

---

# Unit 6. Merger Antitrust Settlements

---

Merger Antitrust Law

Fall 2018 Georgetown University Law Center

Dale Collins

# Topics

- Overview of adjudicated relief and consent settlements
- Consent settlement documents and procedures<sup>1</sup>
- Consent remedies in horizontal cases
- Consent decree violations

---

<sup>1</sup> We will focus on remedies in horizontal transactions in this unit. We will pick up remedies in nonhorizontal transactions later in the course.

---

# Overview of Adjudicated Relief and Consent Settlements

# Recall possible outcomes in DOJ/FTC reviews

## Close investigation

- Waiting period terminates at the end of the investigation with the agency taking no enforcement action, or
- Agency grants early termination prior to normal expiration

## Litigate

- DOJ: Seeks preliminary and permanent injunctive relief in federal district court
- FTC: Seeks preliminary injunctive relief in federal district court  
Seeks permanent injunctive relief in administrative trial

## Settle w/consent decree

- Typical resolution for problematic mergers
- DOJ: Consent decree entered by federal district court
- FTC: Consent order entered by FTC in administrative proceeding

## Parties terminate transaction

- Parties will not settle at the agency's ask and will not litigate, or
- Agency concludes that no settlement will resolve the agency's concerns and the parties will not litigate
  - Examples: AT&T/T-Mobile, NASDAQ/NYSE Euronext

# Adjudicated relief/consent decrees

- Usual outcome of DOJ/FTC reviews: Overwhelmingly consent relief
  - Rare for merger cases to go to court
  - Even so, noticeable increase in litigations in recent years
    - The agency concludes that nothing less than enjoining the transaction in its entirety is acceptable and the parties are willing to litigate, or
    - Prelitigation agency demands for a consent settlement are too high and the parties think that they can do better if they begin litigation and then settle
  
- But—
  - Current policy
    - Consent solutions should match adjudicated permanent injunctive relief if the agency were to litigate and win (i.e., no substantive compromises)
    - Up until 2012, agencies showed somewhat more of a willingness to compromise
  - Agency negotiates consent relief—
    - Not only to remediate competitive concern with the immediate deal
    - But also with an eye to implications for consent decree negotiations in future deals
  
- Upshot
  - Agencies have found that they do not have to give much away in negotiations compared to what they would ask a court to order in adjudicated relief

# Agency perspectives

## ■ Consent settlements

- If the parties are willing to offer a consent settlement (“fix”) that satisfies the agency that the restructured transaction will not be anticompetitive, the agency will accept it
- If the parties are unwilling to offer a fix that satisfies the agency’s requirements, the agency will litigate to obtain what the agency believes is a suitable permanent injunction (almost always a blocking injunction in a preclosing challenge)
  - Sometimes, when the parties offer a curative divestiture that they believe should solve the problem and the agency rejects it as the basis for a consent decree, the parties will sign a contract anyway with a divestiture buyer to implement the fix contingent on the closing of the main transaction. In this situation, courts will assess the competitive effects of the transaction assuming that the fix has occurred (“litigating the fix”).

## ■ To satisfy the agency, the consent settlement must—

- Fix the agency’s competitive concern
- Be workable in practice
- Must not involve the agency in continuous oversight or affirmative regulation
  - Although price increases are the central concern in merger antitrust law, DOJ/FTC will not accept settlements that impose price caps
  - Some state consent decrees impose price caps and other behavioral relief

# Agency perspectives

## ■ Some deals cannot be fixed

- In some situations, the investigating agency will conclude that there is no remedy that will resolve its concerns and that the deal must be blocked in its entirety

- Examples:

- Staples/Office Depot (2015)

- Sysco/US Foods (2015)

- NASDAQ/NYSE Euronext (2011)

- AT&T/T-Mobile (2011)

- Where the transaction is not fixable the agency's satisfaction, the agency will go to court and seek injunctive relief unless the parties voluntarily terminate the transaction

## ■ Enforceability

- Federal judicial consent decrees are injunctions

- Violations are enforceable through contempt sanctions

- FTC consent orders are administrative “cease and desist orders”

- Violation is enforceable through federal district court action for civil penalties

- Penalties are inflation adjusted

- In 2018, the maximum penalty is \$41,484 per day

- District court will also issue injunction to prevent future violations (enforceable through contempt)

---

# Consent Settlements: Documents and Procedures



# Consent settlement documents

- Summary of document types

DOJ (federal district court proceeding)	FTC (FTC administrative proceeding)
Complaint	Administrative complaint
Proposed Hold Separate Stipulation and Order —Proposed Final Judgment —[Contained in body of stipulation]	Agreement Containing Consent Orders —Proposed Decision and Order —Order to Maintain Assets
Competitive Impact Statement	Analysis of Proposed Consent Order to Aid Public Comment
Hold Separate Stipulation and Order (so ordered by the court)	Decision and Order (accepting consent settlement for public comment and entering Order to Maintain Assets)
Federal Register and newspaper notice [Public comment period: 60 days]	Federal Register notice [Public comment period: 30 days]
Final Judgment	Decision and Order (final)

# Consent settlement documents

## ■ Observations

- The settlement documents for the DOJ and the FTC are essentially the same, although—
  - The names of the documents differ somewhat
  - DOJ consent settlements are governed by the Tunney Act;<sup>1</sup> FTC settlements are governed by administrative regulations modelled after the Tunney Act<sup>2</sup>

## ■ Complaints

- Merger antitrust settlements take place in the context of litigation in a district court or in an administrative adjudicative proceedings
- The litigation must be commenced by the filing of a complaint
- In settlements reached prior to the filing of a complaint, a complaint is nonetheless filed and the settlement documents are filed simultaneously with the complaint

<sup>1</sup> Antitrust Procedures and Penalties Act, Pub. L. No 93-528, § 2. 88 Stat. 1706, § 2 (Dec. 21, 1974) (current version at 15 U.S.C. § 16(b)-(h)).

<sup>2</sup> 16 C.F.R. §§ 2.31-2.34 (for pre-administrative complaint settlements (“Part 2 settlements”)); 16 C.F.R. § 3.25 (for post-administrative complaint settlements (“Part 3 settlements”)). After the Commission has voted to issue an administrative complaint, whether or not it actually has been served by the Secretary, the case is in adjudicative status and is subject to the prohibition on ex parte communications to the Commission. See 16 C.F.R. 4.7. A consent agreement or settlement offer may be considered by the Commission, and the Commission may receive advice and comments of the staff concerning the terms of the settlement. only after the case is withdrawn from adjudication. As a result, Part 3 settlements are governed by different rules than Part 2 settlements, although apart from the withdrawal from adjudication the documents and the procedures are roughly the same.

---

# Consent settlement documents

## ■ Complaints

- Merger antitrust settlements take place in the context of litigation in a district court or in an administrative adjudicative proceedings
- The litigation must be commenced by the filing of a complaint
- In settlements reached prior to the filing of a complaint, a complaint is nonetheless filed and the settlement documents are filed simultaneously with the complaint

# Consent settlement documents

## ■ Settlement agreement

- A settlement agreement is an agreement between the investigating agency and the buyer (and sometimes both merging parties) to settlement the investigation or litigation on terms that both sides have agreed and to ask the court or the FTC (as the case may be) to enter a final judgment in the form of the agreed-upon settlement
- When the DOJ is the settling agency, the settlement agreement is contained in a *Proposed Hold Separate Stipulation and Order* signed by all settling parties
  - The parties stipulate to the entry of a Final Judgment by the court in the form attached as an exhibit
  - The settling firm also stipulates to abide by the terms of the proposed Final Judgment between the time of signing and the entry of the Final Judgment by the court
- When the FTC is the settling agency, the settlement agreement is contained in an *Agreement Containing Consent Orders* signed by all settling parties
  - The Agreement Containing Consent Orders will include as an exhibit a Proposed Decision and Order to be entered as a final judgment in the FTC adjudicative proceeding

# Consent settlement documents

- Settlement agreement (con't)
  - Both FTC and DOJ settlement agreements contain a provision that the merging parties will not consummate the transaction until—
    - The court has “so ordered” the stipulation, converting the stipulation into a court order enforceable through the contempt sanction
    - The FTC has accepted for filing (but not entered) a form of proposed Decision and Order
      - Since the proposed Decision and order has only been accept for filing but not issued as an FTC order, it is not enforceable
      - The Commission, however, separately will issue a Order to Maintain Assets or an Order to Hold Separate and Maintain Assets (see below), which is enforceable through civil penalties

# Consent settlement documents

- Typical contents of a DOJ proposed final judgment
  - Whereas clauses
    - I. Jurisdiction
    - II. Definitions
    - III. Applicability
    - IV. Divestitures
    - V. Appointment of Divestiture Trustee
    - VI. Notice of Proposed Divestitures
    - VII. Financing
    - VIII. Hold Separate
    - IX. Affidavits
    - X. Compliance Inspection
    - XI. Notification
    - XII. No Reacquisition
    - XIII. Retention of Jurisdiction
    - XIV. Expiration of final Judgment
    - XV. Public Interest Determination
  - Signature line for judge

*Note:* The remedial obligations in the settlement are drafted in the form of a court order (or an FTC cease and desist order), so that the judge of the FTC may enter the settlement as a final order without having to adapt its form.

# Consent settlement documents

- Maintain assets/hold separate obligations
  - As part of the settlement agreement, the merging parties will agree to preserve and continue to operate the business and assets to be divested as a ongoing economically viable competitive force in the marketplace pending the divestiture
    - *DOJ*: The hold separate obligation will be continued as a provision in the Proposed Hold Separate Stipulation and Order
    - *FTC*: The hold separate obligation will be included in a proposed Order to Maintain Assets attached as an exhibit to the Agreement Containing Consent Orders
      - This accounts for the use of the plural “Consent Orders,” since the agreements contains both a proposed Decision and Order and a proposed Order to Maintain Assets
  - The maintain assets obligation typically includes provisions obligating the settling party to—
    - Provide sufficient working capital and lines of credit to operate the business or assets
    - Maintain separate financial books for the operations to be divested
    - Preserve the existing relationships between the operations to be divested and third parties in the ordinary course of business

# Consent settlement documents

- Maintain assets/hold separate obligations
  - When it is possible to operate the business and assets to be divested separately from the merged company (although still owned by the merged company pending divestiture), settling agency may also require the settling party to agree to a “hold separate” obligation.
  - Example:

Disney shall take all steps necessary to ensure that (1) the Divestiture Assets will be maintained and operated as independent, ongoing, economically viable and active competitors in the video network or programming business; (2) management of the Divestiture Assets will not be influenced by Disney; and (3) the books, records, competitively sensitive production, programming, distribution, sales, content purchases, marketing and pricing information, and decision making concerning production, programming, distribution, sales, content purchases, pricing and marketing by or under any of the Divestiture Assets will be kept separate and apart from Disney’s other operations.<sup>1</sup>

<sup>1</sup> Hold Separate Stipulation and Order § VII(B), *United States v. Walt Disney Co.*, No. 1:18-cv-05800 (S.D.N.Y. filed June 27, 2018).



# Consent settlement documents

## ■ Competitive impact analysis

- Both the DOJ and the FTC prepared an analysis of the competitive impact of the proposed consent settlement
  - The DOJ analysis is called a *Competitive Impact Statement*
  - The FTC analysis is called an *Analysis of Agreement Containing Consent Orders to Aid Public Comment*
- The Tunney Act requires that a DOJ competitive impact statement contain the following information—
  1. the nature and purpose of the proceeding;
  2. a description of the practices or events giving rise to the alleged violation of the antitrust laws;
  3. an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;
  4. the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;
  5. a description of the procedures available for modification of such proposal; and
  6. a description and evaluation of alternatives to such proposal actually considered by the United States<sup>1</sup>

<sup>1</sup> See 15 U.S.C. § 16(b).

---

# Consent settlement documents

- Competitive impact analysis (con't)
  - The FTC Analysis contains information similar to that in the DOJ Competitive Impact Analysis
  - The competitive impact analysis is usually filed by the settling agency either simultaneously with or shortly after the filing of the complaint and settlement documents

# Consent settlement documents

## ■ Public notice and comment

### □ DOJ<sup>1</sup>

- The Tunney Act provides that any proposal for a consent settlement by the DOJ must be filed with the court and published in the Federal Register *and* in appropriate newspapers at least 60 days prior to the effective date of any judgment entered by the court
- In addition, the notice must inform the public that interested persons may submit comments about the proposed consent decree to the United States Department of Justice, Antitrust Division
- The DOJ will consider any comments it receives, respond to them, and—
  - Publish the comments and its response in the Federal Register and,
  - File the comments and its response with the court prior to the court's decision whether to enter the consent settlement as a final judgment
- The settling parties may also respond to any public comments in a filing to the court

### □ FTC

- Similar practice, except—
  - No newspaper notice is required
  - The public comment period is only 30 days as opposed to 60 days

### □ Most consent settlements receive no public comments

- There are exceptions

<sup>1</sup> See 15 U.S.C. §§ 16(b)-(d).

# Consent settlement documents

## ■ Final judgment

- Following the notice and comment period and the response by the settling agency, the court or the FTC may enter the consent settlement as a final order
- DOJ
  - After the expiration of the 60-day period, the DOJ will file with the court any public comments and the DOJ responses, together with a Motion for Entry of the Final Judgment
    - The DOJ, however, may withdraw its consent to entry of the Final Judgment, renegotiate a new consent settlement, or proceed to litigation on the merits if the DOJ decides that the original consent decree is not appropriate
    - The idea here is that the DOJ should have the option of withdrawing consent in light of any public comments that are submitted
  - The court may either grant or deny the DOJ's Motion for Entry of the Final Judgment
    - The court may enter the proposed Final Judgment only if the court finds the entry of the judgment in the public interest<sup>1</sup>
    - If the court does not find the proposed final Judgment in the public interest, the court may either—
      - Deny the motion, or
      - More typically, indicate to the DOJ and the settling party what problems or concerns the judge has with the proposed consent decree and give the parties the opportunity to revise the consent decree proposal
        - Except in rare situations, the court is unlikely to require new notice and a new comment period before ruling on whether to accept a revised consent decree proposal

<sup>1</sup> See 15 U.S.C. § 16(e) (reprinted on the next slide).

# Consent settlement documents

- Final judgment

- DOJ

- *Public interest standard*: The Tunney Act provides:

**(e) PUBLIC INTEREST DETERMINATION**

- (1)** Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court shall consider—
- (A) 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
  - (B) 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.
- (2)** Nothing 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.<sup>1</sup>

<sup>1</sup> See 15 U.S.C. § 16(e).

---

# Consent Remedies in Horizontal Cases

# Agency requirements

- Almost always require the sale of a complete “business”
  - *Agency view*: Essential to the effectiveness/viability of the solution
  - Implication: Entire business of one or the other merger parties in the problematic market must be sold
    - Example: In a supermarket chain store acquisition, Buyer has 10 stores and Seller has 4 stores in a problematic market.
      - If Buyer elects to fix the transaction with the sale of Seller’s stores, it must sell all of Seller’s 4 stores, even if acquiring only 1 of the Seller’s stores would not have raised an antitrust concern
      - Moreover, Buyer cannot sell 2 of its stores and 2 of the Seller’s stores, even if the two Buyer stores are comparable to the 2 Seller’s stores that the Buyer wants to keep (no “mix and match” within a relevant market)
    - Where there are multiple problematic markets, the Buyer picks whether to sell Buyer or Seller business market-by-market (can “mix and match” across markets)
  - Exceptions:
    - Divestiture buyer has necessary infrastructure and limited divestiture assets will enable rapid and effective entry into divestiture business
    - Divestiture assets are commonly traded (e.g., grocery stores)
- Will permit “trade up” solutions
  - Buyer may sell its own business in order to purchase a larger business

# Horizontal remedies: Agency starting point

- Everything associated with the business to be divested must go
  - Principle
    - Start with an obligation to divest everything
    - DOJ/FTC will then negotiate exclusions
  - But must be convinced that the exclusions will not undermine the effectiveness or viability of the solution
    - Agencies tend to be very deferential to the divestiture buyer
    - Can permit the divestiture buyer to “double dip” on the businesses or assets to be acquired:
      1. Negotiate a purchase agreement with the divestiture seller
      2. Then tell the DOJ/FTC that it is not enough in the hope that the agency will refuse to accept the consent settlement unless the divestiture buyer is given more

NB: As noted above, consent settlements must not only “fix” the competitive concerns, the divested businesses or assets must be economically viable in the hands of the divestiture buyer. This sometimes requires the divestiture package to include business or assets that are not competitively problematic.



# Horizontal remedies: Elements

- Divest physical assets
  - Production plants, distribution facilities, sales offices, R&D operations
  - All associated equipment
  - Leases/property from which business operated
  
- Divest IP
  - Sale of any IP rights used exclusively in the divestiture business
  - Sale and license back/license of IP rights used in both retained and divested operations
  - Divestiture buyer must have ability to develop and own future IP

---

# Horizontal remedies: Elements

- Make “key” employees available for hire by divestiture buyer
  - All employees necessary for—
    - production,
    - R&D,
    - sales & marketing, and
    - any other specific function connected with the divestiture business
  - Must facilitate access to key employees
  - Divestiture may make offers to key employees
  - Merging parties cannot make counteroffer or offer other inducement to prevent defection

# Horizontal remedies: Elements

- Assign/release customer contracts and revenues
  - Matter of course for contracts served out of divestiture facilities
  - May also include other contracts to “bulk up” the divestiture business
  - If contracts not assignable, offer customers ability to terminate with no penalties in order to rebid business
- Transfer business information
  - Especially customer-related information
- Provide short-term transition services and support
  - Usually limited to one year
  - May include input supply agreement, technical support, administrative support
- No long-term entanglements
  - Agencies require complete separation between the merged company and the divestiture buyer
  - Long-term entanglements are usually fatal to a consent settlement
    - *Example:* Long-term agreement for merged company to provide divestiture buyer with an input

# Horizontal remedies: Agency right of approval

- Agency will demand right of approval over divestiture buyer *and* the divestiture sales agreement
  1. Must restore competition
    - Divestiture buyer must have the incentive and ability to replace competition the agency believes would otherwise be lost as a result of the acquisition
  2. Must be financially viable
    - Divestiture business/assets must be financially viable in the hands of the particular divestiture buyer
    - The FTC has experienced several failed divestitures because of lack of viability (now very sensitive to the issue)
  3. Must not create its own antitrust problem
    - Divestiture buyer must have no antitrust problem in acquiring divested business
  4. Approval in the agency's sole discretion
    - Not reviewable by a court

# Horizontal remedies: Agency right of approval

- Can be problematic for the merging parties even after the consent decree has been negotiated
  - Agency wants to know if the divested assets are “enough” to make the divestiture buyer a meaningful firm in the market for the divested product
  - If the staff concludes that more assets or other content needs to be added to the divestiture commitment (regardless of what the decree requires), the agency can refuse to approve the divestiture buyer and the divestiture sales agreement
    - The divestiture seller has essentially no option other than to make the requested changes due to consent decree time limits on finding an approved divestiture buyer and an approved divestiture sales agreement
    - Can create incentive and ability for the divestiture buyer to engage in “strategic behavior”

# Horizontal remedies: Divestiture deadlines

- Agency will require a very tight deadline for closing the divestiture
  - More often than not will require a buyer “up front”
    - That is, the parties must—
      1. find a divestiture buyer,
      2. negotiate and sign a sale and purchase agreement (subject to agency approval and the closing of the main transaction), and
      3. obtain approval of the agency of the divestiture buyer and the divestiture agreement before the agency will allow the main transaction to close
  - Typical deadlines for divestiture closing
    - 10 business for buyers upfront
    - 3 months otherwise
  - Almost always results in a “fire sale”
    - That is, a sale with a purchase price materially below fair market value
    - The fire sale nature of a divestiture should be anticipated and taken into account with the buyer at the time the seller is deciding on its offer price

*Practice note:* Unless protected by attorney-client privilege or the work doctrine, business documents and financial modeling of any possible anticipated divestitures in the antitrust risk analysis will be disclosable to the investigating agency in response to the second request.

# Example: TransDigm/Takata

## ■ DOJ concern

- The completed acquisition by TransDigm of the SCHROTH from Takata eliminated competition in three worldwide markets for airline restraints:
  - Traditional two-point lapbelts
  - Three-point shoulder belts
  - Technical restraints
  - Inflatable restraint systems

## ■ Consent decree: Requires—

- TransDigm to divest all of the shares and assets it acquired from Takata in their entirety (including its facilities in Pompano Beach, Florida, and Arnsberg, Germany)
- A buyer upfront: A consortium including SCHROTH management and financial investors
- Divestiture to occur within 30 calendar days of the receipt of all regulatory approvals
  - Committee on Foreign Investment in the United States (“CFIUS”)
  - German Federal Ministry of Economic Affairs and Energy
- Separate operation of the divestiture assets pending the closing of the divestiture sale

# Example: Albertsons/Safeway

## ■ FTC concern

- Proposed \$9.2 acquisition by Albertsons or Safeway would lessen supermarket competition to the detriment of consumers in 130 local markets<sup>1</sup>

## ■ Consent decree

- Divestiture of 168 supermarkets to cure problematic local markets
- Upfront buyers
  - Haggen Holdings, LLC will acquire 146 Albertsons and Safeway stores located in Arizona, California, Nevada, Oregon, and Washington
  - Supervalu Inc. will acquire two Albertsons stores in Washington
  - Associated Wholesale Grocers, Inc. will acquire 12 Albertsons and Safeway stores in Texas
  - Associated Food Stores Inc. will acquire eight Albertsons and Safeway stores in Montana and Wyoming
- Divestiture package
  - Everything associated with each divestiture store had to be divested to the divestiture buyer
  - Exceptions: None of Albertsons' or Safeway's trademarks had to be sold

<sup>1</sup> Complaint, *In re Cerberus Institutional Partners V, L.P.*, No. C-4504 (F.T.C. filed Jan. 27, 2015).



# Example: Albertsons/Safeway

## ■ Assets to be Divested

H. “Assets To Be Divested” means the Supermarkets identified on Schedule A, Schedule B, Schedule C, and Schedule D of this Order, or any portion thereof, and all rights, title, and interest in and to all assets, tangible and intangible, relating to, used in, and/or reserved for use in, the Supermarket business operated at each of those locations, including but not limited to all properties, leases, leasehold interests, equipment and fixtures, books and records, government approvals and permits (to the extent transferable), telephone and fax numbers, and goodwill. Assets To Be Divested includes any of Respondents’ other businesses or assets associated with, or operated in conjunction with, the Supermarket locations listed on Schedule A, Schedule B, Schedule C, and Schedule D of this Order, including any fuel centers (including any convenience store and/or car wash associated with such fuel center), pharmacies, liquor stores, beverage centers, gaming or slot machine parlors, store cafes, or other related business(es) that customers reasonably associate with the Supermarket business operated at each such location. At each Acquirer’s option, the Assets To Be Divested shall also include any or all inventory as of the Divestiture Date.

*Provided, however,* that the Assets To Be Divested shall not include those assets consisting of or pertaining to any of the Respondents’ trademarks, trade dress, service marks, or trade names, *except* with respect to any purchased inventory (including private label inventory) or as may be allowed pursuant to any Remedial Agreement(s).

*Provided, further,* that in cases in which books or records included in the Assets To Be Divested contain information (a) that relates both to the Assets To Be Divested and to other retained businesses of Respondents or (b) such that Respondents have a legal obligation to retain the original copies, then Respondents shall be required to provide only copies or relevant excerpts of the materials containing such information. In instances where such copies are provided to an Acquirer, the Respondents shall provide to such Acquirer access to original materials under circumstances where copies of materials are insufficient for regulatory or evidentiary purposes.

<sup>1</sup> Decision and Order, *In re Cerberus Institutional Partners V, L.P.*, No. C-4504 (F.T.C. July 2, 2015).

# Example: Panasonic/Sanyo

- FTC concern
  - Merging parties produce the highest quality NiMH batteries and are closest competitors – effectively control the market<sup>1</sup>
  
- Consent decree—Divestiture of Sanyo’s NiMH assets<sup>2</sup>
  - Buyer upfront—Fujitsu
  - Divestiture package
    - Manufacturing facility in Takasaki, Japan
    - Supply agreement for NiMH battery sizes not produced at Takasaki
    - All Sanyo IP, including patents and licenses related to portable NiMH batteries
    - Access to identified “key” employees
      - Financial incentives to employees (up to 20% of salary) to move to divestiture buyer
    - Transition services and support for 12 months

<sup>1</sup> Complaint, *In re* Panasonic Corp., No. C-4274 (F.T.C. filed Nov. 23, 2009).

<sup>2</sup> Decision and Order, *In re* Panasonic Corp., No. C-4274 (F.T.C. Jan. 6, 2010).

---

# Consent Decree Violations

# Consent decree violations

## ■ DOJ

- DOJ consent decrees are technically injunction orders by a federal district court
- Violations are punishable by civil or criminal contempt
  - Civil contempt sanctions
    - Designed to enforce compliance with court orders and to compensate those injured by an order violation
    - A sanction designed to coerce compliance, such as a daily fine for each day the defendant violates the order or imprisonment until the defendant complies with the order, remains civil provided that the contempt sanction is subject to purging by compliance with court order
  - Criminal contempt sanctions
    - Designed to vindicate the power of the court by punishing violators: “Criminal contempt is a crime in the ordinary sense.”<sup>1</sup>
    - Are punitive rather than remedial, and are characterized by fixed, unconditional sentences or fines
- A finding of contempt in the D.C. circuit requires a showing by “clear and convincing evidence” that the defendant violated a “clear and unambiguous” prohibition in the consent decree<sup>2</sup>

<sup>1</sup> Bloom v. Illinois, 391 U.S. 194, 201 (1968); *accord*, International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 826 (1994).

<sup>2</sup> See United States v. Microsoft Corp., 980 F. Supp. 537, 541 (D.D.C. 1997). Other circuits have similar requirements, although the articulation may be different.

# Consent decree violations

## ■ FTC

- Violations of an FTC cease and desist order issued under FTC Act § 5 are subject to civil penalties and possible subsequent criminal sanctions
- Civil penalties: FTC Act § 5(l)

Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.<sup>1</sup>

- The maximum amount of the penalty today has been inflation-adjusted to \$41,484 for 2018
- If the district court enters an injunction in aid of a Commission order pursuant to Section 5(l), violations of that injunction are subject to civil and criminal contempt sanctions

<sup>1</sup> 15 U.S.C. § 5(l).

# Consent decree violations

- Violation of FTC consent order: *Boston Scientific*<sup>1</sup>
  - 1995, Boston Scientific agreed to acquire Cardiovascular Imaging Systems (CVIS)
    - At the time, Boston Scientific and CVIS were the two of the three suppliers of intravascular ultrasound (IVUS) catheters, an emerging new technology for diagnosing heart disease, and collectively accounted for 90% of the sales of IVUS catheters
    - They were also involved in vigorous patent infringement cross-litigation to block each other from continuing to manufacture and sell IVUS catheters
  - Boston Scientific agreed to an FTC consent order requiring it to license specific intellectual property rights in IVUS catheter technology to Hewlett-Packard to enable it to enter into the manufacture and sell of IVUS catheters
    - HP had been in a joint venture with Boston Scientific whereby HP developed, manufactured and sold the electronic console that displayed the images generated by the Boston Scientific IVUS catheter.
  - Boston Scientific signed an IP license agreement requiring it to provide HP with the rights specified in the FTC consent order but it breached this agreement
    - HP gave up trying to enter the catheter market and exited the console market altogether in November 1998
    - In early 1999, HP filed a private action against BSC alleging breach of contract, monopolization and attempted monopolization (subsequently settled)

<sup>1</sup> See *United States v. Boston Scientific Corp.*, 253 F. Supp. 2d 85 (D. Mass. 2003).

# Consent decree violations

- Violation of FTC consent order: *Boston Scientific/CVIS*
  - In 2000, the DOJ, acting on behalf of the FTC, filed suit for civil penalties under Section 5(l)
  - In 2003, after significant litigation, the court found in favor of the government and ordered Boston Scientific to pay \$7.04 million in civil penalties for two violations
    - In determining penalty amount, the court looked at six factors:
      1. harm to the public;
      2. benefit to the violator;
      3. good or bad faith of the violator;
      4. the violator's ability to pay;
      5. deterrence of future violations by this violator and others; and
      6. vindication of the FTC's authority
    - Calculation
      - FTC final decision and order: April 5, 1995
      - ADP violation
        - May 5, 1995: Boston Scientific takes position not to supply ADP technology rights to HP
        - July 9, 1997: FTC staff opines that ADP technology is covered in consent decree
        - March 1, 1998: HP exits market
        - Court: \$5000 per day from May 5, 1995 to July 8, 1997 + \$10,000 per day from July 9, 1997 to March 1, 1998 = \$6,325,000 (maximum civil penalties available in the respective time periods)
      - Discovery violation: \$11,000 per day from March 1, 1998 (when samples of the Discovery catheter were available for promotion) and May 5, 1998 (the end of the supply period required by the FTC order) = \$715,000