UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST DIVISION
PUBLIC ROUNDTABLE SERIES ON THE RELATIONSHIP BETWEEN COMPETITION AND REGULATION, SECOND ROUNDTABLE – ON CONSENT DECREES:
COMMENT OF THE GLOBAL ANTITRUST INSTITUTE, ANTONIN SCALIA LAW SCHOOL GEORGE MASON UNIVERSITY

April 25, 2018

This comment is submitted in response to the United States Department of Justice Antitrust Division's ("Antitrust Division") Public Roundtable Discussion Series on the Relationship between Competition and Regulation, Second Roundtable (on Consent Decrees). We appreciate the opportunity to comment and commend the Antitrust Division for inviting discussion on these important topics. We submit this comment based upon our extensive experience and expertise in antitrust law and economics.[1]

The Benefits and Costs of Antitrust Consent Decrees

For almost their entire history, both the Department of the Justice (DOJ) and the Federal Trade Commission (FTC) have enforced federal antitrust laws in one of two ways: through litigation or through consent decrees.[2] Each tool has its benefits and costs. Agencies must weigh these benefits and costs in determining when to use consent decrees and when to use litigation. The choice matters because it raises the larger policy question of whether or not the

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[1] The Global Antitrust Institute (GAI), a division of the Antonin Scalia Law School at George Mason University (Scalia Law), is a leading international platform for economic education and research that focuses upon the legal and economic analysis of key antitrust issues confronting competition agencies and courts around the world. University Professor Joshua D. Wright, Ph.D. (Economics), is the Executive Director of the GAI and a former U.S. Federal Trade Commissioner. John M. Yun, Ph.D. (Economics), is the Director of Economic Education, Associate Professor of Law at Scalia Law, and former Acting Deputy Assistant Director in the Bureau of Economics, Antitrust Division, at the U.S. Federal Trade Commission. Professor of Law Douglas H. Ginsburg is a Senior Judge, United States Court of Appeals for the District of Columbia Circuit, Chairman of the GAI's International Board of Advisors, and a former Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice. Tad Lipsky is the Director of GAI's Competition Advocacy Program, Adjunct Professor at Scalia Law, a former Deputy Assistant Attorney General for Antitrust and a former Acting Director, Bureau of Competition, U.S. Federal Trade Commission. GAI acknowledges the substantial support for preparation of these comments by Scalia Law students participating in the Legal Practicum on Competition Advocacy, Taylor Alexander, Kristen Harris, Tyler Phelps, Travis Royer and Thomas Tucker.

[2] The first Sherman Act consent decree was entered in 1906. *See* Maxwell S. Isenbergh & Seymour J. Rubin, *Antitrust Enforcement Through Consent Decrees*, 53 HARV. L. REV. 386, 387 (1940).

agencies' current ratio of consent to litigation is optimal.[3] As this ratio persists or even increases, the agency mission inevitably changes from law enforcement to regulation.[4]

There are three primary benefits to consent decrees: (1) they are convenient and lack the formality required for litigated remedies; (2) they are faster and, as a consequence, can potentially offer expedited relief against anticompetitive conduct; and (3) they can potentially be more surgical in nature—under the presumption that antitrust agencies are better able to tailor remedies than are generalist courts.[5]

The most obvious benefit of a consent decree is that the agency can obtain relief without the burden, expense, and delay of contested litigation. Respondents also avoid these costs, as well as the business disruption and adverse publicity often associated with antitrust litigation. Consumers potentially benefit from accelerated relief. Assuming these benefits hold, the agencies are able to free resources to pursue additional cases or devote more resources to existing litigation.

On the other hand, there are five primary costs to consent decrees: (1) they stunt the development of legal precedents; (2) they can have the effect of excluding or minimizing the role of agency economists in assessing the merits of the anticompetitive claims; (3) they reduce transparency to third parties; (4) they can allow for regulatory "mission creep" beyond the core objective of promoting consumer welfare; and (5) to the extent that U.S. agencies are inefficiently using consent decrees, additional costs arise if foreign agencies rely on U.S. agency practice as a model for their own efforts.[6]

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[3] *See* Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, *in* 1 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE 177 (Nicolas Charbit et al. eds., 2013) at 178 (''By the 1980s, 97 percent of civil cases filed by the Division resulted in a consent decree, and that percentage remained relatively constant at 93 percent in the 1990s. This trend has continued, with the Division resolving nearly its entire antitrust civil enforcement docket by consent decree from 2004 to present. ... FTC consent decrees more than tripled in number from 1992 to 1995. Since 1995, the FTC has settled 93 percent of its competition cases.'')

[4] *See* A. Douglas Melamed, *Antitrust: The New Regulation*, 10 ANTITRUST 13 (1995) (describing antitrust enforcement as having ''moved markedly along the continuum from the Law Enforcement Model toward the Regulatory Model'').

[5] *See* Joshua D. Wright & Douglas H. Ginsburg, *The Economic Analysis of Antitrust Consents*, European Journal of Law and Economics (2018).

[6] *See id*.

Reflexive reliance on settlement can inhibit the sound development of antitrust law,[7] reduce agency transparency and predictability,[8] expand agency authority beyond the agencies' core mission—what Professors William Kovacic and David Hyman term "regulatory leveraging,"[9] and export these adverse effects to foreign agencies to the extent that they follow the U.S.'s lead. Ultimately, the foundational problem with consent decrees is that the "willingness to settle in competition cases arises for reasons unrelated to the likelihood that the conduct at issue violates the law or has anticompetitive effects."[10]

We could also add a sixth type of cost: (6) consent decrees often require substantial administrative and regulatory oversight, which can offset, to a degree, whatever resources are conserved from avoiding litigation. As the number of consents grows, the significance of these administrative costs also grows and may alter the fundamental character of an agency from law enforcement to regulation.

Given these potential costs of consent decrees, it is important for agencies to maintain policies and institutional arrangements that will ensure a disciplined approach to settlement that serves the agencies' objective of protecting competition and promoting consumer

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[7] Consider the development of the law regarding vertical restraints such as exclusive territories, tying, and resale price maintenance. Backed by the force of economic scholarship, the law evolved from treating these vertical practices as *per se* illegal to assessing them under the rule of reason. This change, which has likely resulted in substantial and continuing consumer welfare gains, was based largely on litigation and not consents. *See* Wright & Ginsburg (2018), *supra* note 5.

[8] Christopher DeMuth states, "The antitrust consent decree is an opaque form of government regulation that operates without many of the checks and balances that constrain and shape ordinary regulatory programs." Foreword p. vii, Richard A. Epstein, Antitrust Consent Decrees in Theory and Practice: Why Less is More, 2007.

[9] William Kovacic & David Hyman, *Regulatory Leveraging: Problem or Solution?*, 23 GEO. MASON L. REV. 1163, 1179 (2016) (''[R]egulatory leveraging leads to less disciplined decisionmaking by governmental agencies. Substantive antitrust law governs merger reviews, but regulatory leveraging encourages agencies to ignore or downgrade these controls. The result is discounting of both process and substance, in favor of the unimpeded pursuit of more nebulous (and often contestable) goals. Among other consequences, this comes at a considerable cost in predictability for affected commercial parties.''). State Attorneys General have also used antitrust settlements to extract remedies untethered from conventional, welfare-based antitrust goals. See, e.g., Nevada v. UnitedHealth Grp. Inc., No. 2:08-CV-00233-JCMRJJ, 2008 WL 5657751, at *16 (D. Nev. Oct. 8, 2008) (as a condition for approval of a merger, a state Attorney General obtained an agreement that the merged company would ''donate'' $15 million to support various health related activities, including the nursing program at the state university and funding for ''one position within the Governor's Consumer Healthcare Assistance Program.''); *see also* Pennsylvania v. Providence Health Sys., Inc., No. 4:CV-94-772, 1994 WL 374424 (M.D. Pa. May 26, 1994).

[10] Wright & Ginsburg (2018), *supra* note 5, at 12.

welfare.[11] Each proposed decree should be subject to appropriate internal review to assure that (1) the relief sought is properly grounded on sound legal principles; (2) the underlying competitive analysis, including predictions regarding the likely competitive effects of the decree, withstands rigorous scrutiny and is based on sound economic evidence, and (3) the decree is grounded solely upon the antitrust objective of preserving a vigorous competitive process, as distinct from any narrow interest such as the protection or promotion of specific competitors (or other interests).

Consent Decrees: The Good, The Bad, and The Ugly

Since 2000, the FTC has issued 221 consent decrees[12] and the DOJ has likely issued a similar number. Certainly, some consent decrees are successful in maximizing the benefits while minimizing the costs of consents. Other consents may have been appropriate and well-crafted at the time of entry but become counterproductive over time due to changing market conditions. And some consents are simply ill-advised from the start and serve only to reduce consumer welfare as long as they are in effect.

Our primary focus in this section is on decrees that imposed restrictions upon business conduct that eventually became superfluous or counterproductive, or where the costs of decree administration became excessive in relation to any identifiable benefit. The point is to highlight the difficulties in crafting robust consents and, relevantly, how consents increase the regulatory role of agencies.[13] For example, the "Paramount Decrees," entered between 1948

[11] Consent decrees entered by the Antitrust Division do require judicial approval pursuant to the Antitrust Procedures and Penalties Act of 1974 ("Tunney Act"), 15 U.S.C. §§16(b)-(h). But this form of judicial review is highly deferential to the Division, and is intended only to ascertain whether the relief provided is consistent with the "public interest". Even this limited scope of review, however, has placed the Tunney Act under a cloud of constitutional doubt. Maryland v. United States, 460 U.S. 1001 (1983)("It is not clear to me that this [public interest] standard, or any other standard the District Court could have devised, admits of resolution by a court exercising the judicial power established by Article III of the Constitution." Rehnquist, J., dissenting from summary affirmance of the Bell System divestiture decree, as modified by the District Court after Tunney Act review).
[12] Federal Trade Commission, Competition Enforcement Database, https://www.ftc.gov/competition-enforcement-database.
[13] Of course, it is reasonable to suggest that litigated remedies can also suffer from staleness and can also involve agency oversight. The issue is one of degree and frequency. Moreover, as detailed previously, litigation—while costly—can result in significant positive externalities in terms of legal precedents, avoiding regulatory leveraging, and so forth—even if the remedy eventually becomes obsolete.

and 1952, required (*inter alia*) the major movie studios (Paramount, RKO, MGM, 20th Century Fox, and Warner Bros.) to divest their holdings in theatres.[14] Ultimately the decrees kept the Antitrust Division and the federal District Court in New Jersey involved in quasi-regulatory supervision of the movie industry for decades, with companies requiring approval from the Division for a wide variety of business decisions, despite drastic changes affecting the industry as time went on.[15]

Similarly, consent decrees prevented the three major broadcast television networks (ABC, CBS, & NBC) from owning or profiting from certain broadcast programing.[16] Critics of the decrees ultimately viewed them as inhibiting, rather than promoting, competition between TV networks and movie studios, and the decrees were lifted in 1993, following FCC action that had repealed similar rules issued under its own regulatory authority.[17] Yet another example of a consent decree that became obsolete by change in circumstances is the 1956 consent decree involving IBM Corp.'s conduct in the market for tabulating machines.[18] By the time the decree was reconsidered in 1996, the computer industry and IBM itself had changed dramatically, leading the Division to agree to terminate the decree.[19]

Even when a consent decree can be regarded as a success in promoting competition, changes in industry circumstances can render the remedy inappropriate within a relatively brief time. The 1982 consent decree[20] that resolved the landmark monopolization case U.S. v. AT&T successfully separated the former Bell System into independent regulated and unregulated enterprises, producing a dramatic transition from regulated monopoly to vigorous competition in many significant communications industry sectors. The complexities of decree administration in an industry undergoing profound and rapid improvements in technology,

[14] United States v. Paramount Pictures, Inc., 66 F. Supp. 323 (S.D.N.Y. 1946), 70 F.Supp. 53 (S.D.N.Y. 1947), *aff'd in part and rev'd in part*, 334 U.S. 131 (1948), *on remand*, 85 F.Supp. 881 (S.D.N.Y. 1949), *aff'd*, 339 U.S. 984 (1950).
[15] *See* Barry J. Brett & Michael D. Friedman, *A Fresh Look at the Paramount Decrees*, 9 ENT. & SPORTS LAW. 1 (1991)
[16] John Lippman, "Networks Can Own TV Shows Judge Rules", LA TIMES (Nov. 4, 1993).
[17] *See* United States v. National Broadcasting Co., 842 F. Supp. 402 (C.D.Cal.1993).
[18] Press Release, U.S. DEP'T. OF JUSTICE, ANTITRUST DIV, *Justice Department Agrees to Terminate Last Provisions of IBM Consent Decree in Stages Ending 5 Years From Today*, (Jul. 2, 1996), *available at* https://www.justice.gov/archive/atr/public/press_releases/1996/0715.htm
[19] *Id.*
[20] 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).

however, led to the adoption of legislation in 1996 that included a mandate to terminate the decree.[21]

While most of the prior examples *arguably* had some merit when initially proposed, some recent consent decrees unfortunately do not even meet this standard. For instance, the FTC's consent decree with Intel Corporation is a clear example of a misuse of agency power.[22] The FTC imposed restrictions on Intel's ability to offer certain discounts and it regulated product design changes that the agency deemed to not "provide an actual benefit" to users. There is no analogous court case where the agency obtained similar relief.

Similarly, the FTC's consent decree with Graco, Inc. involved prohibitions on the firm's ability to enter into exclusive contracts and regulated the scope of loyalty discounts—even though the defendant had never used loyalty discounts.[23] Finally, in the FTC's settlement with Pool Corporation (PoolCorp),[24] the FTC alleged that PoolCorp had foreclosed essential inputs from rivals, which restricted entry.[25] Yet, the FTC acknowledged that new distributors could potentially avoid exclusion through efficient scale and realigning supply contracts; moreover, there is evidence that no exclusion actually occurred and there is little to no evidence of actual injury to consumers.[26]

These examples illustrate the need for agencies to remain vigilant in ensuring that settlements do not have adverse welfare effects.[27] They also highlight the need for economic analysis to play a more prominent role in structuring and evaluating consent decrees at the time of implementation and beyond. Additionally, with the passage of time such decrees may no longer preserve and may even inhibit vigorous competition, as well as impose a variety of

[21] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (Jan. 3, 1996). The Antitrust Division maintained a substantial staff of attorneys and support personnel devoted primarily to administration of this specific decree.
[22] *In re* Intel Corp., FTC Docket No. 9341, 2010 WL 4542454 (2010).
[23] *In re* Graco, Inc., FTC File No. 101-0215 (2013). *See also* Wright & Ginsburg (2018),*supra* note 5.
[24] *In re* Pool Corp., FTC File No. 101-0115 (2011).
[25] Order, *In re* Pool Corp., 2011 WL 5881164 (FTC 2011).
[26] *See* Wright & Ginsburg (2018), *supra* note 5, at 12.
[27] For further examples *see* Epstein, *supra* note 8.

costs on the parties, the agencies, and the courts. Sound policy supports periodic review to ensure that competitive benefits continue to exceed costs.

Two recent examples of successful reviews of prior consents are Nine West Group Inc. and Toys "R" Us. In Nine West, the FTC—in light of the Supreme Court's decision in Leegin v. PSKS, Inc.--modified a prior consent that had prohibited Nine West from entering into agreements setting minimum resale prices.[28] In Toys "R" Us, the FTC—in light of the repositioning and expansion of Walmart, Target, and Amazon--modified a prior consent that had prohibited Toys "R" Us from entering into certain restricted supply agreements.[29]

The Role of Conduct Remedies

Up to this point, our discussion has focused solely on consent decrees without making a finer distinction between structural and conduct (behavioral) remedies, whether via consent or litigation. The fundamental question is whether conduct remedies are primarily responsible for most of the costs associated with consent decrees. In other words, can the agencies minimize the costs and maximize the benefits of consents by relying almost exclusively on structural remedies?

We believe the answer is no. Although structural relief is and should be the preferred remedy in horizontal merger cases, conduct remedies can be a valuable tool for agency enforcement in vertical cases.[30] Relative to horizontal mergers, vertical mergers characteristically contain the promise of substantial efficiencies (*e.g.*, elimination of double marginalization, overcoming high costs of defining and enforcing long-term contractual commitments, obtaining an assured distribution channel for a product or an assured source of supply for an input), making the costs of false positives (i.e., mistakenly blocking a competitively

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[28] *See In re* Nine West Group Inc., Order Granting in Part Petition to Reopen and Modify Order (Apr. 11, 2000).
[29] *See In re* Toys "R" Us Inc., Order Reopening and Modifying Order (Apr. 11, 2014).
[30] *See* [30] *See* U.S. DEP'T. OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 5 (2011), https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf ("[I]n appropriate vertical merger matters the Division will consider tailored conduct remedies designed to prevent conduct that might harm consumers while still allowing the efficiencies that may come from [allowing] the merger to be realized. The Division also will consider structural remedies in vertical merger matters—they may be particularly effective when the vertical integration is a small part of a larger deal.")

benign or neutral transaction) greater in the vertical context. Moreover, conduct remedies may provide a relatively low-cost way of accepting a transaction presumptively likely to enhance the economic value of output and stimulate competition, while guarding against the possibility of anticompetitive effect.

Thus, the relevant question is not whether to use conduct remedies but rather *whe*n and *how* to use them. Take, for instance, arbitration, which played a central role in the DOJ's Comcast-NBCU consent decree.[31] According to the Arbitration Committee of the ABA Section of Dispute Resolution, "Arbitration is preferred by many as a way to resolve commercial disputes. It has many advantages over litigation in court."[32] Thus, rather than being a feature outside of the free market, arbitration has been a component of free market pricing for centuries. While economists and antitrust regulators often "assume a price," the actual business of setting prices is complex and can involve disputes—particularly during bilateral negotiations. Arbitration can fill a role in helping set market prices. Moreover, arbitration requires no additional government supervision—beyond general compliance considerations which are costs associated with even structural remedies. Consequently, conduct remedies with features such as arbitration do not necessarily involve government oversight beyond those needed for structural remedies.

Ultimately the issue of conduct versus structural relief is one of determining the appropriate use of each. While the experience of the FTC and DOJ have clearly resulted in a presumption in favor of structural remedies over conduct remedies – and rightly so in many instances – we urge the agencies to preserve a degree of freedom and use conduct remedies in appropriate circumstances.

The agencies may also play a constructive role in stimulating independent economic analysis of prior decrees. They can highlight the issues and openly encourage economists and

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[31] *See* Press Release, U.S. DEP'T. OF JUSTICE, ANTITRUST DIV, *Justice Department Allows Comcast-NBCU Joint Venture to Proceed With Conditions*, (Jan. 18, 2011), https://www.justice.gov/opa/pr/justice-department-allows-comcast-nbcu-joint-venture-proceed-conditions.

[32] Edna Sussman & John Wilkinson, *Benefits of Arbitration for Commercial Disputes*, A.B.A. 2, (Mar. 5, 2012), https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf

other scholars to study and assess the long and intricate history of antitrust consent decrees using the tools of economic analysis.

Conclusion

We appreciate the opportunity to comment and would be happy to respond to questions the Antitrust Division may have regarding this comment.