



CPI's North America Column Presents:

Grasping the Meaning of Big Tech Antitrust Consent

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I. Is Antitrust all about a Paradox?

Many academic lawyers and economists see antitrust enforcement as either being too lax or too prone to over-regulation.² Today, Bork's antitrust "paradox" is even more relevant, because increasingly dynamic data-driven markets are making the enforcement of antitrust principles challenging. Price is no longer the main parameter of competition — most digital markets are data driven, and products and services are offered free of charge to users. Network effects, which characterize these markets, can easily lead to a "winner takes all" outcome.³ As a consequence, concentration in data markets is likely to be the result of a company's success rather than anticompetitive conduct — and no antitrust action at all or heavy fines seem to be the common solutions.

Like in the past, the antitrust "paradox" seems to be what antitrust is all about — a discipline that is constantly seeking to define its identity and scope. Some scholars have suggested that antitrust should be simply abolished,⁴ on the basis that for much of its history it has done more harm than good. But, as simple and attractive this suggestion might be, it is unlikely to be an effective solution.

II. Could Consent Hold the Key to Resolve such a Paradox?

In 1906, the DOJ reached the first consent-based solution to settle an antitrust investigation in *Otis Elevator Co.*⁵ Nowadays, approximately ninety percent of civil antitrust lawsuits filed by the U.S. government (excluding mergers) are settled by means of consent decrees,⁶ which put in place remedies agreed with the company under investigation. In exchange for remedies, companies avoid the risk of uncertain and expensive litigation, fines, and reputational damage. *Could consent-based solutions be the key to tackle the antitrust paradox?*

I think the answer is "Yes." The potential for consent-based solutions is enormous, but their success would largely depend on the specific nature of the remedies enshrined in consent decrees and their economic effects in affected markets.⁷ Antitrust law originated in the U.S. as a regulatory tool in the government's arsenal⁸ to address forms of private monopolization and collusion in certain new booming markets, such as oil and telecommunications.⁹ Today's markets appear very different, and self-regulation or overregulation is unlikely to be the solution. The preservation of an efficient economy that benefits consumers and producers overall needs to be balanced with the necessity of preserving companies' incentives to deliver innovation.

Antitrust law and economic regulation should focus mainly on antitrust settlements (U.S. consent decrees and EU commitment decisions) to be effective. Antitrust settlements are regulatory tools that have the advantage of being flexible and contain remedies agreed with the companies subject to an antitrust investigation.¹⁰ Market players have knowledge of markets that an antitrust agency might not, and their involvement in the definition of

appropriate market rules could be crucial. Despite their different approaches to enforcing antitrust law, both in the U.S. and in Europe antitrust settlements can succeed where government regulation or self-regulation fail in increasingly dynamic markets.¹¹

III. From the Creation of the Internet to the Development of Blockchain Technologies

Remedies enshrined in the AT&T consent decree of 1956 completely changed the dynamics of the telecommunication industry by setting the tone for the creation of the Internet. Today, data is the critical industry and antitrust's main concern in data industry is how to tackle Big Tech and regulate data-driven platforms while preserving privacy. Antitrust settlements along with unlocking the complexity of blockchain technology and smart contracts may be the key to governing present and future data-driven markets.¹² Blockchains are immutable, decentralized, transparent databases that promise to protect privacy and security, and regulate data flow better than existing regulations¹³ by using a vast number of computers and employing an encrypted system.¹⁴ Everything is tracked in a blockchain. Antitrust agencies may require companies that raise antitrust concerns to employ pro-competitive remedies that can include the implementation of a blockchain to supervise the company's exploitation of data.

Smart contracts, in turn, are self-executing contractual states stored on a blockchain. They are contracts translated into code and enforced by software.¹⁵ As a consequence, antitrust agencies might think of imposing remedies that are self-executed in smart contracts to contrast anticompetitive practices. Smart contracts have the potential to become a valuable tool to replace traditional antitrust settlements by automatizing the execution of remedies.¹⁶ However, blockchain-based smart contracts should not be immune from antitrust scrutiny. The risk of market collusion and monopolization can be critical in certain types of blockchains, such as private blockchains.¹⁷ Private blockchains can, for example, create the perfect conditions for competitors to collude and smart contracts automatically punish deviations by competitors from cartel agreements. In those blockchains that raise serious antitrust concerns, antitrust agencies might require the implementation of structural or behavioral remedies self-executed by means of the same smart contracts that run in an antitrust blockchain to be effective.

IV. Concluding Remarks

Today, innovation is the main factor to compete. Markets will continue to develop breakthrough technologies, such as blockchain, that can reduce today's Big Tech control over the data economy without antitrust intervention. However, as in the past, antitrust scrutiny is necessary to enable competitive technologies and innovation to succeed over monopolies' supremacy.¹⁸

In summary, antitrust law should not be abolished, and new regulatory tools are not necessarily needed to tackle today's and future markets. Paradoxically, a globally enforced consent-based solution that exploits the same Big Tech *ingenuity* could drive today's data-driven markets through a technologically managed solution.¹⁹

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² Alfred E. Kahn, *Standards for Antitrust Policy*, 67 Harv. L. Rev. 28 (1953).

³ OECD, *Data-driven Innovation for Growth and Well-being* 7 (October 2014) available at <https://www.oecd.org/sti/inno/data-driven-innovation-interim-synthesis.pdf>.

⁴ See, e.g. GARY HULL, *THE ABOLITION OF ANTITRUST* (Transaction Publisher, 2005); DOMINICK T. ARMENTARO, *THE MYTHS OF ANTITRUST* (Arlington House, 1972).

⁵ Andrea Berger Kalodner, *Consent Decrees as an Antitrust Enforcement Device*, 23 ANTITRUST BULL. 277 (1978); Walton Milton & Irene Till, *Antitrust – The Reach After New Weapon*, 26 WASH. U. L. Q. 1 (1940).

⁶ GIOVANNA MASSAROTTO, *ANTITRUST SETTLEMENTS—HOW A SIMPLE AGREEMENT CAN DRIVE THE ECONOMY* 8 (Wolters Kluwer, 2019).

⁷ *Ibid.* at 73-142.

⁸ *Ibid.* at 75.

⁹ Giovanna Massarotto, *From Standard Oil to Google: How the Role of Antitrust Law Has Changed*, 41 WORLD COMPETITION 395 (2018). See also GIULIANO AMATO, *ANTITRUST AND THE BOUNDS OF POWER* 4 (Hart Pub., 1997); Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019, 1029 (1989); Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. L. & ECON. 14 (1966).

¹⁰ See Walton Hamilton & Irene Till, *Antitrust: The Reach after New Weapon*, 26 Wash. U. L. Q. 11, 18 (1940).

¹¹ Massarotto, *From Standard Oil to Google: How the Role of Antitrust Law Has Changed*, *supra* note 9.

¹² *Ibid.* at 203-07.

¹³ See, e.g. EU General Data Protection Regulation (GDPR), https://ec.europa.eu/commission/priorities/justice-and-fundamental-rights/data-protection/2018-reform-eu-data-protection-rules_en.

¹⁴ MASSAROTTO, *ANTITRUST SETTLEMENTS—HOW A SIMPLE AGREEMENT CAN DRIVE THE ECONOMY*, *supra* note 6, at 202.

¹⁵ See Massimo Bartoletti & Livio Pompianu, *An Empirical Analysis of Smart Contracts: Platforms, Applications, and Design Patterns* (Mar. 18, 2017), https://www.researchgate.net/publication/315454656_An_Empirical_Analysis_of_Smart_Contracts_Platforms_Applications_and_Design_Patterns.

¹⁶ MASSAROTTO, *ANTITRUST SETTLEMENTS—HOW A SIMPLE AGREEMENT CAN DRIVE THE ECONOMY*, *supra* note 6, at 204, 206.

¹⁷ Private blockchains are closed—the participation in private blockchain networks is by invitation only and everything these blockchains do is totally private.

¹⁸ See WILLIAM J. BAUMOL, ROBERT E. LITAN & CARL J. SCHRAMM, *GOOD CAPITALISM, BAD CAPITALISM, AND THE ECONOMICS OF GROWTH AND PROSPERITY* 82 (Yale U. Press, 2008). (“Breakthrough technologies can quickly make existing products and services obsolete and for that reason may be fiercely resisted within large organizations.”) *Id.*

¹⁹ *Ibid.* at 206-12.