by the use of consent decrees by the government. After describing the instrument of consent decree in the United States, the European Community and Switzerland (1.), I want to address inherent flaws of the settlement process (2.) and proposals to mitigate these flaws (3.).

Due to the lack of a conflict of interest⁷, the integrity of settlements in private antitrust cases are hardly compromised, and will not be discussed, except as an instrument mitigating a possible perversion of public interest. Further, I will neglect the enforcement activity of the States' Attorneys General.

⁴ See Lloyd C. Anderson, *United States v. Microsoft, Antitrust Consent Decrees, and the Need for a Proper Scope of Judicial Review*, 65 Antitrust L. J. 1, 4 (1996).

⁵ Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (1974).

⁶ See Lloyd C. Anderson, *supra* note 4, at 9.

⁷ In private antitrust cases, there is no split between principal (the public) and agent (enforcement authority, politicians).

1. How Consent Decrees Work

(a) Types of Consent Decrees in the United States

A consent judgment is a contract of the parties entered upon the record with the approval of a court, which concludes the lawsuit amicably instead of resolving the case by trial. A consent decree is the equitable counterpart of a consent judgment. A consent order is any court order to which the opposing party agrees; also, the FTC settles its cases by consent order. In the following, these terms will be used as synonyms.

For the purposes of this paper, consent orders may be distinguished by the participating federal authority, which is either the FTC or the Antitrust Division. The major difference in the enforcement actions of these authorities consists in the scope of jurisdiction⁸ and the requirement of court approval for consent decrees in government cases: the final acceptance of a consent decree negotiated by the government (the Antitrust Division) is a judicial act, and has the same legal effect as a judgment entered following a fully litigated action.⁹ In contrast to proceedings of the government, the FTC follows its own procedure; in particular, the FTC has the power to review the initial decision of the Administrative Law Judge hearing the case.¹⁰ Additionally, minor differences in policy may be identified: The Antitrust Division, e.g., embraces "fix-it-first" remedies, which allow the Division to approve a merger by accepting divestitures proposed by the

⁸ See generally Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* 592-600 (2005).

⁹ See James C. Noonan, *Judicial Review of Antitrust Consent Decrees: Reconciling Judicial Responsibility with Executive Discretion*, 35 *Hastings L. J.* 133, 134 (1983).

¹⁰ 16 C.F.R. § 3.51-3.56.

parties without entering a formal consent decree.¹¹ The FTC generally requires parties to enter into a consent order, while the Antitrust Division, as stated above, acts also informally.

Formally, consent decrees in the United States are not distinguished by subject matter (agreements or mergers); however, the pressure to settle competitive concerns of the antitrust authority may be far bigger in mergers due to the time constraints surrounding every deal; the affected firms may not have time to wait for a final judgment of a court¹²; a word from the Supreme Court was heard already decades ago.

Consent decrees may also be categorized by their content: those that explain or interpret legal core rulings, those that establish new standards, and those that regulate the competitive behavior of parties that come under their scrutiny^{13, 14}. To draw a line between these types of consent decrees is not easy: consent decrees of the interpreting type, i.e. consent decrees which are claimed to be mere interpretations of law, create also new law to a certain extent.¹⁵ With regard to consent decrees establishing new standards, a red flag could be raised because established

¹¹ Further differences are the need to present an up-front buyer to the FTC, or the use of "crown jewel" provisions (i.e. provisions that require the merging parties to add specific, more valuable assets to the divestiture package if they are unable to sell the assets to a viable purchaser within a pre-determined period of time) by the FTC; see generally Smith Stephen W et al., DOJ issues Antitrust Merger Remedies Guide (2004), available at <http://www.mofo.com/news/updates/files/update1367.html>.

¹² The ability to kill a deal may be even more pronounced in the European Community and Switzerland, where the authorities are not dependent on a preliminary injunction by a court (15 U.S.C. § 18a(f)) to stop the consummation of a transaction.

¹³ See, e.g., in re America Online, Inc., No. C 3989 (2000). See also Robert Pitofsky et al., Trade Regulation: Cases and Materials 1064-1066 (2003) (discussing whether it is wise for antitrust authorities to engage in regulation).

¹⁴ See Michael A. Weiner, *Antitrust and the Rise of the Regulatory Consent Decree*, 10 Antitrust, Fall 1995, 4, at 4.

¹⁵ See Hans-Georg Gadamer, *Wahrheit und Methode: Grundzüge einer philosophischen Hermeneutik* [Truth and Method] 280 (3rd Ed. 1972); Peter Hettich, *Wirksamer Wettbewerb: Theoretisches Konzept und Praxis* [Effective Competition: Theoretic Concept and Case Law] 20 (2003) (with further references on the implementation of the approach in legal methodology).

court standards are not followed, which are supposed to be the primary source of antitrust law ("rule of law" concerns); this issue will be discussed later.¹⁶

We may also draw a distinction between settlements in civil proceedings (consent decrees, consent judgments) and settlements in criminal proceedings (plea agreements for Sherman Act violations). In exchange for the defendant's plea of guilty or *nolo contendere* to either a charged offense or a lesser or related offense, the attorney for the government¹⁷ may not bring, or will move to dismiss, other charges. The attorney for the government may further recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision, e.g. of the Sentencing Guidelines, does or does not apply; he may also agree that a specific sentence or sentencing range is the appropriate.¹⁸ In *Rudolph Santobello v. New York*, the Supreme Court stated:¹⁹

"The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities. Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases [...]"

The plea agreement shall ensure swift and certain punishment, both serving the ends of general deterrence and rehabilitation of the individual defendant. In the past, plea agreements have occurred in an informal and largely invisible manner.²⁰ The Federal Rules of Criminal Pro-

¹⁶ Section 2(a) below.

¹⁷ Only the Antitrust Division will prosecute criminal claims.

¹⁸ Federal Rules of Criminal Procedure 11(c)(1).

¹⁹ 404 U.S. 257, at 260 (1971). *See also* *Brady v. United States*, 397 U.S. 742, at 751-752 (1970)

²⁰ *See* Arnold Enker, *Perspectives on Plea Bargaining*, in *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts* 108, 115 (1967).

cedure require now disclosure of the – for the court non-binding – agreement in open court and set up standards for approval.²¹ The Santobello case makes clear that the plea agreement serves generally the same purpose as the civil consent decree in antitrust law, to be discussed below. The plea agreement may be affected, in principle, by the same adversities as the civil consent decree. However, criminal enforcement does not stand alone in antitrust cases; it will come along with a civil lawsuit against an enterprise. Thus, the plea agreement rather increases the transparency of the whole settlement process (since it involves more persons) and presents probably no additional threat to consumers and economy.

(b) Bypassing Problems of Traditional Antitrust Enforcement

"In both government and private actions, it is not uncommon for discovery, trial and appeal to take to take ten or more years and to involve a vast number of documents. Scores of attorneys often represent the parties to an antitrust litigation. This 'big case' problem has always been part of the antitrust scene."²² Already in 1951, the judicial conference of the United States found that "unnecessary delay, volume of record, and expense in judicial proceedings constitute an obstruction to the administration of justice" in antitrust cases.²³

The flaws of traditional antitrust enforcement by litigation are exemplified by the IBM trial. The IBM case took 13 years until the government finally stipulated dismissal of the case. During these years, 66 million pages of documents were produced; the government's trial presen-

²¹ Federal Rules of Criminal Procedure 11(c)(3)-(5).

²² Robert Pitofsky et al., *supra* note 13, at 113-114.

²³ The Judicial Conference of the United States, Procedure in Anti-Trust and other Protracted Cases, 13 F.R.D. 41, at 83-84 (1951). See also National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General, 80 F.R.D. 509, at 515-524 (1979).

tation took 104'000 pages of transcript; IBM called 856 witnesses, cited 12'280 exhibits, and is estimated to have spent \$ 150 million on its defense.²⁴ This may lead to an overextension of the court.²⁵

The IBM case may serve as basis for several preliminary conclusions: A powerful firm is likely to be prepared for antitrust litigation²⁶, to have the financial resources to afford a big case, and to delay trial; this power is contrasted by the potential impact of the alleged anticompetitive behavior of a powerful firm; its behavior's competitive impact is probably much more severe than any behavior of small firms. Further, the big firm may be also able to invest more resources in the case than the government. In contrast, the costs of trial may be a heavy burden not only for a smaller firm.²⁷ This imbalance is probable to affect the outcome of the trial any may render antitrust enforcement selective.

Unlike the IBM case, the second Microsoft Case²⁸ was tried in 76 days by scheduling the case on a fast track and by limiting each side's number of witnesses.²⁹ Such fast track proceedings, however, put the legitimacy of the court trial into question: fast proceedings do not only affect the fairness of the trial, but may reduce further the likeliness assess the alleged violation correctly and to find the right remedy (sic!). Despite a fast trial, relief may come too late in mar-

²⁴ Id. at 114.

²⁵ See *infra*, 2(c) and 3(b).

²⁶ I assume here that a dominant firm is aware of its likeliness to be subject of an antitrust lawsuit.

²⁷ A smaller firm is probably less likely to be subject to federal prosecution. Nevertheless, it may be defendant in an antitrust case if geographic markets are localized or market volume is small. Outside the scope of the discussion here are private lawsuits against small firms to raise rival's costs.

²⁸ United States v. Microsoft Corp., 97 F.Supp. 2d 59 (D.D.C. 2000); scheduling on fast truck was approved by the Circuit Court, 253 F.3d 34, at 98, 100-101 (D.C. Cir. 2001).

²⁹ Robert Pitofsky et al., *supra* note 13, at 115.

kets as dynamic as the market for software.³⁰ Moreover, such procedural steps do not change the fact that the big antitrust case takes a huge amount of court time and absorbs a judge for several months.³¹ Even if a judge is ready to invest the necessary amount of time in the case, he may find himself overextended and be inclined to base his findings verbatim on the government's brief³², or to adopt mechanically the findings proposed by the defendant.³³ In *Microsoft II*, the Circuit Court stated that "[t]he substance of the District Court's remedies order is nearly identical to plaintiffs' proposal."³⁴

Adequate relief in a civil antitrust case will stop the illegal practices alleged in the complaint, prevent their renewal, and restore competition to the state that would have existed had the violation not occurred.³⁵ As a matter of law, the government does not care if adequate relief can be obtained by judgment after a full trial or by consent decree prior or during trial. This alone supports the use of consent decrees, since, as described above, even a full trial is unlikely to render the "right" solution for antitrust issues.³⁶ Further, the advantages of the consent decree, compared to traditional enforcement by litigation, are huge in every aspect: costs of enforcement, use

³⁰ 253 F.3d. at 49.

³¹ See Breck P. McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 Harv. L. Rev. 27, 58-61 (1950).

³² *United States v. Crescent Amusement Co.*, 323 U.S. 173, 184-185 (1944).

³³ *United States v. Forness et al.*, 125 F.2d 928, at 942 (2nd Cir. 1942).

³⁴ 253 F.3d at 99.

³⁵ See U.S. Department of Justice, Antitrust Division Manual, ch. IV-E (3rd ed. 1998), available at http://www.usdoj.gov/atr/foia/divisionmanual/table_of_contents.htm. See also the corresponding formulation in case law; 253 F.3d at 103; *Ford Motor Co. v. United States*, 405 U.S. 562, at 578 (1972); *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, at 250 (1968); *United States v. Grinnell Corp.*, 384 U.S. 563, at 577 (1966).

³⁶ See *supra*, note 1.

of manpower, speed of relief, and legal certainty. Consequently, 80% of all complaints filed by the Antitrust Division are settled prior to trial by consent decree.³⁷

Given the described flaws of traditional antitrust enforcement – lengthy trial, overextension of courts, uncertain relief and effect in social welfare –, the rise of the consent decree is not surprising. Consent decrees resolve uncertainty about the defendant's legal duties. They save litigation costs on defendant's side as well as enforcement and compliance resources on the side of the authorities. The large amount of control over the enforcement outcome given by consent decrees may enable the authorities to pursue political or economic goals, which they could not enforce by litigation.³⁸ Thus, there may be a divergence between what the law requires and the violations alleged in complaints that are accompanied by consent decrees. However, defendants will enter into consent decrees when the costs of the decree are less than the costs of even a successful litigation, which will restrain excessive demands by the authority. As a further consequence of this balancing of costs by the firm, a consent decree is not necessarily indicating a strong case of the government, in particular if the costs of the decree are low.³⁹

A civil consent decree does not preclude the defendant's right to appeal. However, the Supreme Court held in *Swift & Co. v. United States* that "even gross error in the decree would

³⁷ See John J. Flynn & Darren Bush, *The Misuse and Abuse of the Tunney Act: The Adverse Consequences of the "Microsoft Fallacies"*, 34 Loyola University Chicago Law Journal 749, 766 (2003).

³⁸ See A. D. Melamed, *Antitrust: The new Regulation*, 10 Antitrust, Fall 1995, 13, at 13-14; Warren S. Grimes, *The ABA Consent Decree: Reflections on Oversight of the Consent Process*, 10 Antitrust, Fall 1995, 25, at 26; Christopher C. Sabnis, *Executing the Laws or Executing an Agenda: Usurpation of Statutory and Constitutional Rights by the Department of Justice*, 37 U. Mich. J. L. Reform 257, 260 (2003).

³⁹ Id. at 14.

not render it void."⁴⁰ In criminal antitrust cases, judicial oversight is also reduced since the Anti-trust Division requires the defendants, as part of a plea agreement, to waive their right to appeal.⁴¹

(c) Major Criticism because of political bias

Major criticism against consent decrees emerged after a lawsuit of the United States against International Telephone & Telegraph (ITT) was settled by consent decree. The lawsuit was to challenge the merger of ITT and Hartford Fire Insurance. Since the case was settled after the United States had lost already two other cases against ITT, seeking a consent decree appeared reasonable.⁴² However, heavy criticism arose when financial contributions by ITT to finance the 1972 Republican Convention became public, although it was not clear whether the consent decree was really a return service of the Republican Administration or not. In addition, the consent decree was anxious to avoid hardship to ITT and its shareholders, which is probably a questionable motivation in antitrust.⁴³ These events made clear that consent decrees are susceptible to political capture.

The Tunney Act has the main purpose to counteract the capture of antitrust settlements by political considerations in cases brought by the government; it provides also an opportunity make necessary modifications to the consent decree, e.g. to correct mistakes. It requires the government to publish a proposed consent decree as well as other relevant documents and to file a

⁴⁰ 276 U.S. 311, at 330 (1928).

⁴¹ 18 U.S.C. § 3742(a); see Christopher C. Sabis, *supra* note 38, at 265-266.

⁴² See Lloyd C. Anderson, *supra* note 4, at 7.

⁴³ Id. at 7-8. Anderson also mentions the Western Electric Consent Decree of 1956 as example for antitrust enforcement captured by major lobbying efforts (United States v. Western Electric Co. 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. 1956). See also the disapproved consent decree with El Paso Natural Gas Corp., Cascade Natural Gas Corp. v. El Paso Natural Gas Corp., 386 U.S. 129 (1967).

competitive impact statement. During a 60-day period any person may file written comments relating to the proposed consent decree, and the government is required to consider these comments and to publish a response. A court will consider the competitive impact of the consent decree, including termination of the alleged violations, the impact upon competition in the relevant markets, upon the public in generally and upon individuals alleging specific injury. The court will reflect further any other competitive consideration bearing upon the adequacy the decree, in order to determine whether the decree is in the public interest. Finally, the court will affirm the proposed decree and enter a consent judgment if it believes it to be in the public interest.

The consent decree procedure in cases of the Federal Trade Commission (FTC) is governed by 16 CFR §§ 2.31-2.34 in nonadjudicative procedures and 16 CFR § 3.25 adjudicative procedures. In nonadjudicative procedures, any person may submit a proposal for a consent decree. The FTS sets up rather harsh requirements to enter an agreement: every agreement must contain an admission of the proposed findings of fact and conclusions of law or an admission of all jurisdictional facts and an express waiver of the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law. Every agreement also must waive further procedural steps and all rights to seek judicial review. If the FTC accepts the proposed consent agreement, it will put the agreement on public record for a period of 30 days, during which any interested person may file comments. Following the comment period, on the basis of comments received or otherwise, the Commission may either withdraw or confirm its acceptance of the agreement. In adjudicative proceedings, the settled portions of a case are withdrawn from the proceedings before the Administrative Law Judge and given nonadjudicative status. The agree-

ment will be disposed the same way as nonadjudicative agreements. The consent agreements of the FTC do, therefore, never require approval by a court.⁴⁴

The opening up of the settlement process to interested third parties has the purpose to enable the judge and the FTC, respectively, to acquire the necessary knowledge to assess the impact of the consent decree and to make necessary modifications.

(d) Comparative Note

Consent decrees are also quite common instruments in the European Community and Switzerland. It may be helpful to analyze these foreign approaches of facilitate antitrust enforcement to identify common features of consent decrees, discover further flaws of consent decrees, and avoid to repetition of mistakes in mitigating these flaws.

(i) European Community

With regard to agreements restricting competition (article 81 EC Treaty⁴⁵) and abuses of a dominant position (article 81 EC Treaty), the European Community adopted the instrument of commitment decisions in article 9 of its Council Regulation 1/2003 of December 16, 2002⁴⁶ on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty:

"1. 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. 2. The Commission may, upon

⁴⁴ The ordinary proceedings of the FTC involve a trial before an Administrative Law Judge (ALJ) and the final decisions of the FTC are subject to appeal to the Federal Court of Appeals.

⁴⁵ Treaty establishing the European Community, December 24, 2002, O.J. (C325) 35 (2002).

⁴⁶ O.J. (L1) 1-25 (2003).

request or on its own initiative, reopen the proceedings: (a) where there has been a material change in any of the facts on which the decision was based; (b) where the undertakings concerned act contrary to their commitments; or (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties."

The instrument of a commitment decision is novel to EU law. On September 17, 2004, the Commission issued a memo describing the scope of application of the new instrument. The Commission is willing to consider such a decision if the companies under investigation are willing to offer commitments which remove the Commission's initial competition concerns as expressed in a preliminary assessment, if the case is not one where a fine would be appropriate (as in hardcore cartel cases), and if efficiency reasons justify that the Commission limits itself to making the commitments binding, and that it does not issue a formal prohibition decision.⁴⁷ The decision may cover structural and behavioral commitments and may be limited in time. Furthermore, the decision may be modified if a material change of the facts takes place. Commitment decisions are silent on whether there is a breach of the EU competition rules. Thus, customers or competitors seeking private enforcement in national courts will still need to prove – similar to 15 U.S.C. § 16(a) – the illegality of the behavior to obtain compensation for damages. Nevertheless, it has also been argued that a commitment decision is adopted if the alleged infringement comes to an end or if it takes an agreement or a practice outside of the scope of article 81 EC Treaty; therefore, the "decision includes the implicit positive finding that the agreement as modified by the commitments is in line with article 81 EC [Treaty]"⁴⁸. Further, the decision does not exclude enforcement actions before Member States' authorities and courts. We may note that consent

⁴⁷ Commitment decisions (Article 9 of Council Regulation 1/2003 providing for a modernised framework for anti-trust scrutiny of company behaviour), *available at* <http://europa.eu.int/comm/competition/antitrust/legislation/>.

⁴⁸ See Frank Montag & Andreas Rosenfeld, *A Solution to the Problems? Regulation 1/2003 and the modernization of competition procedure*, 2003 ZWeR 107, 132 (2003).

decrees in the European Community help to handle rather trivial cases; the incentive to enter a consent decree in the United States seems to be rather bigger in large and complex cases. These large and complex cases are much more likely to generate the "big case" problem described above⁴⁹; however, these may also be the cases where the huge investment in litigation is reasonable and a trial seems to be rewarding in terms of prestige.

In merger cases, article 6(2)-(3) and 8(2) of the EC Merger Regulation⁵⁰ applies. The Commission will declare an undertaking compatible with the common market, when modifications by the undertakings concerned eliminates doubts with regard to the preservation of competition. The Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market. The Commission may revoke the decision where the decision is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit, or the undertakings concerned commit a breach of an obligation attached to the decision.

The adoption of a commitment decision in antitrust cases or the adoption of a decision with conditions and obligations does not require court approval⁵¹, but also does not infringe the right of appeal to the European Court of First Instance or the European Court of Justice.

⁴⁹ See *supra*, 1(b).

⁵⁰ Council Regulation (EC) No 139/2004 of January 20, 2004 on the control of concentrations between undertakings, O.J. (L24) 1-22 (2004).

⁵¹ We have to keep in mind that court approval probably would be inappropriate for contracts concluded by an authority in a top hierarchy position; cf. David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 234-258 (2001).

(ii) Switzerland

In Switzerland, consent decrees in antitrust cases are governed by article 29 KG⁵². The investigating authority (Sekretariat der Wettbewerbskommission) has the power to propose consent decrees, if it thinks an agreement is illegal; such consent decrees have to be approved by the adjudicating (administrative) authority, the Competition Commission (Wettbewerbskommission). The statute provides no guidance regarding the content of the consent decree. The legislative history seems to indicate that an instrument should be provided to the authorities, which should make investigation and relief faster and more efficient.⁵³ Lawyers have pointed out that a consent decree should be subject to a genuine willingness on the side of the authority and the defendant to negotiate the issues in question; the imposition of a consent decree by the investigating authority does not meet this requirement. The different viewpoints should be reconciled in the discussion, as long as fundamental issues remain untouched.⁵⁴ An analysis of the case law indicates that consent decrees have been concluded not in the beginning, but rather in the end of an investigation.⁵⁵ As a consequence, the consent decree is not used to enhance efficiency and to

⁵² Bundesgesetz vom 6. Oktober 1995 über Kartelle und andere Wettbewerbsbeschränkungen (Kartellgesetz, KG, SR 251) [Federal Law on Cartels and other Restraints of Competition].

⁵³ See Botschaft des Bundesrates vom 23. November 1994 zu einem Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen [Report of the Federal Council on a Federal Law on Cartels and other Restraints of Competition], in BBl 1995 I 468-637, at 602 (1994).

⁵⁴ See Bruno Schmidhauser, Article 29 KG, in *Kommentar zum schweizerischen Kartellgesetz* [Commentary on the Swiss Antitrust Law], N 11-12, 17 (Eric Homburger et al. ed., 1997); Walter A. Stoffel, *Das Schweizerische Kartellgesetz: Rückblick auf die jüngste Praxis und Ausblick auf die Revisionsbemühungen* [Swiss Antitrust Law: Looking Back on Recent Case Law and Discussion of Draft of the new Statute], 1994 SZW 105, 112 (1994).

⁵⁵ See Roger Zäch, *Schweizerisches Kartellrecht* [Swiss Antitrust Law] 470-471 (3rd ed. 2005) (arguing that the authority's readiness to conclude an agreement in the final stage of an investigation is to reduce the number of appeals).

obtain fast relief; the defendant just deals in his right to appeal to negotiate a more favorable injunction.⁵⁶

There is no specific provision in the law governing consent decrees in Swiss merger cases. However, the Competition Commission has the possibility to approve mergers under conditions or obligations. In many cases, such conditions will secure proposals of the parties to restore or preserve competition.⁵⁷ In such a case, the injunction concluding the investigations is merely clothing the underlying agreement. The right to file an appeal is not waived formally, but the parties will hardly have an incentive to appeal; third parties have normally no right to appeal under the Swiss Merger Law⁵⁸; however, it is not entirely clear yet if a competitor could file an appeal, provided there are good reasons.

(e) Common Characteristics of Consent Decrees

Consent decrees bypass the big case problem associated with traditional antitrust enforcement by litigation. The use of informal consent decrees by the government after passage of the Tunney Act shows that they may also serve as instrument to bypass judicial review. Still, consent decrees have the advantage of providing fast relief on the side of the consumers and certainty on the side of the defendant. Further, they reduce the costs of enforcement (defense costs of the defendant, investigating costs of the government) dramatically; scarce resources are bound only a short amount of time, which allows the government to enlarge the scope of its enforcement

⁵⁶ However, what remains is the right to appeal the approval of the consent decree of the competition commission; the consent decree, itself, constitutes an agreement which cannot be itself appealed.

⁵⁷ See Patrik Durcroy, Article 33 KG, in *Kommentar zum schweizerischen Kartellgesetz* [Commentary on the Swiss Antitrust Law], N 29 (Eric Homburger et al. ed., 1996).

⁵⁸ *Engel v. Competition Commission*, BGE 124 II 499, at 505-506 (1998); see also Roger Zäch, *supra* note 55, 500-501, 514.

efforts. Remarkably, the limited resources in antitrust enforcement are opposed to the collected fines, which may amount to hundreds of millions of dollars in single cases.

Besides these described features shared by all types of consent decrees, the characteristics of specific consent decrees may differ strongly. At the core, there is always an agreement between the authority and the defendant to settle the case. In contrast to a judgment after public trial in court, the materialization of the consent decree may be more obscure. By putting a proposed agreement on public record for comment, the United States have taken steps to increase transparency in the consent decree process; in the European Community and Switzerland, the settlement process has still the character of a "black box". However, the use of informal processes by the Antitrust Division ("fix-it-first"-remedies) diminishes also the benefit of this "comment-mechanism", and the FTC is even less affected by it.

We may further note the broad discretion of the authorities to conclude a consent decree.⁵⁹ The relevant statutes in the United States, the European Community and Switzerland contain no guidelines regarding the process of negotiating the consent decree and the content of the consent decree. Since the consent decree is an instrument of enforcement, it is justified to require the consent decree to terminate the alleged distortion in competition. Nevertheless, the motivation of the parties concluding the consent decree and their course of action remain unobservable. However, the discretion of the authority is also huge in the traditional court proceedings, e.g. the discretion of the authority to decide which cases to file in the first place or which kind of relief (structural or behavioral) to seek. In the United States, the discretion of the government (Antitrust Division) to conclude an agreement is curtailed by the Tunney Act's requirement of court

⁵⁹ Sam Fox Publishing Co. v. United States, 366 U.S. 683, 689 (1961); *see also* Swift & Co. v. United States, 276 U.S. 311, 331-332 (1928).

approval, which requires the court to verify that the consent decree is in the public interest: the impact of this requirement will be discussed below.

While some consent decrees preclude the defendant's right to appeal, there exists not much reason for the defendant to seek judicial review anyway (except if the defendant has changed his mind); however, this is not to deny that disputes may arise on the proper execution of a consent decree.⁶⁰ At least, consent decrees do not infringe the right of third parties (consumers, competitors, etc.) to initiate their own proceedings. This right to initiate proceedings may provide some independent restraints on the negotiations of the authorities.

2. Consent Decree as Burden to Consumers and Economy

(a) Deviation from established Standards

A consent decree may deviate from established court standards in several ways. First, the authority may trade in strong parts of its claim to reach consent in weak parts of the claim, with the purpose to establish a new legal standard over time (one could speak of Executive Precedent⁶¹); by doing this, the authority may avoid the need to file a test case. Established standards may also be transformed by entering in settlements inconsistent with past policy. The authority may further throw in the "nuisance value" of its lawsuit, trying to reach a more favorable result in the negotiation of the consent decree. Also, a defendant with strong political support may lobby for a more favorable deal than he could reach in front of a court.

⁶⁰ See action of the United States to hold Microsoft in civil contempt of the consent decree; *U.S. v. Microsoft Corp.*, 980 F.Supp. 537 (D.D.C. 1997).

⁶¹ See generally Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L. J. 969 (1992).

Another form of deviation, as the Swiss commentator pointed out, is the need for a genuine will of the authority and the defendant to compromise in order to settle a lawsuit amicably. A settlement requires both parties to waive or weaken some of their claims in order to make convergence possible. However, a settlement makes it impossible to find out which of both sides was "right" in the first place. The extensive use of consent decrees may, consequently, hamper the development of standards (case law) over time.

Deviations from given standards may constitute a general threat to the rule of law, i.e. a threat to the premise that disputed legal questions should be decided by a judge according to the law. In antitrust, we face the problem of extreme indeterminacy of the law. § 1 of the Sherman Act states, e.g., that "[e]very 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." This broad rule, taken literally, could not stand from the outset.⁶² Authorities, courts as well as governments, hardly understand the rationale behind anticompetitive behavior and struggle with enforcement of the antitrust laws⁶³ and the formulation of adequate remedies.⁶⁴ Authorities engage, as a consequence, in something resembling LINDBLOM's "muddling through"; they work with limited reliance on theory, with values and policies chosen at the same time, and with successive limited comparisons, thereby trying to find adequate ad-hoc solu-

⁶² United States v. Joint Trade Association, 171 U.S. 505, at 567-568 (1898) (retreating from a literal interpretation of the Sherman Act).

⁶³ See Peter Hettich, *supra* note 15, at 409-410.

⁶⁴ See Richard A. Posner, Antitrust Law 101-04 (2nd ed. 2001); Lawrence A. Sullivan & Warren S. Grimes, The Law of Antitrust: An Integrated Handbook 77-80 (2000); Paul L. Joskow, Transaction Cost Economics, Antitrust Rules, and Remedies, 18 J.L. Econ. & Org. 95, 99 (2002).

tions for present anticompetitive restraints.⁶⁵ The inexistence of guidance and "muddling through" are of concern not only in consent decrees, but also in traditional antitrust litigation. These concerns raise the question if either courts or administrative bodies are better in "muddling through"⁶⁶ and if "muddling through" is the best available course of action.⁶⁷

(b) Limited Transparency

The limited transparency of the consent decree process has already been mentioned. With regard to the acceptance of a settlement, KOVACIC points out that it is difficult for those other than the parties to the negotiations to accurately assess the basis for or significance of the consent agreement.⁶⁸ Statements issued by the authority may exaggerate the rationale and the scope of the prosecution, and may portray the settlement in the most favorable light; the defendant has few incentives to point out such exaggerations.⁶⁹ The incidents around the consent decree seem to represent hidden information difficult to access.⁷⁰ The limited transparency limits further the possibilities of firms to assess and forecast the authority's strategy and policy goals.

(c) Judicial Review to Eliminate Political and other Bias

As described above, the Tunney Act imposes some limits on the government with regard to the content of a consent decree. Its purpose is to contain corporate pressures (lobbying), to

⁶⁵ See Charles E. Lindblom, *supra* note 1, at 80-88.

⁶⁶ See *infra*, 3(b).

⁶⁷ See *infra*, 3(d).

⁶⁸ See William E. Kovacic, *Evaluating Antitrust Experiments: Using Ex Post Assessments of Government Enforcement Decisions To Inform Competition Policy*, 9 Geo. Mason L. Rev. 843, 848 (2001).

⁶⁹ Id. at 848.

⁷⁰ Cf. Gary J. Miller, *Managerial Dilemmas: The political Economy of Hierarchy* 138-158 (1992).

increase transparency, to reduce rubber-stamping of consent decrees by the courts, and to promote consent decrees which are "in the public interest".⁷¹ As I will discuss below, the courts are mostly not able to keep up with the Tunney Act's purpose.

With occasional exceptions, courts never interfere with the negotiated settlements reached by the parties.⁷² However, one of the most prominent post-Tunney Act consent decrees, the AT&T consent decree⁷³, was modified by the district judge in several respects in accordance with his views of the public interest and, although both the government and AT&T acquiesced, non-parties to the decree were allowed to intervene for purposes of appealing the district judge's public interest determination.⁷⁴ Nevertheless, a firm standard of review was not established by the AT&T-case, and cases with relaxed scrutiny followed suit.⁷⁵

The hope for extended judicial review on the basis of the Tunney Act was brought to a sudden end after the first series of Microsoft cases.⁷⁶ The complaint of the Antitrust Division charged that Microsoft violated Sections 1 and 2 of the Sherman Act. The primary allegations in the complaint concerned licensing agreements between Microsoft and Original Equipment Manufacturers of personal computers.⁷⁷ After the failure of the FTC to file a lawsuit, the Antitrust Division took up the case and initiated settlement negotiations in June 1994. Approximately a

⁷¹ John J. Flynn & Darren Bush, *supra* note 37, at 755-760.

⁷² See Warren S. Grimes, *supra* note 38, at 27; Natalie L. Krodel, *The Tunney Act: Judicial Discretion in United States v. Microsoft Corporation*, 62 Brook. L. Rev. 1293, 1321 (1996).

⁷³ 552 F.Supp. 131 (D.D.C. 1982).

⁷⁴ *United States v. AT & T*, 552 F.Supp. 131 (D.C.D.C. 1982), *aff'd sub nom. Maryland v. U.S.*, 460 U.S. 1001 (1983). See summary in *United States v. Microsoft Corp.*, 56 F.3d 1448, at 1458-1459 (D.C. Cir. 1995).

⁷⁵ See, e.g., *United States v. GTE Corp.*, 603 F.Supp. 730 (D.D.C. 1984).

⁷⁶ *United States v. Microsoft Corp.*, 159 F.R.D. 318 (D.D.C. 1995) (dismissal of the proposed consent decree), *rev'd* 56 F.3d 1448 (D.C. Cir. 1995).

⁷⁷ 159 F.R.D. at 322.

month later, the parties came to agreement and filed a proposed judgment with the Court. As required by the Tunney Act, the proposed consent decree was made public for comment; however, only five public comments were received, and these public comments did not provide much enlightenment about the proposed settlement.⁷⁸ Nevertheless, Judge Stanley Sporkin used his broad powers to investigate and admitted additional motions to participate in the comment process. In reviewing the proposed decree, the District Judge was particularly concerned with "Vaporware", an alleged practice of Microsoft about which Judge Sporkin read in a book and which was not addresses in the proposed consent judgment:

"At the first substantive status conference on September 29, 1994, the district judge informed the parties that over the summer he had read a book about Microsoft – Hard Drive – because he 'thought it would be a good idea maybe to know as much about Microsoft as probably they're going to know about me.' Much of the ensuing discussion focused on accusations against Microsoft contained in the book. The district judge asked whether the government's lawyers had read the book and whether they had investigated the allegations made by its authors. In particular, the judge focused on the allegation that Microsoft engages in 'vaporware', which he described in differing terms but ultimately defined as 'the public announcement of a computer product before it is ready for market for the sole purpose of causing consumers not to purchase a competitor's product that has been developed and is either currently available for sale or momentarily about to enter the market.'"⁷⁹

The District Court finally denied confirmation of the consent decree out of four reasons:⁸⁰

"First, the Government has declined to provide the Court with the information it needs to make a proper public interest determination. Second, the scope of the decree is too narrow. Third, the parties have been unable and unwilling adequately to address certain anticompetitive practices, which Microsoft states it will continue to employ in the future and with respect to which the decree is silent. Thus, the decree does not constitute an effective antitrust remedy. Fourth, the Court is not satisfied that the enforcement and compliance mechanisms in the decree are satisfactory."

⁷⁸ Id. at 325.

⁷⁹ 56 F.3d at 1452-1453.

⁸⁰ 159 F.R.D. at 332.

On appeal, the D.C. circuit reversed. The Circuit Court held that the task of the court is, primarily, to inquire into the purpose, meaning, and efficacy of the decree. The court should look for ambiguous terms, difficulties in implementation, and possible injury of third parties. Turning on the role distribution between court and Attorney General, the court held:

"But, when the government is challenged for not bringing as extensive an action as it might, a district judge must be careful not to exceed his or her constitutional role. A decree, even entered as a pretrial settlement, is a judicial act, and therefore the district judge is not obliged to accept one that, on its face and even after government explanation, appears to make a mockery of judicial power. Short of that eventuality, the Tunney Act cannot be interpreted as an authorization for a district judge to assume the role of Attorney General."

Judge Silberman pointed out several issues on which the district court exceeded its authority. The court is not entitled to obtain detailed information of the settlement process, such as the broad contours of the investigation, the conclusions reached by the Government on the investigated practices, the content of the settlement discussions between the Government and defendant, in particular the areas that were discussed, and what areas were bargained away and the reasons for their non-inclusion in the decree, as well as the plans for the Government to deal with non-included issues.⁸¹ Further, the court may not search for better remedies or reformulate the issues in question. The Circuit Court emphasized: "the court's function is not to determine whether the resulting array of rights and liabilities 'is the one that will best serve society,' but only to confirm that the resulting settlement is 'within the reaches of the public interest'."⁸² The judge may also not look beyond what is really necessary to ensure compliance.⁸³

⁸¹ Cf. Deborah A. Garza, *The Court of Appeals sets Strict Limits on Tunney Act Review: The Microsoft Consent Decree*, 10 Antitrust, Fall 1995, 21 (arguing that it is virtually impossible to force the government to bring a claim it has chosen not to bring).

⁸² 56 F.3d at 1460.

⁸³ Id. at 1462.

The Circuit Court decision reduced the scope of review by the courts on the basis of the Tunney Act and introduced a strong deference to the decisions of the Antitrust Division. I agree with FLYNN and BUSH that the Tunney Act aimed to prevent such deference⁸⁴; this aim is already implied in the broad language of the statute.⁸⁵ Furthermore, the judge is, after Microsoft II, required to make his choice on the consent decree blind, not knowing most relevant facts surrounding the negotiation of the consent decree.

However, the Circuit Court may have been right to restrain itself, knowing that the public interest standard as incorporated in the Tunney Act is too vague to be handled by a court. How is the court supposed to determine whether the consent decree is in the public interest, if at all, without entering a full trial on the merits? Judge Aldrich may have been right when he, in the Gillette case shortly after the enactment of the Tunney Act, argued based on legislative history:⁸⁶

"Taken literally, the burden is impossible. The legislative history shows clearly that Congress did not intend the court's action to be merely pro forma, or to be limited to what appears on the surface. Nor can one overlook the circumstances under which the act was passed, indicating Congress' desire to impose a check not only on the government's expertise – or at the least, its exercise of it – but even on its good faith.

[...] With regard to the government's good faith, I have not the slightest reason to suspect otherwise. Nor has there been any contrary suggestion as a result of the proceedings statutory publicity. ... One of the opposers still attacks the wisdom of the decree. Here I make one final generalization. It is not the court's duty to determine whether this is the best possible settlement that could have been obtained if, say, the government had bargained a little harder. The court is not settling the case. It is determining whether the settlement achieved is within the reaches of the public interest. Basically I must look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass."

⁸⁴ See John J. Flynn & Darren Bush, *supra* note 37, at 780.

⁸⁵ See Natalie L. Krodell, *supra* note 72, at 1311.

⁸⁶ United States v. Gillette Co., 406 F.Supp 713, at 715-716 (D.C. Mass 1975).

Judge Aldrich acknowledges the importance of the consent decree as an enforcement tool; he is anxious not to vitiate its benefits. Aldrich regards as sufficient for approval that the record is both open and extensive, and that there is no reason to doubt the government's good faith.⁸⁷ We may conclude from the frustration of Judge Aldrich in examining the decree that the courts are not able to assess whether a consent decree is in the public interest. They are forced, therefore, to pay deference to the accordant assessment of the authorities.⁸⁸ This conclusion is matched by the observation of SPENCER WEBER WALLER, who argued that there is "a legal shift of antitrust from a common law/law enforcement/court centered model to an agency centered/regulatory model".⁸⁹ The Sherman Act never drew a precise line between lawful and unlawful combinations; this task, according to Senator Sherman, should be left to the courts.⁹⁰ The courts, however, share this role with bureaucratic expert bodies, which have, in particular in consent decrees, far more leverage in pressing their points of view than the courts. Today, the internal guidelines of the agencies have much more weight in shaping the antitrust laws than the aged decisions of the Supreme Court.⁹¹ Indeed, today's Supreme Court takes hardly any cases in

⁸⁷ 406 F.Supp at 715-716.

⁸⁸ *United States v. Ciba Corp.*, 50 F.R.D. 507, at 513-514 (1970): "The court in such a situation – short of compelling the trial a consent decree avoids – must proceed in some degree upon faith in the competence and integrity of government counsel. But this is scarcely an alarming necessity. At the least, we may acknowledge that all is lost unless such confidence may be reposed safely on a host of occasions." *See also* *United States v. Ling-Temco-Vought, Inc.*, 315 F.Supp. 1301, at 1310 (D.C.Pa. 1970). However, the courts still fall short of the more extreme deference formulated in *Chevron U.S.A, Inc. v. Natural Resource Defence Council, Inc.*, 467 U.S. 837 (1984).

⁸⁹ Spencer Weber Waller, *Prosecution By Regulation: The Changing Nature of Antitrust Enforcement*, 77 Or. L. Rev. 1383, 1386 (1998).

⁹⁰ 21 Cong.Rec. 2,460 (1890). This touches the problem how to ensure accountability to the principal if the principal was not able to specify its goals and if its enough if the agent (the authority concluding the consent decree) just tries to justify its decision in front of an inapt court; cf. Joshua Cohen & Charles F. Sabel, *Administrative Law and Global Politics: A Possibility for Democracy*, forthcoming in N.Y.U. J. of Int'l L. & Politics, 2005.

⁹¹ *Id.* at 1405. *See also* Charles Sabel, *Theory of Real-Time Revolution*, forthcoming in *The Corporation as a collaborative Community* (Charles Heckscher & Paul Alder eds. 2005) (arguing that after 1980, organizations are

antitrust.⁹² Antitrust cases, especially when dealt under a rule of reason, seem to be too big to handle for the representative federal court, with judges mostly inexperienced in matters of antitrust.⁹³ The court's deference to the government, in particular in merger cases, has even been noticed by the court itself; Justice Stewart noted in *U.S. v. Von's Grocery Co.*: "The sole consistency that I can find is that in litigation under § 7, the Government always wins."⁹⁴ The resources of the courts have not kept pace with the complexity of the modern economy, strongly based on specialization and division of labor, and the new forms of organization coming along with that economy.

As mentioned above, Judge Sporkin received only five public comments in the first series of Microsoft cases, which did not provide much enlightenment about the proposed settlement.⁹⁵ However, courts are not only overextended when they receive little outside support in reviewing a proposed consent decree. In the Microsoft II's consent decree, 32'329 public comments were received, by far the most comments ever received on any proposed decree under the Tunney Act; since this paper deals to a great extent with the Tunney Act as instrument to test the

modified in a way that "decisions of higher units are shaped by lower ones and the lower units can be formally outside the organization"). See also Robert Pitofsky et al., *supra* note 13, at 1034 (for the merger guidelines).

⁹² Id. at 1422-1425. Recently, the Supreme Court has decided *Verizon Communications v. Law Office of Curtis V. Trinko*, 540 U.S. 398 (dealing with Monopolization) and *F. Hoffman La Roche v. Empagran*, 542 U.S. 155 (2004) (dealing with the reach of the Sherman Act in foreign trade); further, the court granted certiorari, 125 S.Ct. 2937, to *Independent Ink v. Illinois Tool Works, Inc.*, 396 F.3d 1342 (Federal Cir. 2005) (dealing with tying) and *Dagher v. Saudi Refining and Motiva Enterprises*, 369 F.3d 1108 (2004), certioary granted, 125 S.Ct. 2957, 2958. See also Robert Pitofsky et al., *supra* note 13, at 1034 (arguing that antitrust enforcement in mergers has largely become administrative and that the Supreme Court has failed to hear cases since 1974).

⁹³ Id. at 1421

⁹⁴ 384 U.S. 270, at 301 (1966).

⁹⁵ 159 F.R.D. at 325.

efficacy of the decision-making process of the authorities, e.g. to overcome political bias, it is worth restating the overview on the comments received:⁹⁶

"Approximately 1,500 comments were unrelated to either the United States v. Microsoft case generally or the RPFJ [Revised Proposed Final Judgment] specifically, or were merely duplicate copies of comments by the same individual or entity. [...] Approximately 1,700 comments relate to other antitrust suits against Microsoft. [...]"

Approximately 22,750 comments express an overall view of the RPFJ. Of these, roughly 5,700 do not, for example, attempt to analyze the substance of the RPFJ, do not address any of its specific provisions, and do not describe any particular strengths or shortcomings of it. [...] The remaining 350 comments expressing an overall view can be characterized as containing a degree of detailed substance concerning the RPFJ. These comments range from one- or two-page discussions of some aspect of the RPFJ, to 100-plus-page, detailed discussions of numerous of its provisions or alternatives. [...]"

Of the total comments received, roughly 10,000 are in favor of or urge entry of the RPFJ, roughly 12,500 are opposed, and roughly 9,500 do not directly express a view in favor of or against entry."

It goes without saying that a district judge is not able to review such an amount of public comments in a reasonable amount of time. Also, the ratio of consenting and dissenting comments can't be decisive for the affirmation of the decree, meaning that a deeper analysis of the arguments is required. Even if the number of reviewed comments is reduced to the more detailed ones (350), the time to be spent to simply read the comments is huge. It is also not clear how the judge should be able to assess the value and trustworthiness of the received comments. Thus, even with much more support from the outside, a judge may still depend on the authority's response to handle the comments and to include the helpful ones in the proposed decree.

⁹⁶ United States v. Microsoft, 231 F.Supp.2d 144 (D.D.C., 2002), Response of the United States to Public Comments on the Revised Proposed Final Judgment: 2002 WL 32151978, ¶ 4-8.

(d) Separation of Powers

The Tunney Act raises also separation of powers concerns, which are related to the issue of political bias, and have been touched by Judge Aldrich's opinion cited above.⁹⁷ This concern arises because consent decrees may be concluded in every stage of the trial, also in the remedy phase (as done in *Microsoft II*⁹⁸). Although such a consent decree is still subject to court approval according to the Tunney Act, "the authority of the court to determine an appropriate remedy [is diminished] by reducing the court's role from active participant in defining the remedy, to passive on-looker in deciding whether the DOJ's judgment is in the public interest."⁹⁹ However, also full participation of a court does not guarantee a reasonable outcome, as has been described above.¹⁰⁰ Still, full participation of the court may help to reduce the probability of political bias of the settlement process.

However, there is also the prominent opinion brought forward by a dissenting Justice Rehnquist with regard to the AT&T consent decree, pointing out that the Tunney Act itself may be unconstitutional because of a violation of article III of the U.S. Constitution:¹⁰¹

"The question whether to prosecute a lawsuit is a question of the execution of the laws, which is committed to the executive by Article II. There is no standard by which the benefits to the public from a "better" settlement of a lawsuit than the Justice Department has negotiated can be balanced against the risk of an adverse decision, the need for a speedy resolution of the case, the benefits obtained in the settlement, and the availability of the Department's resources for other cases. How is a court to decide whether a better settlement in a case involving one industry is more important to the public than the benefits that might be gained by immediately work-

⁹⁷ See *supra*, 2(c).

⁹⁸ *United States v. Microsoft*, 87 F. Supp. 2d 30 (D.D.C. 2000) (Conclusions of Law); 65 F.Supp.2d 1 (D.D.C. 1999 (Findings of Fact); 253 F.3d 34 (D.C. Cir. 2001) (appeal), cert.denied, 534 U.S. 952 (2001).

⁹⁹ See John J. Flynn & Darren Bush, *supra* note 37, at 753-754.

¹⁰⁰ See note 64.

¹⁰¹ *Maryland v. United States*, 460 U.S. 1001, at 1005 (1983).

ing on an antitrust problem in another industry? Finally, the decision requires an evaluation of an initial policy decision, whether the benefits that might be obtained in a lawsuit are worth the risks and costs, that is clearly for nonjudicial discretion."

Justice Rehnquist is probably right complaining about a certain confusion of the traditional roles of attorney general and the courts in the settlement process. This confusion may have, e.g., the following effect: A court may use its Tunney Act powers to "improve" a settlement, i.e. to force a defendant to give up agreed positions; the court has done this in AT&T as well as Microsoft I). By doing this, the court indeed takes over the role of the Attorney General, and also destroys the incentives of the defendant to enter an agreement in the first place.

Having said this, consent decrees disrupt in several ways the traditional understanding of separation of powers, as laid down in the constitution. If these disruptions may be tolerated because of the better results achieved by consent decrees, is questionable; it seems rather necessary to mitigate the procedural flaws related to consent decrees.¹⁰²

(e) Termination and Modification of Consent Decrees

Consent decrees sometimes enjoy a long life. In 1995, e.g., the U.S. Court of Appeals of the 2nd Circuit affirmed the termination of two consent decrees with Kodak, entered in 1921 and 1954 respectively, against the will of the Antitrust Division.¹⁰³ However, a consent decree also binds future executive branch actions, limiting the discretion of future executives to enforce the antitrust laws as they see fit.¹⁰⁴ If the consent decree was "wrongly" negotiated in the first place, its long life may represent an additional burden to consumers as well as the affected enterprise.

¹⁰² See *infra*, 3.

¹⁰³ 63 F.3d 95 (2nd Cir. 1995).

¹⁰⁴ See Christopher C. Sabis, *supra* note 38, at 264-265.

However, the burden seems not different if the wrongful remedy is originating from a consent decree or a judgment after full trial. In consent decrees, it is the government failing to provide an adequate remedy; in judgments, it is the failure of the court.

The Antitrust Division acknowledges, in principle, that consent decrees may be outdated, counterproductive or burdensome; most of the consent decrees entered after 1995 have 10-year-terms and have provisions which retain court jurisdiction to terminate or modify them.¹⁰⁵ The Division has also consented to the modification or termination of older consent decrees that went too far or have been subject to changes in fact (i.e. the market has become more competitive or the defendant is no longer dominant).¹⁰⁶ Procedurally, consent decrees may be altered or terminated by another consent decree, which will be approved, in case of the Antitrust Division, by a district court if it is in the public interest. If the Antitrust Division does not consent to a modification, the defendant has to demonstrate in court that such modification or termination is appropriate, i.e. that the competitive purpose of the decree has been achieved or that a significant change in circumstances warrants revision of the decree.¹⁰⁷

Although the government seems to be ready to restrict consent decrees voluntarily, it is surprising to see – despite the highly context dependent issues – that there are no general procedural rules to follow; the discretion of the negotiating parties to limit the duration of the consent

¹⁰⁵ See John M. Nannes, *Termination, Modification, and Enforcement of Antitrust Consent Decrees*, 15 Antitrust, Fall 2000, 55, at 55.

¹⁰⁶ See Herbert Hovenkamp, *supra* note 8, at 595. See, e.g., *United States v. IBM Corp.*, 163 F.3d 737 (2nd Cir. 1998); *United States v. Western Elec. Co.*, 900 F.2d 283 (D.C. Cir. 1990); *United States v. Columbia Artist Mgmt., Inc.*, 662 F.Supp. 865 (S.D.N.Y. 1987).

¹⁰⁷ See Jed Goldfarb, *Keeping Rufo in its Cell: The Modification of Antitrust Consent Decrees After Rufo v. Inmates of Suffolk County Jail*, 72 N. Y. U. L. Rev. 625, 626 (1997).

decree is huge. Statutory procedural restraints in consent decrees are also unknown in the European Community and Switzerland.

3. Instruments to Mitigate the Burden

(a) Political Bias and Protection of the Defendant

The Tunney Act legislation, as argued above, has not altered substantially the role of the courts and the Antitrust Division.¹⁰⁸ To mitigate the enduring problems with consent decrees, MELAMED argues that authorities should seek consent decrees only if they would litigate in case that the defendant balks, i.e. only if they would litigate if the defendant refuses to agree to the consent decree without good reason. Also, the government should only seek remedies which it also could obtain by litigation. The government should further refuse to enter into a consent decree if the alleged conduct would fairly probable be held illegal; thus, new law or new theories should only be advanced by litigation.¹⁰⁹ This proposal of MELAMED seems to correspond with the policy in the European Community, where consent decrees are not used in cases which are most probably illegal (e.g. hard core cartels).

GRIMES complains of the lack of independent outside review in the settlement process, which makes it easy for the consent negotiations to "be captured by the relatively parochial interests of the defendant and the prosecutorial zeal of the department."¹¹⁰ He also argues that the consent process is most often chosen by parties who feel they lack leverage in negotiations with the Antitrust Division; lack of leverage may be caused by a weak legal position, but also by pro-

¹⁰⁸ See James C. Noonan, *supra* note 9, at 148.

¹⁰⁹ See A. D. Melamed, *supra* note 38, at 14-15.

¹¹⁰ Warren S. Grimes, *supra* note 38, at 26.

cedural rules that favor the government, by tepid or inexperienced counsel, or by an inability to bear the legal costs of an ongoing investigation or litigation.¹¹¹ In his opinion, the Tunney Act¹¹² should be used not only in cases in which the defendant has been treated too leniently, but also in instances in which in which the Department may have pushed its negotiating leverage too far.¹¹³

ANDERSON mentions the idea that Congress could try to reformulate the public interest standard, but finds it unlikely that Congress could find a more workable formulation providing more guidance to the court in specific cases.¹¹⁴ This assessment seems reasonable given the inability of congress to formulate precise standards in its antitrust laws in the first place. According to him, the courts should try to find a way between deference to the prosecutorial discretion and mere rubber-stamping; in particular, courts should accept evidence that the authority was affected by undue political influence when negotiating the settlement.¹¹⁵ This addition in the review process probably results still in a very limited scrutiny.

(b) Overextension of Courts

With regard to the impossibility to determine public interest by the courts, NOONAN proposes to work with presumptions. He wants the Antitrust Division to be required to show that the proposed decree achieves the antitrust enforcement objectives that the Division originally pursued. Once this burden is met, the Division should be entitled to a rebuttable presumption that it

¹¹¹ Id. at 26-27.

¹¹² 15 U.S.C. § 16(b)-(h).

¹¹³ See Warren S. Grimes, *supra* note 38, at 27 (claiming that additional refining of the Tunney Act's review standard "in the public interest" could induce judges to apply closer scrutiny). See also Christopher C. Sabis, *supra* note 38, at 257, 283.

¹¹⁴ See Lloyd C. Anderson, *supra* note 4, at 36-37.

¹¹⁵ Id. at 38-40.

has considered all relevant factors and that its decree is in the public interest.¹¹⁶ However, it remains unclear how a procedural presumption should help the judge to make a substantive assessment of the impact of the consent decree.

Besides the specific question how to facilitate review of consent decrees by the courts, we may shortly touch the question if courts are, in general, the right institution to decide antitrust violations and formulate adequate remedies:

"The ability of the trial courts to perform or evaluate complex economic analysis, economic efficiency studies, and economic welfare trade-offs is extremely limited. Trial judges typically have neither the training nor the staffs to conduct economic analysis of this kind. They must rely on expert reports and testimony prepared for the plaintiff and the defendant, cross-examination of both, and on assistance from their law clerks in evaluating them. The experts retained by the plaintiff and defendant generally come to very different conclusions from the same set of facts. Obviously juries are not in any better position to perform or evaluate such studies than are the judges who must instruct them. Antitrust enforcement agencies are, however, in a much better position to perform these types of economic analysis and this is reflected in the economic tools used by the agencies in the premerger review process."¹¹⁷

I am inclined to agree with JOSKOW. Besides the better ability to evaluate complex economic questions, administrative bodies may adapt their enforcement policies whenever necessary and do not rely on a case to modify standards; they are also able to formulate broader policy goals, and are not restrained to mere dicta in announcing their view on the antitrust laws. It seems, therefore, that administrative bodies are more suited for public enforcement of the antitrust laws in a complex economy.

¹¹⁶ See James C. Noonan, *supra* note 9, at 158.

¹¹⁷ Paul L. Joskow, *supra* note 64, at 99.

(c) Private Enforcement and Competition between Agencies

The right of private parties to bring actions against firms engaging in unlawful restraints of competition is not affected formally by the authority's enforcement. It seems plausible that a private parties or a competing authority (the FTC or the Antitrust Division respectively) may bolster an authority's failures in enforcement. We have to keep in mind that public enforcement of the federal antitrust laws is also done by the States' Attorneys General.

However, the FTC and the Antitrust Division do hardly compete, and have more or less shared the enforcement of antitrust; further, the FTC struggled to establish itself as major player in antitrust matters next to the Antitrust Division.¹¹⁸

With regard to private actions, it is likely that a court will give a lot of weight to a confirmed consent decree, i.e. the fact that the alleged business practice is no longer in effect.¹¹⁹ Private plaintiffs and states may still continue the trial after the government has settled (as in Microsoft), but they are at a disadvantage, facing a disintegrating front of plaintiffs. Further, a consent decree does not serve as prima facie evidence for any party bringing a civil action against a defendant, as opposed to any other judgment or decree in antitrust cases.¹²⁰ In other words, the law provides additional incentives to enter a consent decree, but it does not facilitate additional actions. Indeed, absent the possibility to seek treble damages, we are faced by a classic free-rider-problem, since the non-suing parties benefit as well from the termination of anticompetitive

¹¹⁸ See Spencer Weber Waller, *supra* note 89, at 1389-1391.

¹¹⁹ Cf. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) (holding that, while the consent judgement does not immunize the defendant from liability for actions, it cannot be ignored that the Federal Executive and Judiciary have carefully scrutinized ASCAP and the challenged conduct).

¹²⁰ 15 U.S.C. § 16(a).

behavior. This reduces the probability of additional independent assessment of the alleged anti-competitive behavior.

Furthermore, limited comparisons of the enforcement results of different agencies and courts do not enable a genuine learning process: the comparison and assessment of different "muddling through" approaches would remain still "muddling through" in the LINDBLOM sense.¹²¹

(d) Introduce Feedback and Learning to avoid "Muddling Through"

KOVACIC wants to fight the limited transparency and limited knowledge in the settlement process by periodic ex-post evaluations of the impact of consent decrees, performed by the authority and at least partly by the courts. The disclosure of the results of the assessment could help to increase transparency in the settlement process and to understand the authority's current policy goals.¹²² However, it seems difficult to establish the counterfactual in ex-post assessments. What would have happened if AT&T were not forced to divest, if the court had just issued an injunction or had done nothing? Given the vigorous competition today outside the land-line market in telecommunications, we simply do not know. Ex-post assessment may tell us, e.g., that a decision rendered 20 years ago on ferry piers was optimal, taking all relevant factors into account. May we now transfer this knowledge to today's harbor management, or even draw analogies to gates at an airport? The solutions to problems of the past may be not relevant anymore in the present or in the future.

¹²¹ See Charles E. Lindblom, *supra* note 1, at 80-88.

¹²² See William E. Kovacic, *supra* note 68, at 852-861.

Conversely, KOVACIC seems also to indicate that competitive impact assessments are not really possible at the time when the decision on the consent decree or the judgment is entered. Such a conclusion would be perfectly reasonable. It seems difficult to assess the future effects of a court injunction, and the resulting development of market power over the years. On the one hand, innovation may render a badly needed product of today's monopolist obsolete within a very short period of time; on the other hand, Microsoft and Intel have managed to retain a very strong market position over years in a dynamic and innovative environment. Competition is, as VON HAYEK pointed out, a process of permanent search and discovery, and remains undetermined regarding its results.¹²³

Given the difficulties in defining and correcting anticompetitive behavior in always different market environments, is "muddling through" the best we have? Admittedly, antitrust enforcement is shaped differently today compared to 1890, when the Sherman Act entered into force; with the development of the understanding of economic processes, the enforcement of antitrust laws has been refined; antitrust authorities know much more than a century ago where to focus in their inquiries.¹²⁴ This ongoing learning process seems to indicate that "muddling through" takes place at a limited scale. Consequently, we may ask ourselves how to improve this humble learning process. In the context of human rights, the combination of a judicial enforcement process with an institutional learning process may yield better results regarding the imple-

¹²³ See Friedrich A. von Hayek, *Der Wettbewerb als Entdeckungsverfahren*, in *Freiburger Studien* 249–265 (Walter Eucken Institut Freiburg i.Br. ed. 1969).

¹²⁴ See, e.g., the change in enforcement with regard to mergers: while in the 1960s, nearly every merger could be successfully challenged if it was only increasing concentration, the merger enforcement in the 1990s was much more permissible because of new insights in the efficiencies of mergers and less concerns regarding mere concentration itself; see Robert Pitofsky et al., *supra* note 13, at 990-994, 1062-1063. On the development of economic theory see, e.g., Peter Hettich, *supra* note 15, 346-357.

mentation of human rights; one source for this institutional learning process may be the so called "mainstreaming".¹²⁵ In the field of antitrust, mainstreaming could take place if the authorities were to frame abstract guidelines regarding anticompetitive behavior, under broad participation of the public (industry, consumers, etc.); such guidelines may help the affected firms to anticipate the behavior of the authorities in order to reorganize their course of business. To make the guidelines a useful instrument in judicial review, the guidelines must receive deference by the courts. Judicial review may work if the court's task consists only in matching specific enforcement activity by the authority with its announced enforcement policy. With other words, the courts would compare the content of a consent decree with the abstract guidelines elaborated jointly by the public and the authority, but would refrain from setting up standards themselves. Guidelines describing lawful and unlawful behavior in antitrust do already exist¹²⁶; however, these guidelines are elaborated by the authority without broad outside participation.¹²⁷ Further, these guidelines are not binding for the courts. As we have seen, judicial review struggles to formulate and adapt coherent standards in antitrust and struggles to assess generally whether specific enforcement activity is in the public interest; this results in an erratic antitrust policy or strong deference to administrative decisions.

¹²⁵ See Olivier de Schutter, *Mainstreaming Human Rights in the European Union*, in *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* 37, 43-51 (Philip Alston & Olivier de Schutter, eds. 2005).

¹²⁶ Such guidelines are published on the websites of the respective enforcement agency; see www.usdoj.gov/atr/pubdocs.html, www.ftc.gov/bc/bcburguidelines.htm, europa.eu.int/comm/competition/publications/.

¹²⁷ There are exceptions; after heavy criticism of its first proposal for antitrust guidelines for small and mid caps, the Swiss Competition Commission withdrew the proposal and made a new one available for public comment.

Conclusion

Consent decrees are one of the most important instruments for antitrust enforcement nowadays not only in the United States, but also in the European Community and Switzerland. Traditional antitrust enforcement only by litigation would hardly render satisfactory results due to limited resources of the authorities, due to the costs of the litigation, and due to the heavy burden imposed on enterprises by long-standing lawsuits.

However, the settlement process is obscure by large, and may be captured by lobbying of the firm as well as interests of the authorities beyond pure enforcement of the antitrust laws. With regard to settlements of the Antitrust Division, the Tunney Act was introduced to prevent capture of the authority.

The Tunney Act has several drawbacks. First of all, the courts struggle to determine if the consent decree is "in the public interest", as it is required for approval by the Tunney Act; a workable standard of review, balancing between (too) close scrutiny and mere rubber-stamping, has not been found over the years. Further, scrutiny of consent decrees by the courts was severely limited after the first series of Microsoft cases, requiring the judge to pay much deference to the discretion of the authority. The courts, we may conclude, are neither willing nor able to scrutinize consent decrees in an appropriate way. The inactivity of the Supreme Court in antitrust cases seems even to support the conclusion that this is a general problem, and that courts are not suited to decide antitrust cases anyway.

There are proposals to make the Tunney Act work, reaching from limiting the authority's discretion, broadening the scope of review of the court (e.g. by accepting evidence of corruption of the authority), restating the public interest requirement, to the point of formalizing the review process. All these proposals, in my opinion, must fail. Either they fail to address the lack

of resources on the side of the courts (lack of manpower, expertise, investigating power), or they obstruct the benefits of consent decrees (which consist in, e.g., informal procedure, fast relief, avoidance of a full trial).

We may think of several other possibilities to prevent capture of the authority by external interests: An expert court for the review of consent decree may help to counter the expertise of the authority. Further, the dual structure of antitrust enforcement in the United States (Antitrust Division and FTC) could be used, e.g., to create a mutual system of checks and balances¹²⁸; however, such limited comparisons still limits us to "muddling through", does not overcome bounded rationality problems, and would also mean to restrict the customary informal enforcement agreements between the agencies, creating inefficiencies in other places. A more moderate step to improve transparency in the settlement process would be to involve the courts already in the beginning of the settlement process to make more information accessible. This would require the judge to act, against tradition, outside courtroom and established procedure. Political bias of the authority may also be prevented by giving the authority more independence (as the FTC enjoys). Ex-post assessments (KOVAVCIC¹²⁹) of consent decrees may also help to improve the results of the settlement process in the long run. Such proposals, however, do not address the present "muddling through" by courts and authorities and may only slightly improve the efficacy of the settlement process, if at all.

The extensive use of consent decrees, combined with deference by the courts, leads de facto to an institutional situation like in the European Community and Switzerland. There, the

¹²⁸ The FTC could examine, e.g., consent decrees of the Antitrust Division and vice versa.

¹²⁹ See William E. Kovacic, *supra* note 68, at 852-861.

investigating and adjudicating bodies in antitrust enforcement are unified in one administrative authority. This contravenes deeply the philosophy of regulatory enforcement in the United States. Nevertheless, the courts have proved to be unable to handle the complex questions raised in antitrust enforcement in the context of a highly specialized, complex economy, and there seem no easy remedies available to improve the situation, given the established system of the judiciary in the United States. As we have seen in this paper, it is clearly too late if the courts acquire additional knowledge either through public comment after filing of the consent decree, or through briefs of amici curiae after filing of a lawsuit.

Human rights scholars tell us that it is crucial for the implementation of fundamental rights not only to rely on courts, but also on systematic integration of fundamental rights through all policy areas (mainstreaming). In the field of antitrust, this could mean to encourage the elaboration of abstract antitrust guidelines under broad participation of the public and to shift the court's focus from paying deference to specific, singled out decisions to paying deference to the elaborated guidelines as a whole. This would not only improve the learning process of the authority (legitimacy by better outcomes), but also the ability of the court to scrutinize the enforcement decision of the administration (legitimacy by a better working and fairer process).