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The U.S. Chamber of Commerce (the Chamber) welcomes the opportunity by the Department of Justice (DOJ) to provide comments on the role of antitrust consent decrees as part of a roundtable series examining competition and deregulation. The Chamber supports the important role the consent process plays as part of antitrust enforcement. We offer these comments in support of that perspective.

1. The consent decree process does, and should continue to, play a vital role in U.S. antitrust enforcement

The use of civil consent decrees by the Antitrust Division of the U.S. Department of Justice is a critical component of the agency's enforcement mission and vital to the effective and efficient resolution of antitrust cases. Consent decrees allow the Division and private parties to resolve antitrust investigations without having to engage in costly and uncertain litigation. Each year, the Division implements the vast majority of its enforcement actions through these settlements, rather than through litigation.

Consent decrees are typically entered into before there is a finding of liability by a court. Accordingly, consent decrees are settlement agreements between the Division and private parties which are subject to negotiations and compromise. Consent decrees do not set precedent; however, upon occasion the Federal Trade Commission (FTC) has attempted to use consent agreements to further define its Section 5 authority as a means to set a soft precedent. When this has occurred, the Chamber has expressed its concerns with such practice. The consent decree process will not work well if either the Division or private parties fail to consider any compromise.

2. Consent decrees should strike the proper balance between remedying the potential harm and allowing the parties to engage in lawful, and potentially pro-competitive, conduct

Consent decrees should strike the appropriate balance between remedying the competitive harm subject to the Division's investigation and allowing private parties to continue to engage in lawful behavior that can have pro-competitive benefits. Overly broad remedies can have unintended consequences and chill pro-competitive behavior.

3. Remedies in vertical deals should be more flexible to take into consideration the greater potential for pro-competitive effects

Combining firms that compete at different levels of the market through a vertical deal generally has more potential for pro-competitive efficiencies than a horizontal deal. Accordingly, there is a greater risk that a remedy, whether structural or blocking the deal entirely, will prevent the benefits that would otherwise stem from the transaction. Historically, both the FTC and DOJ have been willing to consider conduct remedies in vertical mergers.

4. Both structural and behavioral merger settlements have been generally effective

There is evidence that the settlement of merger antitrust cases – whether through consent decrees at the Division or through orders at the Federal Trade Commission – have been effective. An FTC study of the effectiveness of merger remedies published in January 2017 concluded that the agency's merger orders from 2006-2012 were generally effective. The study found that in the 50 orders studied, less than 20% could be considered as a failure – where the divestiture or conduct remedy did not maintain the level of pre-merger competition. The study did not attempt to examine post-merger market factors that could have led to the failure, including unforeseen events, but simply compared the pre-merger level of competition to that post-merger. The FTC concluded that the study supported its general approach to remedies and recommended several best practices that could improve its traditional approach, including a preference for the divestiture of ongoing businesses, closer consideration of the transfer of back-office functions, and careful vetting of buyers.

While the vast majority of the mergers studied were horizontal – i.e., combining two competitors offering the same product or service – the FTC remedy study found a similarly high success rate for conduct remedies in vertical transactions – success in around 80% of the cases. The study did not recommend any changes to the FTC's approach to conduct remedies.

Both the 2004 and 2011 Division policy guides on merger remedies recognized the value of conduct remedies in appropriate cases. As stated in the 2011 Guide: "Conduct remedies are a valuable tool for the Division. They can preserve a merger's potential efficiencies, and, at the same time, remedy the competitive harm. . . . Conduct relief can be a particularly effective option when a structural remedy would eliminate the merger's potential efficiencies, but, absent a remedy, the merger would harm competition." Similarly, the 2004 Guide stated: "Standalone conduct relief is only appropriate when a full stop prohibition of the merger would sacrifice significant efficiencies and a structural remedy would similarly eliminate such efficiencies or is simply infeasible."

There have also been very few actions by the FTC or Division to prosecute alleged violations of merger consent decrees.

5. Consideration of potential improvements to the merger settlement process are appropriate, but the Division should be careful not to let "the perfect be the enemy of the good"

It would be virtually impossible to design a merger consent decree process that would be 100% successful. Even with the most robust divestiture package, stringent conduct requirements, and best buyer, the remedy may fail due to unforeseen changes in the marketplace or even the normal competitive process. Moreover, because merger enforcement is an inherently forward-looking, predictive exercise, the Division should consider how confident it can be that harm from the merger will occur and that the remedy will do more harm than good in addressing that potential harm and allowing any merger efficiencies to be realized. Under such circumstances, it may be difficult to materially improve the current high level of success rates with remedies without disrupting the settlement process and potentially preventing efficiencies from transactions that are capable of fixing.

6. Both a retrospective and prospective review of consent decree terms is warranted

As the Division has previously acknowledged, there can be significant changes in markets and technology after a consent decree is entered that impact the effectiveness of the continuing obligations. The parties subject to these obligations may be unnecessarily expending substantial resources to comply and are prevented from taking actions that could be pro-competitive and otherwise good for consumers. The Division most recently acknowledged this issue in March of 2014, when it announced a new streamlined procedure for parties to seek to modify or terminate perpetual decrees entered into before 1980. We would welcome the Division re-examining whether there are additional steps that could be taken to terminate unnecessary or harmful consent decrees that are still in effect.

We would also welcome the Division examining whether the current ten-year standard for consent decree terms is appropriate, at least in certain matters or industries.

7. The Division should also consider examining the appropriate use of other standard terms in merger consent decrees

The Division's consent decrees in merger cases often include the requirement that the parties use third-party trustees at their own cost in certain situations. The Division sometimes requires the appointment of monitor trustees who will be responsible for helping the Division to oversee divestitures or other ongoing obligations under the decree. These trustees can be very expensive and add another level of bureaucracy and process that can be at odds with the purpose of the decree. The Division also requires in most merger decrees that the parties agree to appoint a divestiture trustee if the divestiture assets cannot be sold by the required deadline. It can be very disruptive when a divestiture trustees take over the process and this can lead to even more delay of the divestiture than if the parties remained in control of the process.

The Division should also consider examining its approach to allowing ancillary agreements between the purchaser of the divested business and the merging parties, including supply agreements, other transition services agreements, and licenses. The current trend of disfavoring such agreements could lead to a significant expansion of the divestiture package and other complications that could run counter to the public interest.

8. We would encourage the Division to coordinate its consideration and potential implementation of changes to the consent decree process with the FTC to avoid possible divergence

Both the Division and the FTC have overlapping jurisdiction for most mergers and conduct matters. Historically, the remedies pursued by the agencies have been very similar, whether through consent decrees at the Division or orders by the FTC. It would not make sense for parties to face significantly different approaches to remedies based on which agency happens to investigate the particular matter. Accordingly, we would recommend that the Division coordinate its evaluation of consent decree modifications with the FTC as appropriate.

The Chamber thanks you for the opportunity to share our member's views on the role consent decrees play.

Sincerely,

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U.S. Chamber of Commerce