

**ConsumersUnion®**

POLICY & ACTION FROM CONSUMER REPORTS

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**ANTITRUST DIVISION ROUNDTABLE DISCUSSION**

**ON**

**CONSENT DECREES**

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## **Introduction**

Thank you for inviting Consumers Union, the advocacy division of Consumer Reports,<sup>1</sup> to this important discussion on the appropriate role of consent decrees in furthering the objectives of sound antitrust enforcement.

From our founding over 80 years ago, we have been strong supporters of the antitrust laws. We deeply appreciate the importance of sound and effective antitrust enforcement in protecting and promoting healthy competition in the marketplace, and the benefits that brings all of us as consumers, through the leverage of choice.

Consent decrees are a core part of that sound and effective antitrust enforcement. Each of them is a resolution of conduct, or a merger, that posed enough concern to convince either the Justice Department or the FTC that enforcement resources had to be marshalled to stop it. Each decree embodies an agreement by the defendants, whose conduct or merger created that concern, on what specifically they will do to remove that concern.

So those defendants, who created the concern that gave rise to the enforcement, don't really have much of any equitable claim to getting out from under what they agreed to.

The rest of the marketplace does have an equitable claim, however – in the marketplace's continued healthy competitive functioning. If the restrictions and obligations imposed on the defendants begin to interfere with that healthy competitive functioning, begin to hold back overall growth and innovation, then that's a reason to reconsider those restrictions and obligations. And realistically, the defendants may be among the first to recognize that that's happening. So they should have a right to be heard – but should expect to be greeted with some skepticism. What's important is what's good for the marketplace.

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<sup>1</sup> Consumers Union is the advocacy division of Consumer Reports, an expert, independent, non-profit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. Consumers Union works for pro-consumer policies in the areas of antitrust and competition policy, food and product safety, health care, financial services, telecommunications and technology, privacy and data security, transportation, and other consumer issues, in Washington, D.C., in the states, and in the marketplace. Consumer Reports is the world's largest independent product-testing organization, using its dozens of labs, auto test center, and survey research department to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million subscribers to its magazine, website, and other publications.

## **Considerations in conduct cases vs. merger cases**

How long should a consent decree endure? That would seem to depend on the kind of case.

If it's a conduct case, the consent decree is designed to give the defendants guardrails to make sure they don't slide back into their old anticompetitive habits. Once they get out of the old habits, and into healthy new habits, after a time it probably makes sense to think about removing the guardrails – if, in fact, the guardrails are interfering with the healthy competitive functioning of the marketplace.

Two reasons that might not be the case. First, if there's a likelihood that the defendants might still be tempted to slide back into their old habits. The more time that's gone by, probably the less likely that is. But that's an important consideration in whether the consent decree is still serving a purpose.

And second, if the case revealed a more fundamental market dysfunction. If the default state for a wholly unconstrained market is chaos, and if the natural market response is to rein in the chaos with collusion or market power, then the government needed to step in, and needs to stay. Historically, in some situations, we've seen Congress step in to establish a regulatory administration. But in the course of antitrust enforcement, it could be a consent decree that adds the right amount of structure, to quiet the chaos while guarding against the creation, or at least against the exercise, of the market power.

One good example of that is the ASCAP and BMI decrees. They have worked quite well in enabling music to be used conveniently and the creators to be compensated reliably – notwithstanding the complicating factors that continue to be discussed.

Consent decrees in conduct cases are inherently behavioral remedies. You were doing X, and we brought enforcement action to enjoin you, and you are now agreeing to stop. Maybe you are also agreeing to stop doing Y, because Y too readily sets the stage for doing X, or makes it easier to do X without being detected. Or

maybe you are agreeing that you *will* do Y, because Y makes it more *difficult* to do X, or more difficult to do X without being detected.

Consent decrees in merger cases are conceptually different. In a merger case, the combination is making a one-time change to what we call the structure of the market, the array of competitors, and the concern is that the change in structure will lead to a substantial lessening of competition. This lessening of competition could result from new or easier opportunities for collusion or monopolization in violation of the Sherman Act. But it could also result just from the merged company acting on its new incentives and abilities that the merger creates, in ways that may now be legal under the Sherman Act, but still harmful in comparison to what we'd have seen under the former, pre-merger market structure.

The best response to a structure-based concern is to fix the structure. That can mean divesting businesses or facilities or other key assets, so the important parts of the pre-merger structure remain intact. Or, if divestitures here and there aren't enough to keep the important parts of the structure intact, it means challenging the merger outright.

Behavioral remedies – essentially, promises to behave – fall far short of the structural fix. As explained by others with more direct experience, including AAG Delrahim, and American Antitrust Institute President Diana Moss, a behavioral remedy relies on the merged company to ignore new profit-maximizing opportunities created by the merger, to act against its incentives and abilities to increase profits – to defy its basic DNA. And to do this on a day-to-day basis, as those opportunities present themselves, and to continue doing so over the long haul.

This means either trusting the merged company, or else constantly monitoring its actions, including internal business decision-making that would ordinarily not be known outside the company walls, and refereeing complaints.

The structural remedy is a permanent fix. The behavioral remedy is inherently impermanent. It is a recipe for quagmire that lasts until the behavioral conditions are removed. And after that, we are left with the merged company still having the problematic new structural incentives and capabilities.

I don't think we can say behavioral remedies have absolutely no place in merger enforcement. We can imagine a situation where some kind of merger is shown to be overwhelmingly positive in the synergy and innovation benefits it will bring to society.

Where those benefits would simply be impossible without the merger. Where, now that we know what those benefits would be, we simply can't justify depriving society of them.

Where there's no possible divestiture that could help address the competitive concerns we've identified, without destroying the reason the merger makes sense for the merging companies, or without sacrificing those benefits.

So that all we're left with is to try to come up with some set of behavioral conditions and try to make them work. And lo and behold, what appears to be a suitable set of conditions presents itself, one that appears to be fairly easy to monitor and administer.

But those are exactly the kinds of claims I would try to make as an antitrust lawyer for every one of my merging clients. And I would always be ready to negotiate promises to behave if that would stave off divestitures or a full challenge. So I think the expressed policy that behavioral remedies for structural concerns are highly disfavored is the right policy. And I'd like to look for an even stronger word than "highly."

Moreover, no behavioral remedy for a structural problem should have an arbitrary shelf life. It should last as long as the structural problem does. Since the merger is forever, that should also be the default expectation for the behavioral conditions. Or until the marketplace has evolved past the merger to such an extent that the structural problem has disappeared.

By the same token, depending on how the marketplace has evolved, the structural problems may remain, but the behavioral conditions as originally designed no longer work to address them. It may be appropriate to keep the conditions but to update them so they remain effective.

That kind of updating is familiar for behavioral conditions in consent decrees in conduct cases. The fact that it might seem strange for a merger consent decree simply further points out the shortcomings with trying to use behavioral remedies to solve problems in merger cases.

Of course, we wouldn't want to see a shift away from behavioral remedies in merger cases become a retreat on merger enforcement. I don't think that's anyone's intent. But when the enticement of behavioral conditions is presented as an easy win-win that would avoid the costs and uncertainties of litigation, enforcers need to not only resist the enticement. They also need to be resolute in insisting on structural relief that is truly effective, whether that means sufficient divestitures to fully fix the competitive concern, or challenging the merger in its entirety. Keeping in mind that, by definition, these should all be situations in which the enforcers have determined, based on a thorough investigation, that the merger would violate the law. If not, the enforcers should not be discussing relief of any kind.

The lines between merger and non-merger cases aren't quite as clean as I've described them. Monopolization case remedies can be structural, as was the MFJ in the case against the Bell Telephone System, and Judge Jackson's initial remedy in the case against Microsoft. There, the considerations would be similar. Does the case reveal a flawed market structure that predisposes the dominant player to abuse monopoly power to thwart competition? If so, a structural remedy is likely needed. And it needs to be permanent, or to endure until the market has evolved so that the structural fix no longer addresses a current competitive risk.

### **Recent DOJ decree innovations**

Turning to the Antitrust Division's recent consent decree innovations, I think they are indeed constructive improvements, for the most part, that can help better ensure that consent decrees serve their deterrent and remedial purposes. Specifically:

It makes sense that the burden of proof for showing that a consent decree has been violated should be the same as the burden of proof in the underlying case that led to the agreements in the consent decree in the first place.

And it makes sense that the costs for enforcing a consent decree, in the event it is violated, should be borne by the ones violating it, and not by the taxpayers.

As to the other two innovations, extending the duration of a decree as a consequence for violating it, and allowing a decree or condition to be terminated early, both of those generally good ideas warrant more discussion – in part because they assume a decree of fixed and finite duration. As I have explained, I don't think that will always be the right approach, either in a conduct case or in a merger case.

If a decree is violated, I agree that a higher level of monitoring is an appropriate consequence. But the appropriate form for that may be to consider whether the behavioral condition in the decree is written as protectively as it should be, or needs to be strengthened. That's maybe a more effective protection, and deterrent, than simply extending the duration of the same condition. Again, assuming that the condition should have even been time-limited in the first place.

And as to early termination, the rationale given, that it would be only when the decree conditions are materially impeding healthy innovation in the broader marketplace, that's the right rationale, as I have already said. I don't think this should be a decision for the Antitrust Division to be making unilaterally – particularly in conduct case decrees, and in merger decrees where there's a behavioral remedy.

The three consent decrees cases in which the Antitrust Division added these innovations were all merger cases in which the remedy was structural – one-time divestitures. And the consent decrees were just to require that the divestitures occur. That's not the kind of consent decree where we're likely to see early termination problems. It's the other decrees, the behavioral decrees, and the decrees in conduct cases that contain structural aspects, where we need to be careful to appropriately address ongoing competitive concerns.

And especially for those other kinds of decrees, we need, at a minimum, prior public notice, and a full opportunity for public comment, and an independent assessment by the court that accepted the consent decree – like the Tunney Act requires for the initial decree.

## **Conclusion**

The consent decree is an essential part of ensuring that antitrust enforcement can stop anticompetitive conduct, or an anticompetitive merger, from enriching a narrow set of corporate interests at the expense of the broader public interest in the benefits that flow from healthy competition. The consent decree stands in for a judicial decree, and needs to be every bit as effective.

It must be tailored to stop the anticompetitive conduct, or cure the anticompetitive effects that would otherwise result from a merger. For a conduct case, it may also need to address broader structural problems in the marketplace that led to the conduct. For either kind of case, the decree must last as long as the structural problems that create the anticompetitive risk persist. And it must be adaptable so that it continues to protect the marketplace while allowing it to evolve in ways that can bring innovation and better choices for consumers.