ANTITRUST AND BIG TECH BREAKUPS: PIERCING THE POPULAR MYTHS BY CAUTIOUS INQUIRY

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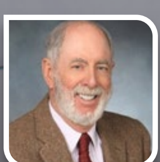

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By Eleanor M. Fox & Donald I. Baker

"Break 'em up with antitrust" is a popular and surging political drumbeat. This essay argues for a closer look at history and experience. They show that breakups of integrated single firm monopolies (which were not the product of mergers) have been rare and difficult. The essay takes a special look at the breakup of Ma Bell — a restructuring that needed to happen — recalling that even this rare success took a decade after the trial to implement.

I. INTRODUCTION

"Antitrust" had been a low-profile technical discipline for decades. But then came the rise of Big Tech/Big Data platforms, an explosion of public fear that the platforms are taking over our lives and minds, political campaigns highlighting their alleged predations, and the emergence of a popular narrative that goes like this:

The Big Tech firms are pervasive, abusive and dangerous; enemies of the people. They subvert democracy and the economy. They misuse our data, they gobble up rising stars, they sabotage firms that compete on their platforms, they wall-in their gardens and dig moats around their castles. They spread disinformation and nurture divisiveness. *They are too big and powerful. Antitrust is the tried and trusted tool. Break 'em up.*[2]

We write this essay to push back on the myth-telling and to cast a clear eye on what is the problem and what are the questions that should inform any restructuring solution. We focus on single-firm monopolization, not monopoly achieved by mergers. First, we identify the myths, prominently including the viral non-sequitur: These are monopolies, so use antitrust to break them up. Second, we frame the inquiry: Why breakup? What is the problem? Does break-up fit as a solution? Third, we revisit the history of antitrust and breakups and find the past breakups few, unique and not particularly helpful for understanding the wisdom of restructuring proposals for innovation-based monopolies. Fourth, we highlight the special case of *United States v. AT&T*, which is the only U.S. antitrust breakup of modern times and is an unusual example where the structural remedy snugly fitted the competitive problems and created positive incentives for innovation and competitiveness. Fifth, we conclude, observing that breakups are not a standard remedy to cure Sherman Act Section 2 monopolization violations, but they are still a possible judicial option following proof of seriously anticompetitive conduct supported by market structure, as well as a possible legislatively-mandated remedy based on other public interest concerns. While realism about history might temper expectations for a rosy post-breakup world, breakup is clearly an issue on the public policy table now, and we recount experience and frame questions that should inform a decision to break up, or not to break up, today's newly dominant platforms.

As noted, we focus on monopoly achieved primarily by internal growth, not by mergers and acquisitions.[3] The merger and acquisition problem is different for three reasons. First, divestiture is logically the remedy of choice to restore the status quo ante when the acquisitions *caused* the competitive problem. Second, to the extent the acquisition was of stock that could be divested or assets that had been held separate, divestiture can be a relatively easy task. Third, a default rule of divestiture for illegal acquisitions promotes incentives not to make anticompetitive acquisitions in the first place. Despite these essential differences, we shall reference certain classic cases of illegal acquisitions and consolidations for they are famously part of the U.S. narrative of breakup.

II. THE MYTH-MAKING

"These firms are monopolies. Antitrust breaks up monopolies. Break them up."

This statement is fundamentally incorrect. Words can be cheap. Yet a word can conjure up images that speak a thousand words and touch heartstrings. "Monopoly" and "breakup" are two such words. The idea that very large firms are monopolies, and that Big Tech/Big Data platforms are monopolies, has spread like wildfire across the country and around the globe. So too has the idea that these firms are too big, that antitrust breaks up firms that are too big, and that Big Tech should be broken up. This casual use of the word "monopoly" is not new. The word has been used elastically through time.[4] The idea that bigness needs a remedy and that the standard remedy is breakup is not a legal tradition. The fanciful usage of "monopoly" and "breakup," while expressive in conveying policy positions and in rallying support, is not helpful when confronting the reality of a law committed to economic efficiency and making markets work.

2 For an example of this narrative, see, e.g. Zephyr Teachout, Break 'Em Up: Recovering Our Freedom from Big Ag, Big Tech, and Big Money (2020).

3 The dominant digital platforms have made some competitively significant acquisitions, but the crucial engine for their growth has been a distinctive service such as "search" or "social networking" or certain transactional capabilities. Therefore, we put Facebook in the single-firm monopoly category (if it is a monopoly), even though the FTC case against Facebook highlights acquisitions and the structural relief sought focuses on divestiture of Instagram and WhatsApp as allegedly having been illegally acquired. See First Amended Complaint for Injunctive and other Equitable Relief, *FTC v. Facebook, Inc.*, No. 1:20-cv-03590-JEB (D.D.C. Aug. 19, 2021), ECF No. 75-1.

4 See William L. Letwin, C*ongress and the Sherman Antitrust Law: 1887-1890*, 23 U. Chi. L. Rev. 221, 226 (1956) ("'Monopoly,' as the word was used in America, meant at first a special legal privilege granted by the state; later it came more often to mean exclusive control that a few persons achieved by their own efforts; but it always meant some sort of unjustified power, especially one that raised obstacles to equality of opportunity.").

This is the reality of the U.S. antitrust law: The relevant law is Section 2 of the Sherman Act, which prohibits monopolization. It does not prohibit a firm from being a monopoly[5] or charging a monopoly price.[6] Instead, it prohibits a firm from acquiring or maintaining a monopoly by conduct or transactions.

Establishing liability requires a plaintiff, usually a U.S. enforcement agency, to complete a three-stage process. As a first screen, the offending firm must have monopoly power in a relevant market. Proving monopoly power is not an easy exercise. Traditionally, it entails a showing that the putative monopolist has the power to raise prices and lower output in a well-defined market.[7] (This may be too narrowly stated for good public policy, which is a matter of current debate.[8]) As a second screen, the offending firm must have engaged in serious anticompetitive conduct that is condemned by the law in order to acquire or sustain its monopoly. To many (but not all) judges, this means conduct that causes net harm to consumers. The law gives an incumbent monopolist considerable latitude to act without regard to adverse effects on competitors,[9] although this perspective is being increasingly debated since the Biden administration came to office. Under current interpretations, conduct can be anticompetitive and not condemned, in the name of preserving (even monopoly) firms' incentives to invest and invent.[10]

After steps one and two, there is a dauntingly difficult third step: What is the best remedy for the violation? This means a remedy that will cure or significantly mitigate the anticompetitive effects or tendencies while promoting (or at least not undermining) society's interest in competitive and innovative markets. The antitrust remedy in non-criminal cases is not meant to be punishment. It is meant to be based on competitive effects and predicted improvement in the conditions of competition. In non-merger monopolization cases, breakup is seldom a favored remedy.[11]

Thus, the popular epithet —"Big Tech are monopolies, break them up"— misses a few important steps when held up to the light of the law. The wide use of the epithet in public discourse has led to unrealistic expectations for the outcomes of antitrust suits against Google, Apple, Facebook, and Amazon (the GAFA).

But what about legislation? Legislation could bypass all of the Section 2 requirements, or even mandate corporate restructuring on some other basis.[12] Numerous bills targeting the big tech platforms are pending and several of the bills have structural dimensions, although none would simply break up the dominant platforms because they are dominant. The Ending Platform Monopolies Act would force the large platforms

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5 In early days, in view of the *Alcoa* decision, see *infra* text accompanying notes 49–52, the law was ambivalent. See Edward Levi, *A Two Level Anti-Monopoly Law*, 47 Nw. U. L. Rev. 567 (1952). The law was ambivalent on treatment of monopoly status through the 1960s and into the 1970s, a period in which some noted scholars urged that "too large" a market share, persistently held, should be dissipated by antitrust. Phillip Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and their Application, ¶ 614 (4th & 5th eds. 1978); Donald F. Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 Harv. L. Rev. 1207 (1969). The U.S. law is ambivalent no longer. E.g. *Verizon Commc'ns., Inc. v. Law Offs. of Curtis V. Trinko LLP,* 540 U.S. 398 (2004) [hereinafter "Trinko"]. Other jurisdictions are also unlikely to find a competition law violation or to order structural separation based on monopoly status, but there are exceptions, especially related to powers of market inquiries. The most prominent example of structure as the basis for divestiture is the UK case of British Airways, which held more than half the landing slots at the Heathrow airport and capacity constraints prevented expanding the number of slots. The UK Competition and Markets Authority required divestiture of three airports. Competition & Markets Authority, BAA Airports: Evaluation of the Competition Commission's 2009 Market Investigation Remedies at 1.2 (May 16, 2016), https://assets.publishing.service.gov.uk/media/57399d43ed915d152d00000b/evaluation_of_baa__market_investigation_remedies.pdf.

6 Trinko, *supra* note 6.

7 See Memorandum Opinion, *FTC v Facebook, Inc.*, No. 1:20-cv-03590-JEB (June 28, 2021), ECF No. 73 (initial complaint dismissed for failure to plead sufficient facts to satisfy the first step).

8 See, e.g. John M. Newman, *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, 107 Iowa L. Rev. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3866725. It is argued that, for example, the Big Tech firms have a new kind of market power; that they are abusing that power, yet they are not trying to lessen output; that the test of sufficient power should be, for example: Can the firm act in abusive ways to fend off competition without facing competitive pressures to constrain it? The debate includes whether the goal of antitrust is to prevent harm to consumers or whether it is more dynamic: preserving market process and robust markets for the good of all market players other than those who seek protection from competition.

9 See, e.g. *Trinko*, *supra* note 6; *Pac. Bell Tel. Co. v. linkLine Commc'ns*, Inc., 555 U.S. 438 (2009); *FTC v. Facebook*, *supra* note 8.

10 *Id.* (all citations).

11 See *United States v. Microsoft Corp.*, treated in text after note 60 *infra*. But see Rory Van Loo, *In Defense of Breakups: Administering a 'Radical' Remedy*, 105 Cornell L. Rev. 1955 (2020) (arguing that the ingrained judicial hostility to breakups is unfounded and that breakups are administrable).

12 See Public Utility Holding Company Act of 1935, Pub. L. No. 74-333 (codified as 15 U.S.C. § 79 et seq.), *repealed by* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1263, 119 Stat. 594 (2006).

to sell lines of business where the platforms' multiple functionalities give rise to an irreconcilable conflict of interest.[13] The American Choice and Innovation Online Act would prohibit the major platforms from discriminating against firms that compete with them on their platforms. This bill provides that, in the case of violations stemming from conflict of interest, the court shall consider divestiture.[14] Both bills are directed against gatekeepers that compete with firms they host on their platforms. It has been suggested that the American Choice bill is also a breakup bill because the non-discrimination rules might impel the big platforms to divest to avoid liability.[15] Perhaps instead, breakup is dangled as a sword of Damocles; a sword that may fall on their "heads" if Big Tech fails to follow the rules.

We cannot predict what Congress will do. We can predict that, for any pending Sherman Act cases, courts will apply the law in a cautious mode. We hope that this essay will help give guidance on how courts are likely to receive any proposals for breakup remedies, and that it provides helpful details to inform choice of remedy.

III. WHY BREAKUP? WHAT IS THE PROBLEM? — QUESTIONS TO INFORM THE CHOICE OF A BIG TECH BREAKUP

To set the stage, and before we review history and experience that might inform Big Tech breakup, it will be helpful to put the breakup remedy into the Big Tech context. What are we talking about when we talk about breaking up Big Tech? What are the problems as to which breakup might be an answer? What are the questions that need to be answered before jurists or legislators can make an informed choice?

The process of breakup, whether as a remedy for an antitrust violation or to comply with a legislative mandate, requires more than ordinary effort[16] and should include a well-informed assessment of whether the post-restructured world will be better for the public, either as compared with the world as it is before restructuring or with alternate relief. Therefore, the choice should be made on an adequate factual record and in view of answers to basic questions. Here are five basic questions: 1) What is the problem to be cured (or significantly alleviated)? 2) What cures are available, including behavioral and restructuring options? 3) How likely is the chosen structural remedy to cure or significantly alleviate the problem? 4) How long will it take to implement the chosen restructuring remedy and at what cost? 5) The counter-factual: What would be the probable state of the market in the absence of restructuring by the time (for example) the remedy can be implemented?

For Big Tech (as in all cases), we first need to identify the problem. The public conversation commonly lumps the Big Tech platforms together, although their business models, the competition problems, and prospects for effective relief without undermining useful functions, are different. Some, such as Google and Facebook, are information/data platforms. They offer a no-fee service to users to attract as many users as possible, collecting their data and selling it to advertisers. Others, such as Amazon, Apple App Store, and Visa, are transaction platforms (even though they also collect data). They enable third-party users to efficiently transact with each other, for which the platform generally charges a fee; and sometimes the platform itself participates on one side of some sales (as Amazon extensively does as a seller on its own transaction platform).

Despite differences, the complaint we most predominantly hear is aggregate: The Big Tech platforms are just too big; they have too much control over the cyberwaves, our minds and our lives. In broad strokes, the broad public concerns center on three main elements: (i) the dominant information platforms are megaphones on which voices and news reach and influence billions of citizens and voters worldwide; (ii) the platforms broadly (and cheaply) distribute false and misleading information from sources who seek to promote divisions in our society (including some politicians, foreign agencies, and in general troublemakers); and (iii) the platforms undermine our privacy by "hoovering" our personal information; they sell it for profit and might at any time use it for surveillance.

To the extent that this agglomerate nightmare is THE problem, it is a huge social problem, far bigger than market competition, which is our compass as antitrust lawyers. Although we do not address the broad existential problem, what we have to say regarding the antitrust questions applies equally to the existential question (although the existential opponents of Big Tech will give more weight to the benefit side of the

13 Ending Platform Monopolies Act, H.R. 3825, 117th Cong. (2021). The bill, introduced by Representative Pramila Jayapal (D-WA) and others, provides that covered platforms may not own subsidiaries that compete on the platform. This would require a spin off (breakup) if the platform competes with rivals it hosts on its platform. See *id.* §§ 2, 3(a).

14 American Choice and Innovation Online Act, H.R. 3816, 117 Cong. (2021), introduced by Representative David Cicilline, Chairman of the Antitrust Subcommittee of the House Judiciary Committee, and others.

15 See Marianela Lopez-Galdos, *Tech Regulatory Overhaul Series: A Discrimination Bill against Consumers*, Disruptive Competition Project (June 22, 2021), https://www.project-disco.org/competition/062221-tech-regulatory-overhaul-series-a-discrimination-bill-against-consumers/.

16 See *infra* Part V.

breakup balance). Thus: Will people feel better off (in terms of control over our lives, autonomy, democracy, speech, etc.) if, for example, we have three Facebooks and a fragmented array of Google, Amazon and Apple? How do we count the costs of what might be foregone by users of the platforms, including the gains from economies of scale and scope in these network markets where the winner takes most, and may be able to offer consumers a superior service, at least in areas such as search?

As for antitrust, there are two sets of problems. The first is the "gatekeeper" problem, when a dominant platform competes with rivals it hosts. The second set focuses on the competition between a platform and its platform competitors.

The gatekeeper issues include self-preferencing, demoting and sabotage of rivals on the platform, appropriation of rivals' ideas to use as their own, and appropriation of users' data to sell to advertisers. The first two are exclusionary restraints; the latter two are exploitative.

The gatekeeper category evokes the claim that the dominant platform is akin to an essential facility to which businesses on the platform should have fair access and a right not to be exploited. U.S. law is hostile to the essential facility doctrine because it requires "[e]nforced sharing"[17] and it does not accept exploitation as a ground for an antitrust violation.[18] Other jurisdictions are sympathetic to both claims. The EU has adjudicated a self-preferencing claim against Google;[19] pending legislation in the EU[20] and in the UK[21] would enact rules granting rights of nondiscriminatory access to the major platforms; and pending legislation in the United States would mandate non-discrimination by the major platforms.[22]

To the extent that lack of fair access is the problem, the grant of a right of access would be a natural alternative remedy to structural separation. Advocates of structural separation may argue that, in view of incentives, the dominant gatekeeper platforms cannot be trusted to give fair access. The Cicilline bill against discrimination (American Choice and Innovation Online) anticipates this possibility and provides a path for breakup. The EU and UK pending regulations likewise reserve breakup as a string in the bow.[23] In any event, policy makers considering structural change will want to consider what services desired by consumers and other users would be lost by mandating separation, what effect restructuring might have on incentives to invent, and what other costs are likely to be incurred, and to weigh the costs against the expected gains of restructuring (which would include gains of innovation and other gains from competition in a restructured world).

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17 Trinko, *supra* note 6, at 408. *Cf. FTC v. Facebook*, *supra* note 8. Prior to *Trinko*, access to a vitally important facility necessary for effective competition was granted in the monopoly cases of MCI Telecommunications Corp. v. AT&T, 708 F.2d 1081 (7th Cir. 1983) and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), and in the joint venture cases of *Associated Press v. United States*, 326 U.S. 1 (1945) and *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912).

18 *Trinko*, *supra* note 6, at 407: "The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices--at least for a short period--is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct."

19 European Commission 27 June 2017 Case AT.39740 *Google Search (Shopping)*.

20 *Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)*, COM (2020) 842 final (Dec. 15, 2020) [hereinafter *Digital Markets Act*] https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608116887159&uri=COM%3A2020%3A842%3AFIN.

21 In December 2020, the Digital Markets Taskforce of UK's Competition & Markets Authority rejected the idea that the new Digital Markets Unit (DMU) in the CMA should have breakup power. It made this recommendation in view of "the costs associated with this remedy, the fact it interferes to a greater extent with a company's property rights, and that the decision cannot be reversed." The Taskforce noted that the power to require divestiture would "remain available to the CMA, following a market investigation." Competition & Markets Authority, A New Pro-Competition Regime for Digital Markets —Advice of the Digital Markets Taskforce, CMA 135, 2020, ¶¶ 4.69-70 (UK), https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf. However, the question is apparently still open. The UK government's most recent consultation document states that it has "not yet formed a view on whether certain interventions, including ownership separation, should be excluded from the Digital Markets Unit's toolkit." Secretary of State for Digital, Culture, Media & Sport and the Secretary of State for Business, Energy and Industrial Strategy, A New Pro-Competition Regime for Digital Markets, CP 489, 2021, ¶ 111 (UK), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf.

22 American Choice and Innovation Act, *supra* note 15 (Chairman Cicilline's bill).

23 For the EU, Article 16(1) of the proposed Digital Markets Act authorizes the European Commission to impose "any behavioural or structural remedies which are proportionate to the infringement committed and necessary to ensure compliance with [the DMA]" on gatekeepers who "systematically infringe . . . the obligations laid down in [the DMA]." *Digital Markets Act*, *supra* note 21. Under Article 16(3) DMA, gatekeepers will be "deemed to have engaged in a systematic non-compliance . . . where the Commission has issued at least three non-compliance or fining decisions . . . against a gatekeeper . . . within a period of five years . . . ." *Id.* Thus, the legislation if adopted will allow the Commission to order a breakup of Big Tech firms that are systematic infringers if breakup is proportionate and necessary to ensure compliance with the DMA.

Competition Commission Vestager has said that the EU has not ruled out the "nuclear option" (breaking up Big Tech) but does not believe it will be necessary. See James Cook, *EU Could Break up Tech Giants as 'Nuclear Option', says Vestager*, The Telegraph (Dec. 5, 2020), https://www.telegraph.co.uk/technology/2020/12/04/europe-will-consider-nuclear-option-breaking-tech-giants-says/.

The second set of antitrust problems is posed by the fact (or claim) that there is almost no competition between and among existing or possible platforms. Facebook accounts for some 70 percent of personal social networking; Google has more than 90 percent of search; Amazon has nearly half of retail e-commerce; Apple and Google/Android have the only two significant operating systems for hand-held devices. The platforms allegedly block opportunities for rivals to enter or survive in each of their main platform markets by blocking interoperability and data portability; and they allegedly exploit developers on their platforms by overcharging them and blocking their maneuvers to avoid the high price of access to the operating system. The platforms allegedly offer poor terms of usage, including poor privacy protection, and it is possible that more competition would induce better privacy options.

What remedies are available to cure these problems? Some distinctions would need to be made between transaction and information platforms. The EU and UK pending legislation would impose interoperability requirements and give portability rights.[24] So too would the Scanlon bill in the U.S. House of Representatives: Augmenting Compatibility and Competition Service by Enabling Service Switching, also called the ACCESS Act.[25] The EU adopted its General Data Protection Regulation (GDPR) in 2016,[26] significantly protecting privacy rights. The EU and the UK have commenced litigation against Apple for charging developers excessive fees, and a private lawsuit, *Epic v. Apple*,[27] which attacks the conduct that enables the high fees, has just been dismissed for lack of proof of monopoly power.[28] A remedy likely to be considered in the transaction platform cases is authorizing developers to allow their customers to use the developers' payment systems rather than be forced to make all transactions through the platform's App store.[29]

In considering the structural alternative to the problem of "not enough competition between platforms," policy-makers will want to consider not only the alternatives above but also: Are some of the platforms natural monopolies, and should they be regulated (and fair access mandated) rather than broken up? If the market can sustain several significant players, can tipping be foreseen and prevented? Will interoperability obligations and portability rights help significantly to keep the market contestable? And, finally, if the market will sustain several players, if interoperability obligations and portability rights are not sufficient to induce sustainable entry, and if the markets will not predictably become competitive before structural relief can be implemented, what will be the tasks of breakup and how likely is the project to succeed?

These principles, facts, and questions are background as we move to an exploration of what history teaches.

24 For the U.K.'s approach, see A New Pro-Competition Regime for Digital Markets, *supra* note 22, at ¶104 ("The Digital Markets Unit will need the power . . . to overcome network effects and barriers to entry/expansion through mandating interoperability, third-party access to data or certain separation measures."); for the E.U. approach, see *Digital Markets Act*, *supra* note 21, at ¶52 ("The gatekeepers should therefore be obliged to ensure access under equal conditions to, and interoperability with, the same operating system, hardware or software features that are available or used in the provision of any ancillary services by the gatekeeper."). See also Art. 6 §1(c), (f) (stipulating that a gatekeeper shall "allow the installation and effective use of third party software applications or software application stores using, or interoperating with, operating systems of that gatekeeper" and "allow business users and providers of ancillary services access to and interoperability with the same operating system, hardware or software features that are available or used in the provision by the gatekeeper of any ancillary services").

25 ACCESS Act of 2021, Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021, H.R. 3849, 117 Cong. (2021).

26 Commission Regulation 2016/679 of Apr. 27, 2016, General Data Protection Regulation, O.J. (L 119).

27 Complaint, *Epic Games Inc. v. Apple Inc.*, No. 4:20-cv-05640 (N.D. Cal. Aug 13, 2020).

28 *Epic Games Inc. v. Apple Inc.* (N.D. Cal. September 10, 2021).

South Korea has just become the first country to enact legislation, amending the Telecommunications Business Act, to give app developers the right to bypass the platforms' app stores and have alternative access to consumers. Heekyong Yang, *S. Korea's Parliament Passes bill to Curb Google, Apple Commission Dominance*, Reuters (Aug. 31, 2021), https://www.reuters.com/technology/skoreas-parliament-passes-bill-curb-google-apple-commission-dominance-2021-08-31/.

29 Apple has settled a class action lawsuit by smaller developers that would loosen some restrictions on these developers. The settlement is subject to court approval. See Stephen Nellis, *Apple Strikes App Store Deal with Small Developers as it Waits for 'Fortnite' Ruling*, Reuters (Aug. 27, 2021, 5:45 AM), https://www.reuters.com/technology/apple-will-change-app-store-practices-after-settlement-with-small-developers-2021-08-27/.

IV. A BRIEF HISTORY LESSON: THE VERY LIMITED USE OF BREAKUPS IN SINGLE-FIRM MONOPOLIZATION CASES DURING THE 131 YEARS SINCE THE SHERMAN ACT WAS ENACTED

In a handful of cases of single-firm monopolization not based on consolidation of competitors or cartel behavior, U.S. courts have granted or seriously contemplated structural relief.[30] This set of cases famously includes *Alcoa*,[31] *United Shoe Machinery*,[32] *Microsoft*,[33] and *AT&T*,[34] and it would have included *IBM*[35] if the relief stage had been reached. In addition, *Standard Oil*[36] and *American Tobacco*[37] are so iconic that, although they are consolidation cases, they warrant reference in any study that seeks to capture what the history of antitrust breakups may teach.[38]

Scholars have canvassed the field in informative articles,[39] and we do not presume to repeat their work (which incidentally expresses various different views on the necessity, wisdom, administrability, and effectiveness of structural relief). Rather, in this short section, we relate some relevant details from *Standard Oil*, *American Tobacco*, *Alcoa*, *United Shoe Machinery*, *IBM*, and *Microsoft*, before exploring the unique and instructive *AT&T* case brought by DOJ in 1974 and settled eight years later with a very large, apparently successful divestiture remedy.

In the *Standard Oil* case,[40] John D. Rockefeller and associates captured most of the oil refining market by buying up and stamping out competitors (as well as introducing efficient rationalizations of the industry, for which the Court gave little credit). As Robert W. Crandall reports:

The relief decree was rather simple in design. It required that the New Jersey trust be dissolved and that the stock in each of the constituent companies be spun off to Standard's stockholders. As a result, 38 separate companies were established as independent entities, albeit with common ownership.[41]

Although the court apparently thought that dissolution would trigger immediate competition, this was not the case. Crandall writes:

> The decree established 10 refining companies, but these companies were separated by substantial distances and were unlikely to begin competing against each other very soon after the decree. All were simply set free with their assets. Some, such as Standard of California and Standard of New Jersey, had extensive pipeline and marketing facilities. Others, such as Standard of Kansas, had

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30 In the period 1890 to 1996, according to Robert W. Crandall, who did a thorough study of structural remedies in Sherman Act monopolization cases, divestiture was required in only four cases of single-firm monopolization. These are: the old IBM tying case, Kansas City Star, United Shoe Machinery (although divestiture was at first denied and was ordered only 15 years later), and AT&T. Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, *in* Microsoft, Antitrust and the New Economy: Selected Essays 292–97 (David S. Evans ed., 2001). There has been no breakup for single-firm monopolization since 1996, the end of the period studied by Crandall.

31 *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

32 *United States v. United Shoe*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 391 U.S. 244 (1968).

33 *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59, 64 (D.D.C. 2000), *vacated*, 253 F.3d 34 (D.C. Cir. 2001).

34 *United States v. AT&T*, 524 F. Supp. 1336 (D.D.C. 1981) (denying AT&T's motion to dismiss at the close of the Government's case); *United States v. Am. Tel. & Telegraph Co.*, 1982–2 (CCH) Trade Cas. ¶ 64,900 (D.D.C. 1982) (consent decree ordering divestment).

35 *United States v. IBM Corp.*, No. 69-Civ-200 (S.D.N.Y. 1969).

36 *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

37 *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911).

38 Also of high profile is *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), which achieved its monopoly position in the insurance-accredited central station service fire and burglar alarm market (much criticized as a proper market) largely through acquisitions, and dissolution was viewed as essential in light of *Standard Oil*. *Id.* at 580.

39 E.g. Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 Yale L.J. 1952, 2008–10 (2021); Rory Van Loo, *In Defense of Breakups*, *supra* note 12; Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, *supra* note 31; Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. Chi. L. Rev. 1 (2001); William E. Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 Conn. L. Rev. 1285 (1999); Fiona Scott Morton, Opinion, *Why 'Breaking Up' Big Tech Probably Won't Work*, Wash Post. (July 16, 2019, 2:41 PM), https://www.washingtonpost.com/opinions/2019/07/16/break-up-facebook-there-aresmart-er-ways-rein-big-tech/.

40 *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

41 Crandall, *supra* note 31, at 302. Although the design may have been simple, execution was not uncomplicated; still, the dissolution proceeded "relatively smoothly." Kovacic, *supra* note 40, at 1289.

none. Ohio Oil and Prairie Oil and Gas were crude oil producers with pipelines, but South Penn Oil was left as a crude oil producer without pipelines. In short, the post-dissolution structure of the industry was largely an accident of Standard's pre-1911 corporate organization.[42]

But still, the breakup facilitated "the emergence of a number of substantial independent competitors — including Amoco, Chevron, Exxon, and Mobil — where there had been but a single firm before."[43]

Like Standard Oil, the American Tobacco Company was a trust. It was the product of the combination of at least 86 different companies.[44] The dissolution order divided the production of cigarettes into three parts. American Tobacco kept about 37 percent of production. P. Lorillard had 15 percent. Liggett & Meyers, a new company, was provided with assets amounting to 28 percent.[45] The decree thus changed a monopoly into an oligopoly. Crandall reports that the oligopolists "did not engage in vigorous price competition."[46] But again, the dissolution crafted three significant firms where there had been only one.

Alcoa[47] is the first case of single-firm monopolization. Alcoa had safeguarded its U.S. monopoly of aluminum, but not by exclusionary restraints. Instead, it increased its production capacity and output whenever it deciphered new demand — conduct that would not count today as anticompetitive. The court essentially found a monopoly status violation[48] (which is not the law today).

The remedy was postponed until after World War II. During the war the government had constructed numerous plants for aluminum production. After the war it assigned these assets to Reynolds Metal and Kaiser, two private firms which would then be competitors of Alcoa. The district court judge assigned to the remedy phase, Judge John Knox, was obviously relieved. He believed that a breakup of Alcoa would weaken it and diminish its competitiveness, with highly speculative benefits.[49] Had the two new firms not entered the market, breakup may have seemed the natural remedy. But by chance the government had created competition, and breakup was unnecessary. The court required the shareholders of Alcoa to sell their stock either in Alcoa or its sister Canadian Aluminum Ltd., prohibited patent grant-backs, and authorized sale of a government plant.[50]

United Shoe Machinery[51] was a product of the 1950s and 1960s, when antitrust "opinion" still held that very large market share should be dissipated, if possible. United Shoe Machinery was held to have illegally monopolized the shoe machinery market, of which it controlled 85 percent. Unlike *Alcoa*, United Shoe Machinery built its monopoly on exclusionary acts. The acts created barriers to entry, steering USM's customers to lease instead of buy the machines (chilling formation of a second-hand market), and to use their USM machines to the full before purchasing a machine of another seller. The judge, Charles Wyzanski, found abundant exclusionary conduct, even while he queried whether predatory conduct was a necessary ingredient of the violation.[52] Wyzanski declined to order dissolution, however, and entered a decree imposing many obligations on USM designed to establish a second-hand market and significantly reduce USM's market share and thus restore workable competition.

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42 Crandall, *supra* note 31, at 304–05.

43 Kovacic, *supra* note 40, at 1300, 1302.

44 Crandall, *supra* note 31, at 306.

45 *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911); Crandall, *supra* note 31, at 307.

46 Crandall, *supra* note 31, at 308.

47 *United States v. Aluminum Co. of Am. (Alcoa),* 148 F.2d 416 (2d Cir. 1945).

48 There was significant foreign production of aluminum. A world cartel kept foreign aluminum substantially out of the United States, but the court perhaps surprisingly did not find that Alcoa was a member of the world cartel.

Separately, the court found an illegal price squeeze, but the remedy was principally addressed to the monopoly status. For Alcoa as a monopoly status violation, see Levi, *A Two Level Anti-Monopoly Law*, *supra* note 6.

49 *United States v. Aluminum Co. of Am. (relief),* 91 F. Supp. 333, 416–18 (S.D.N.Y. 1950).

50 *Id.*

51 110 F. Supp. 295 (D. Mass 1953), *aff'd*, 347 U.S. 521 (1954).

52 110 F. Supp. at 342–44.

Ten years later, USM's share was reduced to only 62 percent. The DOJ went back to court to amend the decree to require divestiture. The district court denied the petition. The Supreme Court reversed the denial, saying that, if after 10 years the decree had not achieved its object to extirpate the anticompetitive practices and restore workable competition, "the time has come to prescribe other, and if necessary more definitive, means to achieve the result."[53] On remand, the district court ordered USM to divest approximately one third of its operations.[54]

We fast forward to *United States v. IBM*. This was the beginning of the era of innovation-based dominance. IBM allegedly had a monopoly position in general purpose digital computers (also called mainframes) (it accounted for about 74 percent of the market), and made peripheral equipment such as disks and memories to go with it. IBM adopted a series of aggressive tactics against competitors and potential competitors, allegedly preventing them "from having an adequate opportunity effectively to compete for business in the general purpose digital market."[55] The complaint charged IBM with bundling hardware, software, and support systems; introducing low-priced fighting machines where competitors were otherwise likely to be successful, and announcing the imminent introduction of new generation products which were actually fictitious, to dissuade its customers from shifting to competitors' new and better products. Moreover, when peripheral competitors' products became better and cheaper than IBM's, IBM formed a committee called SMASH, which brainstormed strategies to destroy the rivals, including by creating incompatibilities and by charging selective low prices. The Justice Department sued IBM for monopolization in 1969. From the start, it announced that it would seek a breakup that would result in competitively balanced firms. A staff economist declared: "Competition in the computer industry can be improved . . . only by a profound restructuring of IBM's assets."[56]

The case got off to a bad start. Delay followed delay. The DOJ trial staff constantly changed. The judge, David Edelstein, was not an expediting judge. The case went to trial in 1975 after six years of discovery. The computer industry was already changing, with small powerful machines displacing the giant mainframes. The trial proceeded, slowly, for almost seven years. By 1980 antitrust law principles and analysis were changing from a perspective hostile to bigness to a perspective sympathetic to business and respectful of its need for space for innovation. In 1981, William Baxter became Assistant Attorney General, under President Reagan. Baxter thoroughly reviewed the case. He found the evidence outdated and the case in disarray. He questioned the merits of the case, he questioned whether appropriate relief could be granted even if the government won at trial, and he estimated as small the chances of prevailing on appeal.[57] As to structural relief, he said, in a memorandum to the Attorney General suggesting withdrawal of the case:

Structural relief in this case would be totally disproportionate to the nature and scope of the violations that we might be able to prove. Further, despite years of effort, no structural relief proposal has been identified that would inject new competition into the industry while retaining the efficiencies necessary to create viable successor companies.[58]

In 1982 the Reagan administration's DOJ withdrew the case as no longer viable.[59]

We turn now to *United States v. Microsoft*, leaving *United States v. AT&T* for a later section of its own. As a network and innovative-market case, *Microsoft* logically follows the discussion of *IBM*. In the two decades after IBM was targeted with antitrust for exclusionary practices that allegedly chilled competition in large mainframe computers, computing technology grew and changed. Small personal computers were invented. Microsoft dominated the market for operating software for personal computers, accounting for upwards of 90 percent. Applications (such as word processing and browsers) were the consumer-facing functions and they needed to interface with the operating system. The applications' developers needed to write code to an operating system. Microsoft Windows was the operating system of choice. Because of network effects, it reached many more users and potential users than any fledgling operating system could do. Microsoft wanted to keep developers focused on Windows and feared any technology that could bypass it because that would break Microsoft's power over the operating system.

53 *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 252 (1968).

54 *United States v. United Shoe Mach. Corp.*, 1969 U.S. Dist. LEXIS 13280 (D. Mass. Feb. 29, 1969).

55 Complaint ¶¶ 20–21, *United States v. IBM*, No. 69-Civ-200 (S.D.N.Y. 1969), *quoted in* Donald I. Baker, *Government Enforcement of Section 2*, 61 Notre Dame L. Rev. 898, 909–10 (1986).

56 Richard T. DeLamarter, Big Blue 328 (1986), *quoted in* John E. Lopatka, *United States v. IBM: A Monument to Arrogance*, 68 A.T.L.J. 145, 160 (2000).

57 When he reviewed the case in 1976-77, then Assistant Attorney General Donald Baker had had some analogous concerns. However, he believed it would be politically difficult to dismiss the case even in order to save DOJ enforcement resources for better use elsewhere. When Baxter dismissed the case in 1982, he was able to couple that announcement on the same day of the widely-praised AT&T settlement (which we will discuss in the next section).

58 Memorandum from Abbott B. Lipsky, Jr. "at the direction of Assistant Attorney General Baxter in his absence" to the Attorney General (Jan. 6, 1982) (released by the Department with a press release on January 8, 1982). Quoted by Baker, *supra* note 56, at 912.

59 Baker, *supra* note 56, at 912; Lopatka, *supra* note 57.

Meanwhile, Netscape developed the browser, Navigator, and Sun Microsystems developed a new language, Java. Java was a cross-platform language; if commercialized, applications developers could use Java to write to any operating system, and this would "commoditize" Microsoft. Netscape proposed to carry Java language on its browser, and when Navigator reached a critical mass of users, Netscape/Java would be able to launch the technology that could break the power of Microsoft. Microsoft reacted. It adopted a series of practices to hold the threatening new technology at bay. Chief among these were strategies — including tying, exclusive dealing, and refusal to share interface connections — to keep the Netscape browser from getting a critical mass of users on Windows. Other challenged practices by Microsoft were designed to protect its "fort" from emerging innovation of others.

The government had learned (some) lessons from *IBM*. It developed a clear theory of the case against Microsoft, it retained a top antitrust trial lawyer, it assembled an expert trial team, and it tried this complicated case in a record five months. At the start of the trial, the DOJ declined to say what remedy it would seek. It suggested that the appropriate remedy could be determined only after the trial revealed what the court would find as facts. At the close of trial, the court held for the DOJ on liability.[60]

Settlement negotiations for an agreed remedy, all based on behavioral requirements, failed. Back in court for the remedies phase, the DOJ announced that it wanted a breakup. There was much discussion, not only among the parties but also among policymakers and the academic community, as to what a breakup would entail. A new phrase crept into the vocabulary, in honor of Microsoft's CEO Bill Gates and the only prior breakup of recent memory, "Ma Bell"—the American telephone system, which had been broken into seven "Baby Bells." "Baby Bills" was born.

What would the Baby Bills look like? Would a breakup be horizontal, vertical, or both? In the public conversation, all were proposed. Vertical would mean separating the operating system business from the applications businesses. Horizontal would mean keeping the functional integration but splitting every function in half or thirds. Hybrid would draw from both.

The government proposed a vertical breakup into two Baby Bills; one for the operating system including all operating system software, and one with all applications software and all remaining software assets. The officers and shareholders would not be allowed to hold executive or ownership positions in both. Behavioral conditions would also apply; for example, Microsoft would be prohibited from designing Windows to disable or compromise rivals' products. Neither restructured limb would be banned from expanding into the market of the other.

The court held only a summary proceeding on remedy. The judge said (without basis) that, in view of the DOJ victory on liability, the DOJ should be able to dictate the terms of the remedy. Over objections of Microsoft both on substance and process, including its preclusion from offering testimony in opposition to the specific DOJ proposal, the judge adopted the DOJ's proposed relief.[61]

The Court of Appeals for the D.C. Circuit affirmed most (but not all) of the liability holdings. It held that Microsoft had been denied due process on relief, and reversed and remanded the question of relief, after declaring that breakup is a drastic remedy and should not be lightly ordered.[62] The court also ordered that the case be remanded to a new district court judge to rule on relief, even though the new jurist would necessarily be less familiar with facts on which the affirmed liability findings were based. Presidential administrations changed. The DOJ no longer sought a breakup. On remand, the new district court judge entered a long behavioral consent decree as proposed by DOJ, but opposed by some its staff and co-plaintiffs.[63]

While all designs for breakup hold some concerns, the DOJ choice and thus the vacated district court breakup order were criticized on a number of grounds even before the reversal. First, the design (vertical separation) did not create competition. It would have eliminated perverse incentives that stemmed from the vertical integration, but a hope that the newly unintegrated applications company would create a new operating company was a stretch of imagination, given the presence of network effects and the reality that "one firm wins most." Second, despite being touted as a clean surgical break, the breakup would entail substantial supervision of both the process of breaking up and the behavioral requirements. Third, unlike AT&T, "Microsoft was a young entrepreneurial company run by very few top executives . . . , and its divisions are very fluid." "[A] break-up would pose significant managerial problems and severely reduce the company's flexibility."[64]

60 *United States v. Microsoft Corp.,* 97 F. Supp. 2d 59, 64 (D.D.C. 2000), affirmed in major part, see below.

61 See Nicholas Economides, *The Microsoft Antitrust Case* (NYU Stern Sch. of Bus., Working Paper, 2001), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=253083.

62 *Microsoft Corp. v. United States*, 253 F.3d 34, 98 (D.C. Cir. 2001).

63 Final Judgment, United States v. Microsoft Corp., No. 98 Civ. 1232 (CKK) (D.D.C Nov. 12, 2002), available at https://www.justice.gov/atr/case-document/file/503541/download.

64 Economides, *supra* note 62, at 31; see also Crandall, *supra* note 31; but see Rory Van Loo, *supra* note 12.

Taking stock at this point and reflecting on the history of remedies in monopolization cases as background for the "break 'em up" slogan of 2021, we offer these observations (subject to additional lessons from AT&T, below): There are still few lessons from past enforcement efforts that can give good guidance for providing relief in the single-firm monopolization cases, much less for innovation-based monopolization cases. The early iconic cases of breakup were not cases of single-firm monopolization; they were cases of immense consolidations of most of the industry into one firm. The perspective that prevailed in the middle period (*Alcoa* through the filing of *IBM*) — that monopoly structure is presumptively bad and that dominated markets should be restructured to create competition — has been replaced by skepticism as to what courts and governments can effectively do and faith that markets will dissipate monopoly power at least faster and better than court-ordered restructuring. *Standard Oil* remains an icon, but it is a consolidation case and does not light the path to good policy for innovative markets where winners take most. "Big Tech is too big, antitrust is the tool, break 'em up" is a non sequitur.

V. UNITED STATES V. AT&T (1974-1982) AS A UNIQUE INSTANCE OF A SUCCESSFUL JUDICIALLY-MANAGED BREAKUP OF A MAJOR MONOPOLIST UNDER SECTION 2

In *United States v. AT&T*, DOJ was responding to two distinct competitive concerns — one historic and the other quite new. Each had critical structural dimensions.

The historic competitive concern was about the common ownership by AT&T of (i) the Western Electric communications equipment manufacturing company ("Western") and (ii) the local Bell System telephone utilities which provided retail telephone services to a majority of Americans ("Local Bells"). The local utilities were natural monopolies whose rates and services were regulated by state public utility commissions ("State PUCs"). This was done on the basis of classic rate-based regulation under which the utility was allowed to earn a *reasonable return* on the investment it made in order to provide the regulated services, its so-called *rate base*. This meant that the regulated local utility did not have any inherent objection to increasing its rate base by paying more for equipment so long as its State PUC did not think it was paying "too much" for its equipment.[65] With virtually all the Local Bells' communications equipment being procured from Western, it was almost impossible to determine whether they were paying "too much" for their equipment; and AT&T's incentives were to increase Western's sales prices and the Local Bells' rate bases. AT&T's justification for these (and other) monopolistic arrangements was always *reliability*, strongly arguing that it was providing the most reliable telephone service in the world.[66] Western's role as the monopolistic supplier of reliable equipment to the local telephone monopolies had been a central feature of an earlier DOJ case, which had been settled by a 1958 consent decree which DOJ regarded as wholly inadequate by the 1970s. By then, the obvious solution was structural — that AT&T be ordered to divest Western as a way of encouraging competition in telephone equipment and making that market more transparent.

The second, emerging competitive concern was based on new technology which was opening the potential for new competition in long distance telephone service. Historically, most long distance and local telephone service had been provided on an integrated basis by the same network, almost everywhere in the world. *Operating* them separately was treated as almost heretical from an engineering standpoint, given the network reliability arguments in favor of integration.

But different pieces of the integrated network were separately *regulated*, which had important political and economic dimensions which turned out to be significant catalysts for DOJ's AT&T case. AT&T's interstate long distance business was its Long Lines division whose rates and terms of service were regulated by the Federal Communications Commission ("FCC") in Washington. Of course, an actual long distance call was provided over facilities provided by both Long Lines and the Local Bell on either end—and this necessarily raised the practical issue of how the FCC-set rate on the long distance call should be allocated among Long Lines and the two Local Bells that originated and received each call. The State PUCs generally had a strong political interest that the basic rate for local resident service be kept low because it was normally paid by voters; and it was glad to have those rates subsidized by long distance callers who were often business users. So there was heavy political pressure on the FCC to allocate a disproportionate share of its long distance *rates* to the "local" utilities on either end, at the same time that long distance transmission *costs* were declining with engineering improvements.

65 DOJ had already had a preview of this issue in the famous *Electrical Equipment* prosecutions that it had brought against General Electric, Westinghouse, and other manufacturers in the early 1960s. Many private local electrical utilities had seemed surprisingly indifferent to a widely suspected series of cartels among the producers of various products they routinely purchased (turbine generators, transformers, switchgear, etc.), while the higher prices were inflating their rate bases. The main whistleblower turned out to have been the federally-owned Tennessee Valley Authority.

66 These were not new arguments for DOJ. The staff had been through an extended fight after DOJ helped persuade the FCC to invalidate AT&T's long standing "foreign attachments" rule in its famous *Carterfone* decision in 1968. *In re* Use of Carterfone Device*,* 13 F.C.C.2d 420 (1968). This rule had prevented any local telephone subscriber from owning and using any equipment (mostly equipment from Western) that was not provided by its Local Bell. It took almost five years (1967-72) for DOJ to persuade the FCC to require AT&T to allow "foreign" equipment on its network as long it satisfied objective technical standards.

Thus, by the early 1970s, Long Lines' costs for transmitting a call from San Diego to Boston were much lower than what it was charging the customer for doing so. Into this situation came a new communications company (Microwave Communications Inc., or "MCI") which had established an initial microwave network between Chicago and St. Louis over which it proposed to offer a lower cost long distance between those two cities. Of course, to complete its cheaper calls MCI needed access to the Local Bells in each city. Needless to say, AT&T was horrified and adamantly negative, while the FCC was also reluctant about such a disruption of the regulatory status quo. AT&T, MCI, and the FCC each regarded the MCI effort as the proverbial foot-in-the-door, a first step to something much bigger.

Meanwhile, MCI's widely watched efforts clearly alerted the DOJ to both (i) the still-novel engineering possibility of having a free-standing long distance service provider and (ii) the competitive danger of having AT&T controlling both Long Lines and the Local Bells. That the FCC's long distance rates were so out of whack with the declining transmissions costs was well-recognized by DOJ, the FCC, and the White House Office of Telecommunications Policy, as well as many business executives and economists. Thus, there were substantial economic gains to be achieved from bringing a major case against AT&T, which all of us at DOJ recognized would require a major investment of the Antitrust Division's limited enforcement resources.[67]

On November 20, 1974, DOJ filed its Complaint in the District of Columbia. The three defendants were AT&T, Western, and Bell Labs, while the 23 Local Bells were treated as co-conspirators but not defendants. The Bell System was charged with providing communication service to more than 80 percent of the nation's telephones. The defendants were charged with attempting and conspiring to monopolize and monopolizing the markets for (i) telecommunications services and (ii) telecommunications equipment, in violation of Section 2. The offenses were based on obstruction of interconnection with various communications sources (including microwave and satellite services) and directing the majority of Bell System communications equipment purchases to Western.

Structural relief was clearly seen as central to the case. DOJ sought divestiture of Western and its further division into two or more competing equipment suppliers. The Complaint also sought separation of either Long Lines or the Local Bells from the Bell System as separate and independent companies. In the DOJ press release accompanying the Complaint, Assistant Attorney General Thomas E. Kauper explained, "the specific relief we will seek to separate the Long Lines Department from the Bell Operating Companies will depend on what is feasible based upon the evidence adduced at trial."[68] Those of us who worked on the case felt that the whole major effort would only be worth it if DOJ could ultimately obtain divestitures; and we realized splitting off Long Lines or the Local Bells from AT&T would be the more difficult task, given both were part of an integrated communications network.

Once filed, the case moved very slowly until Judge Harold Greene took over the case after the death of the originally assigned judge. Among other things Judge Greene wrote a long opinion in 1978 rejecting the defendants' arguments based on exemptions,[69] and in 1981 he conducted the multi-witness trial of DOJ's affirmative case and the first part of the defendants' case. Thereafter, Judge Greene rejected the defendants' motion to have the case dismissed at the conclusion of DOJ's case.[70] This led to active settlement discussions triggered by an AT&T proposal, and ultimately to an agreement that AT&T would divest both Western and the local retail telephone businesses operated by the Local Bells. The newly created New Local Carriers were required not to discriminate in offering their customers access to long distance services offered by AT&T and its new competitors. This agreement was formally embodied in a huge amendment to 1956 consent decree[71] and thus became known as the Modified Final Judgment ("MFJ"), which Judge Greene approved as being in the public interest, after reviewing a barrage of diverse objections to it.[72] The divestitures were formally accomplished a year later in 1984, but it would take at least six to seven more years of proceedings for the FCC and Judge Greene to sort out all of the details completing the separations of the New Local Carriers owned by some of AT&T's original shareholders.

67 The fact that DOJ had so many attorneys and economists already committed to the seemingly endless IBM Section 2 was an understandable caution at the time.

68 DOJ Press Release (Nov. 20, 1974).

69 461 F. Supp. 1314 (D.D.C. 1978).

70 524 F. Supp. 1336 (D.D.C. 1981).

71 This 1956 decree settled a 1949 DOJ complaint case brought in New Jersey seeking divestiture of Western; but the much-criticized settlement involved no divestitures and only a few injunctions.

72 552 F. Supp. 131 (D.D.C. 1982).

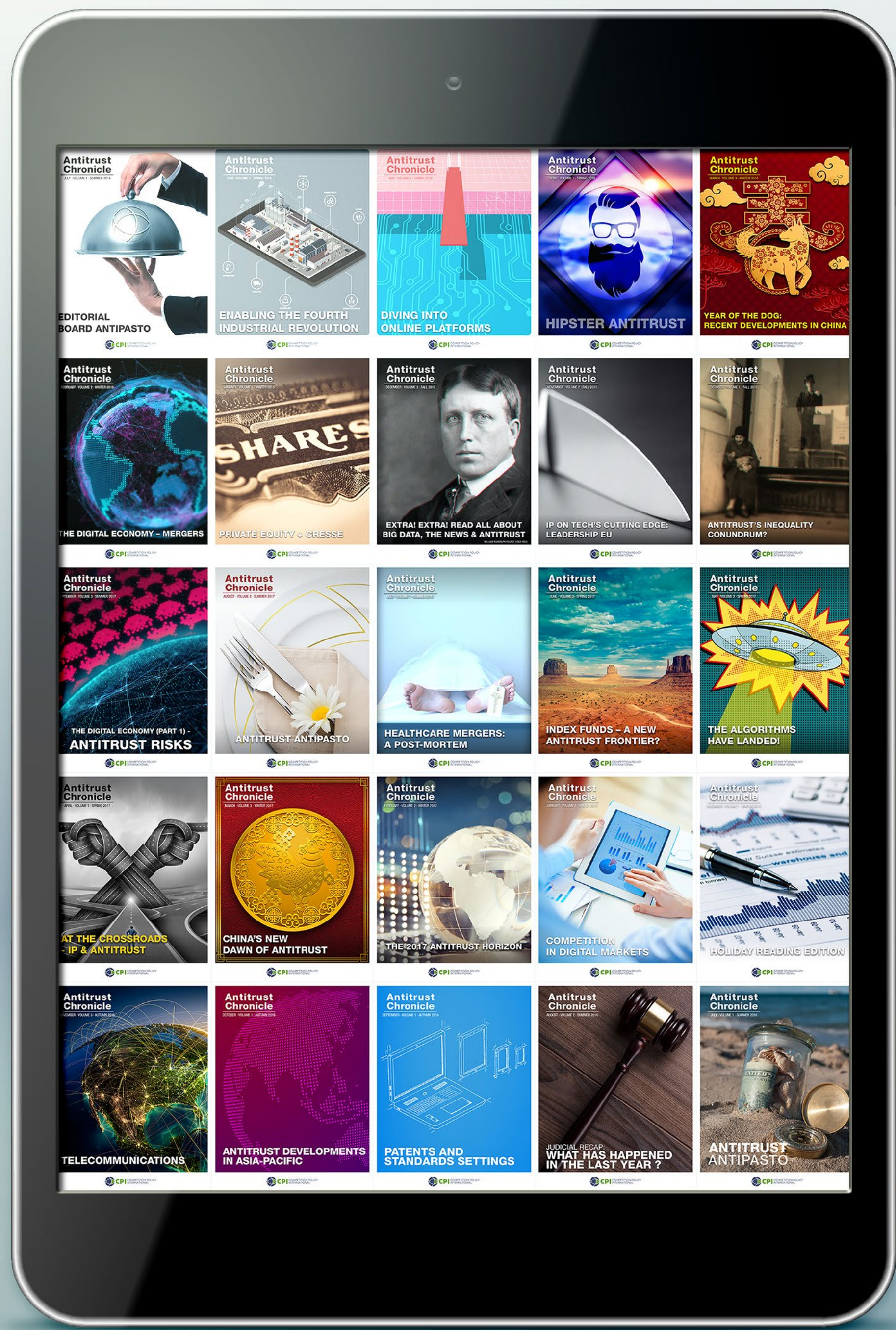
The MFJ has turned out to be a great success competitively. Based on the MFJ combined with major changes in technology which the decree has helped to facilitate, the telecommunications industry has been transformed since 1984. The communications equipment market has become very competitive, while Western has faded as a competitor. The long-distance markets for voice, data and video services has grown enormously with AT&T as one of several competitors, including satellite companies. Cable companies offer telephone and broadband competition to Verizon and other New Local Carriers. Finally, wireless phones have become widely used and a major source of personal communications being offered now by Verizon Wireless, AT&T Wireless, and T-Mobile; and many individuals have abandoned their landline residential telephones to rely just on their wireless phones. The MFJ and the FCC have assured non-discriminatory interconnections and access.

Our ultimate conclusion is that *United States v. AT&T* was a special case where (i) historic corporate structures created the basic Section 2 problems, and (ii) DOJ presented a strong substantive case that led a negotiated divestiture agreement, but this still required a prolonged implementation progress. Divesting AT&T's ownership in Western was comparatively straight-forward because it required transfers of shares. Divesting the local telephone businesses to be run by the New Local Carriers was a long bumpy road because the underlying network assets were so intertwined (as the big digital platforms' assets appear to be).

VI. CONCLUSION

We have tried to talk realism and to sort out the truth about antitrust and breakups. We have shown that the first truth is: The public conversation about antitrust and breakups has been distorted; it is based on myths and non-sequiturs. The second truth is: U.S. antitrust law does not lean towards breakups for single-firm monopolization. Breakup is rare. It has been a standard remedy only when monopoly has been created by acquisition or consolidation of numerous rivals (something that no longer occurs on the scale of Standard Oil as a result of modern anti-merger enforcement). The third truth is: Breakup has been effectively implemented only after extensive, difficult efforts by government enforcers and judges.

This does not mean that there should never be breakups, whether for antitrust or social reasons. But it does imply long and hard attention to the relevant questions before the choice of breakup is made.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