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English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

COMMITMENT DECISIONS IN ANTITRUST CASES

-- Note by the United States--

15-17 June 2016

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*More documents related to this discussion can be found at
www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm*

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1. The United States antitrust agencies – the U.S. Department of Justice Antitrust Division (“DOJ” or “Division”) and the U.S. Federal Trade Commission (“FTC”) (collectively, “the agencies”) – resolve most of their civil non-merger antitrust cases with negotiated settlements – referred to as “commitments” in this roundtable – as they do with mergers.¹ Litigated civil non-merger cases are rare. Settlements are an important procedural tool, because they let the agencies and the target parties resolve their disputes effectively, quickly, and thoroughly.² The test for an acceptable settlement, therefore, is whether it addresses the anticompetitive conduct in a way that eliminates the harm and prevents its recurrence. The agencies will not accept a proposed settlement that will not accomplish those goals; in those instances, the agencies will litigate to achieve an effective result.

2. The agencies’ ability to resolve antitrust violations without necessarily proceeding through litigation is an important tool to achieve effective and expeditious relief from anticompetitive conduct, without both the agency and the parties incurring the costs of delay and litigation. The agency obtains the relief it needs much sooner than it would from litigation, and it avoids the risk that it might not prevail. The parties obtain certainty about what they may, and may not, do in the future. A further benefit of negotiated settlements is that the agency and parties can discuss in great detail the scope of the remedy, including any carve-outs that may be supported by particular circumstances. A fine-tuned remedy that fully accommodates legitimate business needs of the parties while still providing full competitive relief may not be easily obtained in an adversarial litigation context. The agencies’ settlements have effectively halted unlawful conduct in many matters over the decades of antitrust enforcement in the U.S.; they have prevented their recurrence; and they have informed the public about the agencies’ view of the application of antitrust laws to economic activity.

1. Settlement Procedures in the United States

3. The agencies follow similar but parallel procedures to impose negotiated settlements – commitment decisions. DOJ files consent decrees, or civil consent judgments, in a U.S. federal district (trial) court to obtain effective relief without taking a case to trial.³

4. The FTC issues negotiated administrative consent orders under its statutory authority, to resolve violations without the need for a trial. DOJ and FTC use consent decrees and consent orders, respectively, most often to settle merger cases, but also use them to settle alleged competition violations that include both unilateral conduct, such as exclusive dealing and monopolization,⁴ and concerted action cases, such as unlawful agreements.⁵ Consent decrees are not used to resolve allegations of hard-core horizontal conduct that DOJ

¹ The table at the end of this paper provides some statistics on settlements and litigations.

² No particular business sectors are more subject to settlement than others.

³ Examples of significant civil non-merger consent decrees include the 1941 *American Society of Composers, Authors and Publishers* and *Broadcast Music, Inc.* decrees; *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); and *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995). Recent cases involving both litigated and consent judgments include *U.S. v. American Express Co.* (case filings available at <https://www.justice.gov/atr/case/us-and-plaintiff-states-v-american-express-co-et-al>) and *U.S. v. Apple, Inc.* (case filings available at <https://www.justice.gov/atr/case/us-v-apple-inc-et-al>).

⁴ *In re Victrex plc*, FTC File No. 141-0042 (proposed decision & order issued Apr. 27, 2016), <https://www.ftc.gov/enforcement/cases-proceedings/141-0042/victrex-plc-et-al-matter>; *In re Intel Corporation*, Dkt. C-9341 (decision & order issued Nov. 2, 2010) <https://www.ftc.gov/enforcement/cases-proceedings/061-0247/intel-corporation-matter>.

⁵ *In re Concordia Healthcare Inc.*, Dkt. C- 4553, and *Par Pharmaceutical, Inc.*, Dkt. C-4554 (decisions & orders issued Oct. 30, 2015) <https://www.ftc.gov/enforcement/cases-proceedings/151-0030/concordia->

prosecutes criminally, such as price-fixing, market or customer allocation, or bid rigging. The FTC does not have authority to pursue criminal prosecutions, and it refers such matters to DOJ.⁶

5. At both agencies, settlements are achieved by negotiating the scope of the remedy, writing a clear and enforceable order, and then entering into an agreement with the parties, who admit certain facts to establish jurisdiction, waive their rights to any further proceedings, and agree to be bound by the terms of the final order. The agencies also issue or file a complaint setting out the relevant facts and alleging how the parties have violated the law.

2. Procedures at DOJ's Antitrust Division

6. The Antitrust Procedures and Penalties Act. The Division first used consent decrees to settle antitrust cases in 1906 and 1911. Since 1974, civil consent judgments are governed by the Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. § 16 ("APPA"), also known as the Tunney Act. The APPA establishes a process for public scrutiny and comment, which begins with the filing of a complaint by DOJ in federal district court that alleges the theory of harm and the relevant markets, along with a Competitive Impact Statement ("CIS") and a proposed final judgment that the Division will ask the court to enter after the public comment period.⁷ The CIS is directed to the public, as well as to the court, and is therefore written in a narrative style that avoids technical jargon. It sets out the information necessary to enable the court and the public to evaluate the proposed final judgment, and explains why the proposed final judgment is appropriate under the circumstances and is in the public interest. The CIS is the Division's explanation of its case, the judgment, and the circumstances surrounding the judgment.

7. The APPA requires the Division to include certain elements in the CIS, including an explanation of the proposed final judgment, remedies available to potential private litigants, etc. The Division drafts the CIS both to meet these requirements and to provide the legal and business communities with useful instruction and guidance on the Division's enforcement intentions.

8. The APPA requires that the proposed judgment and the CIS be published in the *Federal Register* "at least 60 days prior to the effective date of such judgment." The APPA also requires that a summary of the settlement be published in a newspaper of general circulation several times during that period. Before the judgment can be entered, the Division must publish in the *Federal Register* any public comments the Division receives about the proposed judgment during the notice and comment period, and the Division's reply to them.⁸ In addition to the public comment period, the APPA allows "full or limited participation in proceedings before the court by interested parties or agencies." Private parties may file amicus briefs, and in rare cases, courts have allowed interested persons to intervene.

9. The court must approve the relief accepted by the Government if it is within the "reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995) (citations omitted). In making that determination, the Court is required to consider:

[healthcare-par-pharmaceutical](#); *In re Ferrellgas Partners, L.P.*, Dkt. 9360 (decision & order issued Jan. 9, 2015) <https://www.ftc.gov/enforcement/cases-proceedings/111-0195/amerigas-blue-rhino-matter..>

⁶ Non-criminal matters are handled by only one of the agencies, under a "clearance" procedure that considers prior matters, industry expertise, and other relevant factors.

⁷ A detailed description of the Division's procedures for negotiating and entering consent decrees is available in the Division Manual, Chapter IV.D, available at <https://www.justice.gov/atr/file/761146/download>. The FTC's procedures are available at <https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch06consents.pdf>.

⁸ With the court's approval, the comments can be published on the Division's website.

- The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
- The impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint, including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

10. 15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one, as the Government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *Microsoft*, supra at 1461. That is, the court is not to substitute its opinion on the best way to resolve the government's claims; rather it is to determine if the government's decision is within the reaches of the public interest.

11. Final authority to authorize the settlement rests with DOJ's Assistant Attorney General and, pursuant to the APPA, the judgment is subject to withdrawal or change at any time prior to its formal entry by the court. Defense counsel do not review court papers, other than the proposed judgment and, for merger decrees, any hold separate stipulation and order, prior to filing with the court.

12. In 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). It is very unusual for a court to require an evidentiary hearing in connection with a Division settlement.

3. Procedures at the Federal Trade Commission

13. Settlement Procedures. The FTC's Rules of Practice set out the procedures used to settle the FTC's cases. 16 C.F.R. §§0.0 *et seq.* Settlements are negotiated by the staff, with oversight of senior management and sometimes with input from the FTC Commissioners. The specific provisions of any settlement are incorporated into an order – the Consent Order – that the FTC will issue, under its statutory authority if a majority of the Commission votes to accept the settlement. If agreement is reached between the parties and the staff, both will execute an Agreement Containing Consent Order ("ACCO"), which identifies the parties and contains critical representations and waivers as required by the Rules. The parties waive, *inter alia*, any right to seek judicial review of the Consent Order, and they acknowledge that once it becomes final it can be enforced as any final order issued by the FTC. The staff will also show a proposed Complaint to the parties, who acknowledge in the ACCO that they have read it. The Complaint recites the relevant facts, including the identities of the parties and relevant third parties, explains the facts giving rise to the decision to bring the case, and the specific allegations of law violations. The Complaint is an important part of the settlement because the ACCO recites that the Complaint may be used to construe the Consent Order and that nothing outside of the Consent Order or the ACCO may be used to limit, vary, or contradict the Consent Order's terms. After the ACCO is signed, the matter is submitted to the Commissioners for their consideration.

14. FTC Votes, and Opportunity for Public Comment. If a majority of the Commission finds a "reason to believe" that the law has been violated, and if they conclude that the proposed settlement accomplishes the FTC's remedial goals, they will vote to accept the proposed Consent Order for public comment. The FTC then will issue a press release, along with the ACCO, the proposed Complaint, the proposed Consent Order, and an "Analysis of Proposed Consent Order to Aid Public Comment." These

are available on the FTC's public website, FTC.gov. The FTC will also publish the Analysis in the *Federal Register*, with hyperlinks to the other documents. The Analysis to Aid Public Comment (similar to DOJ's CIS) explains the case in some detail and explains how the law has been violated, in order to assist the public in understanding and commenting meaningfully. The FTC invites comments for 30 days, after which it again considers the matter.⁹ If no changes are warranted, either based on comments or other reasons, the FTC then issues the Consent Order as a final FTC order, issues the Complaint as final, issues a new press release, and serves the parties with the final documents. The Consent Order does not become final until the FTC votes the second time. Until that point, the Commissioners may reject the settlement, may instruct the staff to negotiate changes to the proposed order (which require the parties' consent), may close the matter without taking enforcement action, or may begin administrative litigation with the parties. These are rare outcomes – virtually every proposed Consent Order becomes final as originally negotiated, except for minor modifications to which the parties and staff may agree during the settlement process.

4. General Considerations at Both U.S. Agencies

15. Settlement negotiations. Negotiations typically take place between agency staff and defense counsel, beginning with discussion of the staff's competitive concerns and their views on required remedies. There is no requirement in the U.S. that the parties make the first offer, and negotiations may occur at any stage in a matter – including during litigation.¹⁰ The staff's concerns usually become clear during the investigation, and at some point the parties may engage in discussions about how to resolve them. If those discussions proceed fruitfully, the staff will generally prepare the first draft. Drafting and negotiations proceed to clarify issues, resolve disputes, and agree on final language. Depending on the complexity of the matter, these discussions can proceed over weeks or months.

16. Neither DOJ nor the FTC conducts a formal “market test” of a proposed consent decree, as is done in some other jurisdictions. However, the agencies conduct a thorough assessment of the likely effectiveness of any proposed remedy. As part of the underlying investigation, the agency staff will have interviewed industry players, including customers and competitors, about the substance of the proposed remedy.

17. Contents of Consent Decree. The agencies will not consider a remedy unless there is a sound basis to believe that a violation has occurred or is likely to occur.¹¹ Staff consults frequently with senior managers at their agency to assure that there is general agreement that there has been a violation. There must be a close, logical nexus between the remedy and the theory of harm. The remedy must restore the lost competition, and should be designed to do so without unnecessarily restricting competitively beneficial conduct. The remedy must be clearly written and enforceable.

18. Adequate relief in a civil antitrust case is relief that will (1) stop the illegal practices alleged in the complaint, (2) prevent their renewal, and (3) restore competition to the state that would have existed

⁹ Public comments are themselves made public, unless the commenter requests confidentiality. Third parties do not have a right to intervene or challenge the FTC's settlement. Moreover, the FTC may shorten or dispense with the public comment period, if circumstances warrant; it may extend the comment period as well. The FTC may also issue the consent order as final at the time it invites public comment, if it believes that competitive circumstances warrant making the order binding immediately. The FTC will usually respond to the comments it receives at the time it makes the order final.

¹⁰ The FTC's Rules provide for withdrawing a matter from adjudicative status for the purpose of considering a proposed settlement.

¹¹ The Assistant Attorney General at the Division must conclude that a violation has occurred. The FTC, by majority vote, must find reason to believe that a violation has occurred.

had the violation not occurred. Many settlements contain “fencing-in provisions,” which prohibit conduct that may not itself violate the law but that could bring the parties dangerously close to a repeat violation.

19. The standard provisions of the settlement documents include: jurisdictional and applicability clauses; definitions of key terms; clear prohibitions on the covered conduct; reporting (and sometimes monitoring) provisions; compliance provisions (e.g., right to inspect and copy documents and interview employees), which may vary from one decree to another; notice of corporate changes; and the term of the judgment. DOJ’s decrees provide for retention of jurisdiction by the court. The Division’s standard decree language requires that the consent decree expire on the tenth anniversary of its entry by the court. The FTC’s orders in non-merger cases generally terminate after twenty years. Both agencies may require longer terms, or agree to shorter terms, as appropriate.

20. Monitoring and Enforcement of Consent Decrees. DOJ’s consent decrees and the FTC’s consent orders include provisions allowing the agency to monitor compliance, such as a requirement that defendants submit written reports or data or allow for staff inspections. Each agency devotes resources to overseeing compliance with remedies. At DOJ, staff that conducted the investigation is responsible for monitoring the decree and ensuring compliance, with the assistance of the Office of Chief Legal Counsel. At the FTC, the Compliance Division attorneys, who help draft the settlement documents and participate in settlement negotiations, are responsible for monitoring and enforcing the Consent Order.

21. Where a decree requires affirmative acts, such as the submission of periodic reports, agency staff determines whether those acts have occurred and evaluates the sufficiency of compliance. Where decrees prohibit certain actions, agency staff (or a monitoring trustee) may conduct periodic inquiries to determine whether defendants are observing the prohibitions. Both agencies also rely on information from third parties (such as firms that may have been injured by the prior unlawful conduct) to alert agency staff if new violations occur.

22. If the agency concludes that a consent decree may have been violated, it can conduct an investigation, using all available investigative tools (including demands for documents and information, and taking testimony) to determine whether there has been a violation, and what action should be taken. DOJ will institute an enforcement action, civil or criminal, in the court that retains jurisdiction over the case. The purpose of a civil contempt action is to compel compliance with the court’s order, and can involve the Division seeking injunctive relief and/or fines. The purpose of a criminal contempt action is not remedial, but is to punish the violator and deter future conduct. Criminal contempt may be punished by fine, imprisonment, or both.

23. The FTC has statutory authority to seek civil penalties and further injunctive relief from a federal court if it concludes there has been an order violation. 15 U.S.C. §45(l).¹² Penalties are designed both to punish the violation and to deter future violations. Additional injunctive provisions may be obtained if needed to force the violating firm to come into compliance with the FTC’s order. If a party violates an enforcement order issued by a federal court, the FTC may seek the same relief as DOJ does for violations of its consent decrees.

24. Modification of Consent Decrees. Because the parties have consented to the consent decree, there is no appeal from the judgment. As time goes on, however, circumstances may change that make it appropriate to consider modifying a decree. Both agencies have procedures to accomplish this.

¹² Civil penalties for FTC order violations may be up to \$16,000 for each day of violation. Courts consider various factors in determining how much of the maximum to impose. *See, e.g., U.S. v. Boston Scientific Corp.*, 214 F.Supp. 2d 167 (D.Mass. 2002).

25. The FTC's and underlying statute and implementing Rules provide that any party under order may seek a modification.¹³ The basis for the modification can be either a change in the underlying facts or law, such that continuing the order as written would be inequitable or unnecessarily limit competition, or that the public interest otherwise supports modification. The burden is on the requesting party to support its application with probative relevant facts. The FTC's staff will not engage in a lengthy investigation of its own; if the requester fails to make its showing, the request will be denied. For example, a firm under an order that prohibits exclusive dealing, based on the firm's dominant market position, may be able to show that over time significant market entry has occurred, and the firm is no longer in a position to abuse a dominant position. Because the goal is to prohibit anticompetitive conduct, and not to prohibit conduct that may be reasonable in other circumstances, a firm may be able to establish that its order should be set aside in full, or relaxed in some ways. The FTC's Rules provide that all such applications are made public, and the public is invited to comment on the application, before the Commissioners vote.

26. Because DOJ's decrees are court orders, the Division cannot unilaterally modify or terminate them. Parties must petition the court to modify or terminate them, and only the court may order a modification or termination. If a party to a decree wishes to modify the judgment, it provides the Division with an explanation as to why it should be modified and a statement of the changes, if any, in its method of operations or doing business that the party contemplates if the decree is modified. The Division opens an investigation to determine whether modification is appropriate and in the public interest. The Division will usually consent to modification where there are changed circumstances in the industry and the decree unnecessarily prohibits a defendant from using efficient market techniques that are available to other firms and would not restrain competition. In a few cases, the Division has agreed to decree modifications, such as swapping of assets to be sold, where there is no competitive impact of such a change. Similar to the APPA process, public notice and an opportunity to comment are afforded the public before the Division decides whether to agree that a modification is appropriate. If the Division agrees that a modification is appropriate, it advises the parties, who then move the court to modify the judgment.

27. Effect of Consent Orders on Private Actions. DOJ's consent decrees and the FTC's consent orders have no evidentiary value in private lawsuits for damages. The standard decree states that the defendants "have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law." The FTC's consent orders contain similar language. Accordingly, third parties may not use an agency's settlement as *evidence* of a violation.

Statistics on the Agencies' Settlements

Fiscal Year ¹⁴	Civil Nonmerger Cases with Negotiated Settlements		Civil Nonmerger Cases with Litigated Outcomes		Merger Cases with Negotiated Settlements		Merger Cases with Litigated Outcomes	
	DOJ	FTC	DOJ	FTC	DOJ	FTC	DOJ	FTC
2011	4	1	0	1	12	9	0	1
2012	5	4	0	1	7	16	1	1
2013	7	4	1	0	4	17	0	1
2014	2	6	0	0	8	14	1	0
2015	4	7	1	1	9	18	0	2
2016*	2	4	0	1	6	8	0	2

*Through April 30, 2016

¹³ FTC Act § 5(c), 15 U.S.C. §45(b); and FTC Rule 2.51, 16 C.F.R. §2.51.

¹⁴ The fiscal year runs from October 1 through September 30.