PUBLIC COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE
PREPARED FOR THE ANTITRUST DIVISION ROUNDTABLE
EXAMINING ANTITRUST CONSENT DECREES

APRIL 26, 2018

I. Overview

AAI is pleased to participate in the Antitrust Division's Public Roundtable Discussion Series on Regulation & Antitrust Law. AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. Please see antitrustinstitute.org for more information. AAI commends the U.S. Department of Justice (DOJ) for hosting this roundtable discussion on consent decrees. The AAI believes that consent decrees negotiated in settled merger and non-merger antitrust cases raise a number of important issues. These comments address three major themes: (1) broader issues of enforcement policy that are raised by consent decrees; (2) the disadvantages of behavioral remedies contained in decrees; and (3) questions and considerations to help guide the DOJ's policy on termination or modifications of perpetual decrees.

II. Issues Generally Raised by Antitrust Consents

Antitrust consent decrees raise issues that are integral to the goals and effectiveness of antitrust enforcement in promoting competition and protecting consumers from unlawful, harmful anticompetitive behavior. These issues apply equally to consents that are negotiated in merger and non-merger settings, and are of time-limited or perpetual duration. The most central of these issues include:

- The guiding principle for merger remedies contained in antitrust consents is that they must be effective. This means they must fully restore competition that is lost by an illegal merger or mitigate the risk that post-merger firms will act on incentives to exercise any form of market power, alone or in concert with rivals. Consents that rely on behavioral restraints to prevent the exercise of market power are not effective, since they create incentives for market participants to circumvent the remedy, leading to harm to competition and consumers.

- In conduct cases, the standard that a remedy must fully restore competition is aligned with the goals of antitrust and DOJ's role as a law enforcement agency. Law enforcers are not administrative agencies that regulate through forward-looking rules to promote competition and other societal or economic goals. Rather, DOJ's antitrust remedies in conduct cases must prevent and deter future violations and, where necessary, compensate victims.

III. Behavioral Remedies

A. The Ineffectiveness of Behavioral Remedies

AAI has consistently advocated for the U.S. antitrust agencies to forebear from using regulatory-style behavioral (or conduct) remedies and to remain consistent with the agencies' own stated and strong preferences for structural remedies. This applies equally to merger and non-merger consent decrees. Behavioral remedies are well known to be fraught with problems that directly affect their deterrence value.[1] They articulate prohibited, permitted, and required conduct without changing the merged firm's incentives to exercise market power. Behavioral remedies thus encourage circumvention of the remedy.

Behavioral remedies require ongoing monitoring and enforcement by the agencies and the courts, which are not well suited to act as regulators. Such remedies often depend on smaller market participants, under the weak protection of anti-retaliation provisions, to come forth to lodge complaints about non-compliance. The AAI believes that high levels of market concentration increase smaller entities' (rivals, customers, or suppliers) fear of retaliation and reduce the effectiveness of anti-retaliation provisions. Decrees that rely on arbitration provisions for complaint resolution demand considerable time and resources and are likely to lead to suboptimal settlements that defeat the purpose of fully restoring competition. Moreover, firewalls that attempt to limit anticompetitive information transfers between affiliates of a merged company are difficult to police.

Behavioral remedies are thus oriented around a "design" standard, i.e., compliance with the requirements of the remedy. This stands in stark contrast to structural remedies that are shaped around a "performance" standard, or an "obligation in terms of ultimate goals that must be achieved."[2] Behavioral remedies thus carry a higher risk of failure, a risk that is more likely to be shouldered by consumers, not the merging parties.[3]

Behavioral remedies are also undermined by evidence that the types of efficiencies they are designed to promote are not realized in consummated merger transactions.[4] A major reason for this is that after the merger, managers must often simultaneously integrate the merging business ecosystems, spin off assets to comply with any divestiture requirements, and also make good on their promises

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[1] *See* John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57 ANTITRUST BULL. 979, 994, 1010 (2012). *See also,* John E. Kwoka Jr., *Does Merger Control Work? A Retrospective on Enforcement Policy, Remedies, and Outcomes* 78 ANTITRUST L. J. 619, 636 (2013); *See also,* Makan Delrahim, Asst. Att'y Gen., Dep't of Justice, Antitrust Div., Keynote Address at American Bar Association's Antitrust Fall Forum (Nov. 16, 2017), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar.

[2] *See, e.g.*, Steven C. Salop, *Modifying Merger Consent Decrees to Improve Merger Enforcement Policy*, 31 ANTITRUST 15 (2016).

[3] *See, e.g.*, Bill Baer, Responses of Assistant Attorney General Bill Baer to Questions Submitted for the Record Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy, and Consumer Rights Hearing: "Oversight of the Enforcement of the Antitrust Laws" (Mar. 9, 2016), https://www.judiciary.senate.gov/imo/media/doc/Baer%20Responses%20to%20QFRs.pdf; D. Bruce Hoffman, Acting Director, Bureau of Competition, U.S. Fed. Trade Comm'n, It Only Takes Two to Tango: Reflections on Six Months at the FTC, 6-7 (Feb. 2, 2018), https://www.ftc.gov/system/files/documents/public_statements/1318363/hoffman_gcr_live_feb_2018_final.pdf.

[4] Scott A. Christofferson, Robert S. McNish, and Diane L. Sias, *Where mergers go wrong,* McKinsey Quarterly (May 2004), https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/where-mergers-go-wrong.

to deliver cost savings and consumer benefits. Completing these tasks presses on the bounds of managerial competency at the same time they create significant changes that are likely to affect profit-maximizing incentives, relationships between affiliates, and other key operational factors. Collectively, these factors affect post-merger operations, conduct, and strategy.

B. Ineffectiveness of Some Types of Structural Remedies

Some structural remedies contained in consent decrees also are ineffective. The FTC has experienced problems with some structural remedies involving divestitures of targeted assets. In the merger of retail grocers Safeway and Albertsons, the FTC-approved sale of almost 150 stores to a regional west-coast grocer (Haggen) led to the failure and shuttering of the divested stores only a few months later.[5] In Hertz-Dollar Thrifty, the buyer of the divested assets (Advantage Rent-a-Car) filed for bankruptcy soon after the sale.[6] And despite divestitures in the UnitedHealth-Sierra and the Aetna-Prudential mergers, analysts have documented post-merger premium increases.[7]

The FTC has performed two major studies of its divestiture remedies – one in 1999 and an update in 2017.[8] The latter study observed that targeted asset divestitures are much less effective than line of business divestitures. The report noted "all of the divestitures involving an ongoing business succeeded. Divestitures of limited packages of assets in horizontal, non-consummated mergers fared less well . . . ."[9] The AAI urges the DOJ to consider these issues in crafting structural remedies and to incorporate learning from previous merger cases and retrospectives.

C. The Government's Move to Block a Merger is Often the Most Effective Remedy

In some cases, the most effective remedy may be for the government to move to block a merger. Such cases include mergers that are "too big to fix" because the degree of concentration in the industry precludes a remedy that fully restores competition. A number of recent, large horizontal mergers that have been successfully blocked by the agencies or abandoned in the face of government opposition illustrate this phenomenon. These include: Staples-Office Depot, Sysco-US Foods, John Deere-Precision Planting, GE-Electrolux, Applied Materials-Tokyo Electron, Halliburton-Baker-Hughes, and Anthem-Cigna.[10]

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[5] Press Release, Fed. Trade Comm'n, FTC Requires Albertsons and Safeway to Sell 168 Stores as a Condition of Merger (Jan. 27, 2015), https://www.ftc.gov/news-events/press-releases/2015/01/ftc-requires-albertsons-safeway-sell-168-stores-condition-merger; Brent Kendall, *Haggen Struggles After Trying to Digest Albertsons Stores*, WALL ST. J. (Oct. 9, 2015), http://www.wsj.com/articles/haggen-struggles-after-trying-to-digest-albertsons-stores-1444410394.

[6] Press Release, FSNA, Franchise Services of North America Inc. Announces Bankruptcy Filing by Simply Wheelz LLC (Nov. 4, 2013), http://www.fsna-inc.com/newspdfs/115201391920.PDF.

[7] *See, e.g.,* Guardado, Jose R, Emmons, David W. & Kane, Carol K, *The Price Effects of a Large Merger of Health Insurers: A Case Study of UnitedHealth-Sierra*, 1 HEALTH MGMT POL'Y 16 (2013); Leemore Dafny, Mark Duggan, & Subramaniam Ramanaraynan, *Paying a Premium on your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161 (2012).

[8] FTC'S MERGER REMEDIES 2006-2012, A REPORT OF THE BUREAUS OF COMPETITION AND ECONOMICS (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf; A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS, BUREAU OF COMPETITION (Aug. 1999), https://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf.

[9] *Id.*, at 1.

[10] *See* Press Release, Fed. Trade Comm'n, *After Staples and Office Depot Abandon Proposed Merger FTC Dismisses Case from Administrative Trial Process* (May 19, 2016), https://www.ftc.gov/news-events/press-releases/2016/05/after-staples-office-depot-abandon-proposed-merger-ftc-dismisses; Press Release, Fed. Trade Comm'n, *Statement of FTC Bureau of*

The foregoing transactions share a number of characteristics: highly concentrated markets, poor prospects for new entry, the absence of viable buyers of potential divestiture assets, and complex business organizations. The viable buyer problem—where no purchaser of sufficient size, scale, or competency can be relied upon to deploy the divestiture assets so as to fully restore competition—has been at the center of several recent merger cases. These include the Safeway-Albertsons and Hertz-Dollar Thrifty cases, as noted above, where failed divestiture remedies led to assets exiting the market. In mergers that were successfully blocked by the government, including Sysco-US Foods, Staples-Office, and Halliburton-Baker Hughes, viable buyers of possible divestiture assets did not exist. uch buyers need to be capable of functioning independently (without the help of the merging parties), successfully maintaining the assets, and quickly re-injecting the competition lost by the merger.

The complexity of a remedy is likely to correlate with the complexity of a merger. A potential buyer will inherit a diverse package of assets from players that are deeply entrenched in the market. This often involves significant involvement in R&D and distribution, in addition to production and marketing. Structural remedies in such situations are often accompanied by conduct remedies such as limited-term supply agreements to increase the chances of a successful transition from the merged company to the buyer. Behavioral remedies may also include licensing and access provisions to ensure that the buyer has continued access to technology or distribution controlled by the merged company.

There is a commensurately higher risk that a complex merger remedy will not be executed successfully. The government's experiences in Comcast-NBCU, Ticketmaster-Live Nation, and even in ABInBev-Miller Coors highlight this risk. The Monsanto-Bayer and AT&T Time-Warner mergers also raise these concerns, adding to the list of deals that are "too big fix."[11] Complex remedies are therefore likely to conflict directly with the government's requirement that an effective remedy preserve competition and protect consumers. A remedy with the most deterrence value therefore might well be to move to block the deal instead.

Competition Director Debbie Feinstein on Sysco and U.S. Foods' Abandonment of Their Proposed Merger (June 29, 2015), https://www.ftc.gov/news-events/press-releases/2015/06/statement-ftc-bureau-competition-director-debbie-feinstein-sysco; Complaint, *United States v. Deere & Co.*, No. 1:16-cv-08515, at 16 and 18 (N.D. Ill. Aug. 31, 2016), https://www .justice.gov/opa/file/889071/download; Press Release, U.S. Dep't of Justice, *Electrolux and General Electric Abandon Anticompetitive Appliance Transaction After Four-Week Trial* (Dec. 7, 2015), https://www.justice.gov/opa/pr/electrolux-and-general-electric-abandon-anticompetitive-appliance-transaction-after-four-week; Press Release, U.S. Dep't of Justice, *Applied Materials Inc. and Tokyo Electron Ltd. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy* (Apr. 27, 2015), https://www .justice.gov/opa/pr/applied-materials-inc-and-tokyo-electron-ltd-abandon-merger-plans-after-justice-department; Complaint at 2, 30, 32, 36, United States v. Halliburton Co., No. 1:16-cv-00233-UNA (D. Del. Apr. 6, 2016), https://www .justice.gov/opa/file/838651/download; Complaint at 25, United States v. Anthem, Inc., No. 1:16-cv-01493 (D.D.C., Jul. 21, 2016), https://www.justice.gov/atr/file/903111/download; *see also*, United States v. Anthem, Inc., No. 17-5024, at 12- 13 (D.C. Cir. Apr. 28, 2017), https://www.justice.gov/atr/case-document/file/971316/download.

[11] See, e.g., Letter from American Antitrust Institute, Food & Water Watch, and National Farmers Union to the U.S. Department of Justice *Re: Proposed Merger of Monsanto and Bayer* (Jul. 26, 2017), http://antitrustinstitute.org/sites/default/files/White%20Paper_Monsanto%20Bayer_7.26.17_0.pdf. *See also* Letter from American Antitrust Institute, Food & Water Watch, and National Farmers Union to the U.S. Department of Justice *Re: Monsanto-Bayer Merger: Competitive Concerns Surrounding Traits-Seeds-Chemicals Platforms, Digital Farming, and Farm Data* (Oct. 3, 2017), http://www.antitrustinstitute.org/sites/default/files/AAI-FWW-NFU_MON-BAY%20addendum.pdf.

IV. Questions and Considerations to Help Guide Policy on Perpetual Consents

To determine if and how a perpetual decree should be terminated or modified, the AAI urges the DOJ to explore a number of important questions. The answers to these questions will usefully inform the DOJ's recommendations on how a particular decree or class of decrees should be approached. For example, the AAI suggests that the following queries would provide essential information to guide this process:

1. ***Persistence of the proscribed conduct.*** Does the underlying competitive problem and conduct that the consent was originally intended to proscribe still pose a significant risk to competition and consumers? If not, has the conduct that gave rise to the decree evolved to encompass more sophisticated ways to exercise market power? This could include the use of intellectual property to shape or control competition, algorithmic pricing that could facilitate coordination, the deployment of data as a strategic competitive asset or barrier to entry, or efforts to stymie competition across multiple (e.g., bricks and mortar and online) distribution channels.

2. ***Changes in markets and technology.*** Have changes in the scope and structure of markets, entry, innovation (e.g., new or improved products and services), or regulation affected the ability or incentive for market participants to exercise market power as originally proscribed? If so, how have such changes eliminated opportunities for the exercise of market power (e.g., by broadening relevant markets, encouraging entry, etc.)?

3. ***The absence of competition at the time of the decree.*** In instances where competition did not exist in the affected markets at the time of the decree, how has the decree "shaped" the evolution of competition in the industry? Could termination of a decree under such circumstances lead to inefficiencies in promoting competition? This could include the exposure by all parties to an excessively litigious market dynamic once antitrust claims begin to fill the vacuum left by a terminated decree.

4. ***Proof of competition.*** What steps are necessary to gather evidence and gain assurance regarding the state of competition in the markets affected by decrees? How will information gleaned from previous decree reviews (e.g., Assistant Attorney General Bill Baxter's 1982 reviews), and previous administrations' decisions regarding whether to leave longstanding decrees intact or to terminate or modify them, affect the Division's analysis of whether a decree warrants removal?

5. ***Changes in the standard for determining the original competitive harm***. Has the formal or informal standard (e.g., *per se* or rule of reason) for evaluating the conduct proscribed by the decree changed since the decree was put into place? Although the DOJ and the courts may now adhere to a "looser" standard for determining whether a competitive problem exists, for example, nothing can be presumed in either direction. Indeed, more rigorous and careful scrutiny, and further investigation, may be warranted if the proscribed conduct was governed by the *per se* rule at the time of the decree but is now governed by the rule of reason.

6. ***Effects related to price determination forums.*** How would forums such as rate courts that are part of some decrees be affected by the termination or modification of a decree? How would the purpose and function of such forums be considered in this process, particularly where a marked transition from administrative rate setting to market price determination is a possibility?

7. ***Options if the risk of anticompetitive conduct remains***. Under what circumstances would the DOJ decide to terminate a decree where anticompetitive incentives persist and seek structural relief in a new settlement? Under what conditions would the agency seek to impose sunset provisions on a decree and what considerations would govern the agency's reasoning on the timing of a sunset?