Reconsideration Of The Equity Argument Against Structural Remedies

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Abstract
Much has been written about failure on the part of the courts to issue the structural remedies of dissolution, divorcement, and divestiture in civil antitrust decisions, especially in those involving violations of Section 2 of the Sherman Act. As was pointed out by Walter Adams in a 1951 article and has been repeated by many antitrust experts, the government often wins "a resounding legal victory only to suffer a crushing economic defeat" due to the unwillingness of the courts to impose effective remedies. As Dewey stated, "it is a commonplace in antitrust work that the government wins the opinions and the defendants win the decrees."

Disciplines
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AGAINST STRUCTURAL REMEDIES

Jean W. Adams

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RECONSIDERATION OF THE EQUITY ARGUMENT AGAINST STRUCTURAL REMEDIES

Much has been written about failure on the part of the courts to issue the structural remedies of dissolution, divorcement, and divestiture in civil antitrust decisions, especially in those involving violations of Section 2 of the Sherman Act. As was pointed out by Walter Adams in a 1951 article and has been repeated by many antitrust experts, the government often wins "a resounding legal victory only to suffer a crushing economic defeat" due to the unwillingness of the courts to impose effective remedies. As Dewey stated, "it is a commonplace in antitrust work that the government wins the opinions and the defendants win the decrees."

Why the courts are apparently so reluctant to use structural remedies has been discussed in the antitrust literature during the last several decades and a variety of arguments are typically presented in textbooks on the economics of antitrust. This paper considers one of the often-repeated arguments against the use of structural remedies in civil antitrust cases. The argument considered herein is the equity argument that such remedies cause harm to "innocent" investors. The validity of other arguments against the use of such remedies is not considered herein. In addition, the economic justification for the use of structural remedies (namely, that a more competitive market structure will induce greater economic efficiency and that in some cases structural change may be the only means of restoring competition) is taken as valid and is not given further consideration.

The first section presents the traditional equity argument against the use of structural remedies as developed by Donald Dewey. The next section considers this argument in view of recent contributions in the area of compensation and transitional equity. Arguments against the use of compensation
and a viable alternative to compensation are then considered. The final section provides a brief summary of the major conclusions of the paper.

I. The Traditional Equity Argument

Donald Dewey was the first to present the effect-on-investors argument as the major reason for the discrepancy between decision and decree.

"... dissolution and divestiture suits are conducted upon a premise which most judges and laymen really do not accept. Unlike the advocates of strong remedies, they are not convinced that the exercise of monopoly power which has been acquired by means neither actionable nor indictable per se violates the law to an extent justifying its elimination without a sympathetic attention to the position of workers and stockholders whose interests may adversely be affected by trust-busting."^ Dewey notes that"... the possibility that the elimination of power over price may injure the fortunes of innocent parties is seldom explicitly explored in antitrust suits."^ The major reason Dewey gives for the typical lack of explicit consideration is that "it is the 'company' that is charged with violating the antitrust laws.... Since the corporation is a fictitious person, during the trial the court is under no obligation to take cognizance of the obvious; namely, that the beneficiaries of any successful 'attempt to monopolize' are those stockholders, workers, and executives who realized capital gains or higher incomes as a consequence of unlawful business aggrandizement."^ However, while Dewey argues that no explicit consideration is given, he does find that implicitly the courts must and do attempt to weigh possible public gains against possible private losses and that "... the more problematical the public benefit, the greater the proper conservative bias in
favors of private claims. Based on the belief that law enforcement should penalize only those parties responsible for illegal actions, Dewey argues that those who would be adversely affected by structural remedies are not typically those responsible for the antitrust violation under consideration.

"When a corporation's monopoly power antedates the antitrust suit by more than a few years, the presumption is that most persons currently dependent upon the corporation for an income have not materially profited from its exercise."

A related consideration emphasized by Elzinga and Breit in their 1976 book is that structural remedies are in effect, penalties. Yet "In United States antitrust law, DDD is not seen as a penalty for antitrust violations but rather as a remedy to be applied in situations where competition cannot be restored otherwise. The Supreme Court has held that, in antitrust civil proceedings, the courts are not 'to punish antitrust violators, and relief must not be punitive'. To achieve a truly nonpunitive dismemberment of a firm (or industry), as Donald Dewey has argued, is almost a contradiction in terms."  

Despite Dewey's claim that effects on investors are only implicitly considered by the courts, he cites in a footnote in his 1959 text a case in which such considerations were explicit in Judge Sandborn's objection in 1914 to a decree ordered in the International Harvester Company case which would have divided the company into three units.

"'Its business was conducted openly without legal challenge or attack, so far as this record shows, during all these years, and it is not improbable that many parties hold stock of the International Company which they purchased during these ten years in reliance upon these facts, the value of which a decree against the defendants will greatly depreciate. So it is that in any event this suit does not appeal to the conscience of a chancellor with the force it might have had in 1903 or 1904 before the actual conduct of the business of the defendants had demonstrated its innocuous effect and no parties had been induced to act in reliance upon its freedom from attack.'"
That the effect on investors continues to be taken into account in at least some instances is evidenced by an example cited in the 1973 Breit and Elzinga article that considers the availability and feasibility of various antitrust remedies and penalties. These two authors almost immediately reject structural remedies as effective means of antitrust violation deterrence and they cite the following recent use of the effect-on-investors argument for the consent decree reached in the ITT case.

"Most of the assets originally listed in the Government's complaint remained untouched by the settlement. One of the reasons given by former Antitrust Division Chief, Richard McLaren, was that divestiture of those assets would adversely affect ITT's stock prices and therefore penalize its shareholders."

One can summarize and state more fully the assumptions and specific equity problem raised by Dewey's effect-on-investors argument as follows. It is assumed that the degree of monopoly power possessed by a corporation will be capitalized into the price of the corporation's securities. Structural remedies are aimed at reducing the monopoly power of the corporation and, if successful, the market values of the corporation's securities will fall, causing a capital loss to the current holders of the corporation's securities. The equity problem arises because of the likelihood, and occurs to the extent, that those holding the corporation's securities at the time of the remedy ("current investors") are not the same individuals who held the securities when the monopoly power was created or increased ("old investors"). It is assumed that the corporation's monopoly power or increase in monopoly power was capitalized into the prices at which the "old investors" sold the securities to the "current investors". Thus, the "old investors" received a capital gain as a result of their security ownership, whereas the "current investors" will suffer a capital loss if structural remedies are imposed. In other words, those who benefited from the creation or extension of monopoly
power and who may have been at least partially responsible for the creation of that monopoly power (for example, by their direct or indirect participation in the corporation's policies and/or management selection), are not those whose securities decrease in market value due to the later use of structural remedies.

Dewey finds only two situations in which structural remedies are appropriate. The first is "where any financial loss will fall upon the persons who have engineered the unlawful suppression of competition" and Dewey notes that "the most severe decrees involving dissolution and divestiture have been returned against companies whose major stockholders have been personally responsible for the castigated policies of their firms." As examples, Dewey cites cases involving the tabacco, petroleum and railroad industries. The second situation is "when the target is monopoly power which cannot be capitalized; that is, when it is inseparably bound up with the acumen or charisma of particular individuals." Dewey concludes that,

"In short, meaningful antimonopoly remedies can be anticipated only when it is possible for judges to 'personalize' the issues, which is to say that until the courts can bring themselves to impose decrees that seriously menace the interests of innocent parties the Sherman Act can never serve as an instrument to further anyone's program for laissez-faire."

II. The Appropriateness and Feasibility of Compensation

Despite the apparent long-standing acceptance of Dewey's main arguments and of his conclusion that the courts' conservatism in the use of structural remedies is both "understandable and commendable", further consideration of the equity effects of such remedies is warranted, especially in light of recent theoretical contributions in the area of compensation. Such research by economists in the fields of public choice and public finance has focused on the appropriateness from an equity viewpoint and the feasibility of
compensation in response to proposed changes in tax legislation. Such analyses
and policy prescriptions can and should be applied to both changes in the use
of structural remedies under existing antitrust law and to proposals call-
ing for near-automatic restructuring of monopolistic and oligopolistic
industries when specified structural, conduct, and/or performance criteria
reflective of "undue" monopoly power have been found to exist in a firm or
industry. 

Mention has sometimes been made of the possibility of compensation for
the capital losses experienced by investors as a result of structural remedies.
While Dewey mentions that compensation is an alternative to existing policy,
he finds the likely administrative difficulties with such an approach to be
the probable reason why compensation is "never seriously proposed." However,
Asch, in his textbook discussion of Dewey's general argument, recognizes that
compensation to individuals harmed by structural remedies may be possible.
Nevertheless, full consideration of compensation is not given in the antitrust
literature.

It must first be recognized that arguments against the use of structural
remedies which focus on the equity effects on "innocent" investors and on the
necessity of compensation are based on short run transitional considerations,
rather than on more long run permanent problems. While Dewey does not state
it as such, his basic argument presented above is concerned solely with the
effects on investors of a change in policy from the current situation of very
little or in effect no use of structural remedies (in cases under Section 2
of the Sherman Act) to a situation where such remedies are imposed frequently
enough that expectations form in the minds of investors concerning the
probability that such remedies will be applied in similar future instances.
A. Equity and Compensation Considerations After the Policy Transition

For now, ignore the transitional difficulties (which will be considered subsequently) and consider first the situation that would exist after such a policy transition has been completed. After the policy transition there would exist a general awareness among potential and actual investors that structural remedies are included among the possible antitrust remedies, similar to the current knowledge that fines, prison terms, injunctions, treble damages, etc. are possible outcomes of antitrust violations. Just as is currently the case, investors would then make their decisions concerning which securities to purchase on the basis of relative expectations of earnings. However, such earnings expectations would then take into account the probabilities attached to structural remedies being imposed, which, ceteris paribus, would decrease the values of the securities of those corporations which are likely to face antitrust violations of the type where structural remedies may be utilized.

Using accepted investment terminology and theory, investors valuate securities on the basis of their relative present values (PVs), where

\[ PV = \sum_{t=1}^{n} \frac{R_t}{(1 + r)^t} \]

The \( r \) in the denominator is the prevailing rate of return on other assets in the same risk class. \( R_t \) is the expected value of returns in period \( t \), where

\[ R_t = \sum_{i=1}^{m} R_{t,i} \cdot Pr(i) \text{, with } \sum_{i=1}^{m} Pr(i) = 1. \]

\( Pr(i) \) is the investor's estimate of the probability that state \( i \) will occur and \( R_{t,i} \) is the level of net returns associated with each state. \( \text{23} \)

Let state 2 in equation (2) above be the situation where structural remedies are issued when the courts have found, for example, a Section 2
Sherman Act violation. Dewey argues that structural remedies are unfair because investors have been led to assume (based on past antitrust decrees) that \( \Pr(2) \) is zero or very close to zero and they have made their investment purchases accordingly. To the extent that expected returns (under this assumption) have been higher for those firms which hold illegal monopoly power, the present value and price of the securities of such firms have been higher.

Once the policy transition is completed, investors will upwardly revise the probability estimates they attach to state 2 occurring, with the result that, ceteris paribus, the expected returns from ownership of the securities of likely monopoly violators will decrease, causing a decrease in the present value and price of such securities.

Thus, once the policy transition is completed, the equity argument against the use of structural remedies loses its validity. While those investors who purchased securities of a firm after its monopoly power was created or extended would suffer capital losses as a result of the imposition of structural remedies, they would not be "innocent" in that they chose to purchase the securities given the risks and returns attached thereto. Ceteris paribus, such investors would be compensated by the market in the form of higher than normal returns on reduced security prices for the additional risk incurred in purchasing the securities of a corporation that may be operating in violation of the antitrust laws. Therefore, no equity argument against the use of structural remedies is justified in the long-run sense (that is, after the policy transition has been completed); similarly, there is no justification for compensation after the transition has been completed.
B. Equity and Compensation Considerations During the Policy Transition

Much of the recent work on compensation as a means of removing horizontal equity problems accompanying policy changes is attributable to Hochman who presented a paper entitled "Rule Changes and Transitional Equity" at the 1972 Urban Institute Conference on Redistribution through Public Choice. Subsequently, Martin Feldstein extended the analysis in the context of tax reform in two 1976 journal articles.

The equity considerations that prompted Dewey and others to disfavor the use of structural remedies would be eliminated if full compensation were given (during the policy transition) to those individuals who hold the securities of the corporations that have violated the antitrust laws. As Feldstein points out, determining both the appropriate recipients and amounts of compensation would in some cases be a difficult task. However, Feldstein cites policy changes affecting the value of assets as an example of a situation where compensation is feasible.

"Compensation would be easiest for tax changes that affect the value of assets for which prices are continuously available. For example, when a change in future tax liabilities is capitalized in the value of a stock or bond, the owner of that security could be compensated on the basis of the difference between the value of the stock or bond before the tax change and its value after the law has changed." Thus, the mechanism for calculating the appropriate amount of compensation per security would be via reliance on the securities market, wherein the probability of decreased returns attributable to structural remedies would be taken into account. While the occasional layman investor probably would be unable to accurately assign the appropriate probability of structural remedies occurring in the relevant future for each available security, one can assume that there would exist a sufficient number of informed investors to enable the market to accurately reflect the decreased market value of securities attributable to the policy change.
But, while compensation would be feasible during a policy change in the use of structural remedies, some difficulties would surely arise. Two areas of difficulties concerning compensation that would present themselves in the context of a structural remedy policy change, but would not arise or not arise to the same extent with a tax reform, are discussed below. Possible ways of dealing with some of these difficulties are also suggested.

First, whereas it would be fairly simple to calculate the effect on a corporation's net returns from some tax policy changes, much more uncertainty might surround the antitrust policy change considered in this paper. In the latter policy change, uncertainty would first exist concerning the probability of structural remedies being issued against a particular corporation. A practical means of reducing this cause of uncertainty under existing antitrust laws would be by having the Department of Justice and the Federal Trade Commission announce fairly detailed guidelines for the use of structural remedies, such as the Justice Department's Merger Guidelines issued in 1968.

Something similar to such guidelines are included as part of most of the industrial reorganization legislative proposals; these typically require some quantitative structure, conduct and/or performance criteria to be met by a firm and/or industry before the statute is applicable.

A second type of uncertainty would exist regarding the effects of structural remedies on individual corporation's net returns. It would be left to the securities market to establish post-policy change security prices. This second type of uncertainty applies less to tax policy changes than to structural proposals.

Another problem area with compensation is the appropriateness and feasibility of withholding compensation from some security holders. The basis for compensation, as presented above, is to avoid penalizing investors who, as
Elzinga and Breit refer to it, "bought-in-late" (i.e., purchased securities of a corporation after the monopoly power was created or extended). A question arises as to the appropriateness of compensating those investors who purchased the securities prior to the acquisition of illegal monopoly power and retain ownership of the same securities when the policy change occurs. Equity considerations do not require that such investors be compensated; however, if they were excluded from compensation, they would have an incentive to quickly sell securities for which they expect the price to fall due to the policy change.

Also, monopoly power is rarely, if ever, created instantaneously; rather, it normally evolves over time, although perhaps in spurts. If an attempt were made to exclude from compensation those investors who retained ownership of the securities while the monopoly power was being established, a somewhat arbitrary cut-off date would have to be established, either for all securities or for each security.

A similar difficulty arises concerning those investors who owned the securities of a corporation prior to its acquisition or extension of monopoly power and then sold the securities at prices reflecting the monopoly power. A case could be made for retroactively taxing such capital gains to provide funds to compensate "innocent" investors, because those capital gains resulted from the development or extension of illegal monopoly power. However, such a policy may be impractical from a legal viewpoint as well as being considered unjust, since past enforcement policies have not given investors any reason to believe they would be subject to such penalties after they sold the securities.
III. Arguments Against Compensation and Alternatives to Compensation

Both Hochman and Feldstein discuss some circumstances under which equity considerations do not require compensation and/or where only partial compensation may be appropriate. Only those two circumstances applicable to the issue at hand (antitrust remedy policy change) will be discussed herein.

A. Overcompensation

Feldstein argues that providing "complete" compensation (that is, paying investors the full amount by which their security values decrease due to the policy change) may well result in "overcompensation" because some of the losers (in the absence of compensation) will also be indirect gainers from the policy change. Thus, investors who receive complete compensation may be net gainers from the policy change. For example, many of those who hold securities of corporations in violation of the antitrust laws may have diversified portfolios with holdings in competing firms or industries; with complete compensation, such investors will be net gainers in that, after the policy change, the values of their other securities, ceteris paribus, will rise. Feldstein considers such indirect gains to be secondary effects of the policy change and he argues that, on the average, they are sufficiently small that they can be ignored and "must...be ignored in any practical system of compensation."31

Similarly, it can be argued that in the context of a change in the use of structural remedies, the losers (in the absence of compensation) will also be indirect gainers from the increased competition and efficiency which will presumably result from the use of structural remedies. While this would likewise call for less than full compensation, practical considerations would preclude estimation of these indirect gains from the policy change.
B. Anticipation

A second and more serious compensation consideration is discussed by both Hochman and Feldstein. Hochman notes that, "In determining whether compensation must be considered an ethical requirement, the ability of individuals to anticipate change and adjust their behavior to curtail potential losses is crucial."32 As Feldstein states, "The most serious objection to compensation in tax reform is that the prospective losers recognize that they are taking a risk of tax reform when they buy certain types of property... These risks are reflected in asset prices..."33

Both authors present the example of elimination of the oil depletion allowance and note that the frequent discussion of this policy change should have resulted in current investors being aware of the risks of the policy change with the result that "The price of oil stocks are therefore low in relation to current earnings, or, equivalently investors in oil stocks are compensated [with high rates of return] for the perceived risk of tax reform. They knowingly take the gamble and should not be compensated if they lose."34 In such a situation the policy transition has already been anticipated, making compensation inappropriate.

To at least some extent, one might expect anticipation to have occurred with respect to a potential change in the use of structural remedies. Under existing antitrust law, possible structural remedies have been discussed in the media for some of the firms and industries involved in current antitrust investigations and litigation; examples include cases involving AT&T, IBM, the cereal industry and the petroleum industry. To the extent investors believe such remedies to be likely outcomes of current cases, the price of the securities of these firms should already adequately reflect the perceived risks.35 If this has occurred, no compensation would be warranted, as in the
oil depletion allowance policy change discussed above. However, the rare use of structural remedies in all but merger cases in recent times probably has precluded full, if not even substantial security market adjustment in anticipation of the use of structural remedies.

Both Hochman and Feldstein also provide some practical alternatives to compensation that may reduce, but will not eliminate completely, transitional inequity in situations where compensation is not feasible. The primary alternative both suggest is postponement of the policy change. As Feldstein states, postponement here is referring to "current enactment with a future effective date, and not merely postponed enactment." Feldstein argues that postponement helps balance efficiency and equity considerations in that it reduces the loss associated with policy changes in two ways: (1) postponement reduces the present value of individual losses and (2) postponement encourages a reallocation of resources away from the activity so that its gross return rises. Feldstein also argues that postponement is preferable to a partial change or gradual change in that postponement maximizes the opportunities for a favorable reallocation of resources.

Given the goal of trying to utilize the most workable means of changing the use of structural remedies with as little harm to "innocent" investors as is feasible, and taking into account all the factors raised above concerning the appropriateness and feasibility of compensation, postponement may be preferable to compensation. Substantial postponement is already built into antitrust enforcement. The typical time delay between when an antitrust case is first investigated and when charges are filed and the even longer common lag between the filing and when the case is finally resolved after possible postponements and appeals, allows what should be adequate time for market adjustments to reduce the equity necessity of compensation.
effect, such time lags provide the postponement of policy changes Hochman and Feldstein suggest as a practical alternative to compensation. But, because this type of postponement varies from case to case a common minimum postponement time could easily be provided by specifying a future effective date of the policy change.

Similar automatic postponement and consequent security market adjustment should also occur if any of the proposed industrial reorganization laws are enacted. The necessary investigation time, especially given the wide applicability of these proposed statutes, should provide substantial time during which the market could at least partially adjust to the policy change, making compensation less necessary. In addition, it is likely that such legislation would include a specified time lag before it goes into effect.

Thus, while compensation may be one solution to the equity considerations accompanying a policy change affecting the use of structural remedies, a viable alternative would be automatically provided by market adjustments, given advanced notification and thereby sufficient time to adjust to the policy change before enforcement is begun.

IV. Conclusions

This paper has focused on one of the justifications typically presented for the courts' reluctance to impose structural relief in civil antitrust cases, especially those brought under Section 2 of the Sherman Act. First, Dewey's effect-on-investors equity argument was fully stated. It was then shown that, while this argument does raise a legitimate concern, it applies only during the policy transition and thus is only a short run problem. It was also shown that the equity argument is valid only for those investors (referred to as "innocent investors") who purchased securities of a corporation after its monopoly power was capitalized into security prices.
The possibility of net efficiency gains from the policy change motivates serious consideration of compensation to make equitable the process of achieving efficiency gains. Thus, the appropriateness and feasibility of compensating investors who are harmed during the policy transition was considered. While some difficulties in implementing compensation were noted, such as the possibility of overcompensation and determining which investors should be compensated and by how much, many of the difficulties are manageable. Thus, compensation appears sufficiently workable to warrant serious consideration.

Finally, a partial alternative to compensation, that would reduce but not completely eliminate transitional inequity, was considered; this alternative is a delayed policy change that would enable the security and commodity markets to adjust to the policy change prior to its implementation. It was noted that, all factors considered, postponement may be preferable to compensation.

In summary, the use of either compensation or postponement, by eliminating or reducing transitional inequity, should make acceptable a policy change in the use of structural remedies in situations where effective competition and efficiency cannot be achieved through alternative means. Dewey's effect-on-investors equity argument should no longer be presented or interpreted as necessarily precluding structural remedies in civil antitrust cases.
**The author wishes to express thanks to Roy D. Adams for helpful comments and suggestions.

1. Throughout this paper the term structural remedies will be used in the generic sense to refer to dissolution, divorcement and divestiture; the distinctions between these terms are unimportant to the issues considered in this paper.

2. This paper is concerned primarily with the use of structural relief under Section 2 of the Sherman Act and, to a lesser extent, under other sections of the antitrust laws and under proposed antitrust legislation. It is recognized that structural relief is commonly used for merger violations brought under Section 7 of the Clayton Act.


5. Two examples of antitrust texts that include this argument are Peter Asch, Economic Theory and the Antitrust Dilemma 257 (1970) and Clair Wilcox and William G. Shepherd, Public Policies Toward Business 219 (5th ed. 1975).

6. Supra note 4, at 95.

7. Id. at 97.

8. Id. at 100.

9. Id. at 97-98.

10. Id. at 95.

11. Id. at 98.


15. Supra note 4, at 100-101.

16. Id. at 101.
The use of structural remedies under existing antitrust law could be changed by legislation, by court interpretation and decision, and to some extent by enforcement agency practices, guidelines and requests for structural relief.

Three proposals of this type are as follows: Kaysen and Turner's "Draft Antitrust Law", Carl Kaysen and Donald F. Turner, Antitrust Policy: An Economic and Legal Analysis 266-272 (1959); "The Concentrated Industries Act" which was one of the proposals of Phil C. Neal et. al., White House Task Force Proposal (1968), reprinted in 2 Antitrust Law and Economics 11-12, 30-33 (1968-1969); Philip Hart's "Industrial Reorganization Bill", S. 3832, reprinted in U.S., Congressional Record, 92nd Cong., 2d Sess., 118, part 19, 24925-24935 (1972).

As an example, Feldstein cites changes in the taxation of labor income. Feldstein, Compensation at 126.

Feldstein also suggests that such compensation might be best financed by long-term government debt.

Also applicable to both policy changes, as well as to any policy changes that utilize the market to determine the amount of compensation, are problems stemming from other changes which affect security prices that may be occurring simultaneously with or in close succession or precession with the policy change. Separating out the effects of changes in other security price determinants may complicate the calculation of appropriate compensation.
An example of the stock market's anticipation of adverse antitrust decisions was cited in the March 7, 1977 issue of Business Week: "The last time International Business Machines Corp. won an important antitrust case—the famous action brought by Telex Corp. and decided at the U.S. Appeals Court level in January, 1975—the stock price soared some 17 points in one day and continued to rise for a couple of months afterwards." Business Week 62 (March 7, 1977).

Feldstein, Theory, at 99; Feldstein, Compensation, at 128.

Feldstein, Compensation, at 128. Hochman also discusses several other imperfect substitutes for compensation which are contained in the political process itself, including logrolling, majority rule and interjurisdictional mobility. Supra, note 24, at 330-333.

Posner's study of antitrust cases found that with respect to monopolization cases,
"The average dissolution or divestiture proceeding is substantially more protracted than the average civil antitrust case. If we exclude local and small regional monopoly cases..., dissolution or significant divestiture in a monopolization case has taken an average of almost eight years. And...this is only the interval between the filing of the complaint and the final judicial order. The interval between the formation of the monopoly and the actual carrying out of divestiture is greater."