

CLASS 5 SLIDES

Unit 4. Merger Antitrust Settlements

Merger Antitrust Law
Georgetown University Law Center
Professor Dale Collins

September 14, 2021

A Few Things to Remember

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

Topics

- Overview of adjudicated relief and consent settlements
- Consent remedies in horizontal cases¹
- Consent settlement procedures and documents
- Consent decree violations

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

Adjudicated relief/consent decrees

- Usual outcome of DOJ/FTC reviews when the agency intervenes: Overwhelmingly consent relief
- 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 the competitive concerns with the immediate deal
 - But also with an eye to implications for consent decree negotiations in future deals
- Upshot
 - Agencies do not compromise in consent decree negotiations and accept less relief than they believe is necessary to cure the competitive problem
 - Agencies will rarely if ever negotiate changes to “boilerplate” (i.e., standard provisions used in all consent decrees)

Adjudicated relief/consent decrees

- Enforceability—No difference in relief between adjudicated relief and consent decrees
 - But parties do not admit liability when agreeing to a consent decree
- Federal judicial consent decrees are injunctions that are entered as a final judgment
 - Violations are enforceable through civil and criminal 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 2021, the maximum penalty is \$43,792 per day (adjusted annually)
 - District court will also issue injunction to prevent future violations
 - These district court orders are enforceable through judicial contempt sanctions (criminal and civil)
 - Contempt sanctions can expose the company to greater liability than the per day civil penalty

Consent Remedies: The Substance

Mergers and acquisitions involving competitors are by far most common type of business combination challenged under the merger antitrust laws. We will examine relief in vertical cases later in the course.

Agency perspectives

- **Standard:** To satisfy the agency, the consent settlement must—
 1. Eliminate the agency's competitive concerns
 2. Be workable in practice (viability)
 3. Must not involve the agency in continuous oversight or affirmative regulation
 4. Must not create its own antitrust concerns
- Remedies in horizontal cases (almost) always requires structural relief
 - In the Trump administration, the AAG took a strong stand and refused to accept consent decree settlements in any type of case that involved behavioral restrictions as relief
 - Biden administration enforcement officials have not spoken on this, but it is likely that they will continue to reject behavioral consent decrees
- The agencies do not accept price caps
 - 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

1. 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
2. Examples:
 - Staples/Office Depot (2015)
 - Sysco/US Foods (2015)
 - NASDAQ/NYSE Euronext (2011)
 - AT&T/T-Mobile (2011)
3. Where the transaction is not fixable the agency's satisfaction, the agency will go to court and seek a blocking injunction unless the parties voluntarily terminate the transaction

“Litigating the fix”

■ The idea

- 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, the practice of the courts is to assess the competitive effects of the transaction assuming that the fix has occurred
- The courts, of course, allow the agency to challenge the competitive sufficiency of the fix

■ Collateral attack

- Third parties can collaterally attack the sufficiency of a DOJ/FTC consent decree in their own Section 7 action
- This is what a group of states did in the T-Mobile/Sprint deal after the DOJ accepted a consent decree¹

¹ See *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179 (S.D.N.Y. 2020). Unfortunately, the states did not prevail in their challenge. In retrospect, most observers now believe that the DOJ consent decree in fact failed to preserve competition. We will examine T-Mobile/Sprint later in the course.

Agency requirements

1. Almost always require the sale of a complete “business”
2. Will permit “trade up” solutions
3. Often will require a “buyer upfront”
4. Everything associated with the business to be divested must go
 - a. Divest all physical assets
 - b. Divest all IP
 - c. Make designated “key” employees available for hire by divestiture buyer
 - d. Assign/release customer contracts and revenues
 - e. Transfer all business information
5. Merged firm must provide any necessary short-term transition services and support
6. Often will require a “monitor” to oversee performance of obligations
7. No long-term entanglements between the merged firm and the divestiture buyer
8. Agency can withdraw consent, in its discretion, any time before the entry of the final judgment

Agency requirements

- New development: Prior approval provisions
 - Provision requiring prior approval by the reviewing agency of future acquisitions by the defendant-buyer
 - When used in the past, applied only to acquisitions that were not HSR-reportable
 - Remains to be seen what the Biden antitrust enforcement policy will similarly limited
 - Likely to be included to consent decrees for all types of mergers

Example: Albertsons/Safeway¹

■ FTC concern

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

■ Consent order

- 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
 - In each market, all of the divestiture seller's stores had to be sold
 - Everything associated with each divestiture store had to be divested to the divestiture buyer
 - *Exception:* None of Albertsons' or Safeway's trademarks had to be sold
 - Why?

¹ See Albertsons/Safeway case study in optional reading materials.

Example: TransDigm/Takata¹

- DOJ concern
 - The completed acquisition by TransDigm of SCHROTH from Takata eliminated competition in three worldwide markets for airline restraints:
 - Two-point lapbelts used on commercial airplanes
 - Three-point shoulder belts used on commercial airplanes
 - Technical restraints used on commercial airplanes
 - Inflatable restraint systems used on commercial airplanes

- Consent decree: Required—
 - 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: Here, 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”) and German Federal Ministry of Economic Affairs and Energy, or
 - the Court’s signing of the Hold Separate Stipulation and Order in this matterwhichever is later
 - Combined company had to operate the divestiture assets separately from the rest of the its business pending the closing of the divestiture sale

¹ See TransDigm/Takata case study in optional reading materials.

Agency right of approval

- Agency will require the right of approval over divestiture buyer *and* the divestiture sales agreement
 1. Manner of divestiture must restore competition
 2. Divestiture business must be financially viable
 3. Divestiture must not create its own antitrust problem
 4. Approval is in the agency's sole discretion
- Can be problematic for the merging parties even after the consent decree has been negotiated

Divestiture deadlines

- Agency will require a very tight deadline for closing the divestiture
 - More often than not will require a buyer “up front”
 - Typical deadlines for divestiture closing
 - 10 business for buyers upfront
 - 3 months otherwise
 - Almost always results in a “fire sale”

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.

Monitors and trustees

■ Monitors

- If the consent decree imposes obligations on the merging parties over some period of time, the consent decree may provide for the appointment of a “monitor” to oversee compliance with these obligations
 - Proposed by the merging parties but subject to the approval of the agency
 - Paid for by the merging parties but obligations run to the agency
 - Not an enforcement authority—only reports on compliance to the agency

■ Trustees

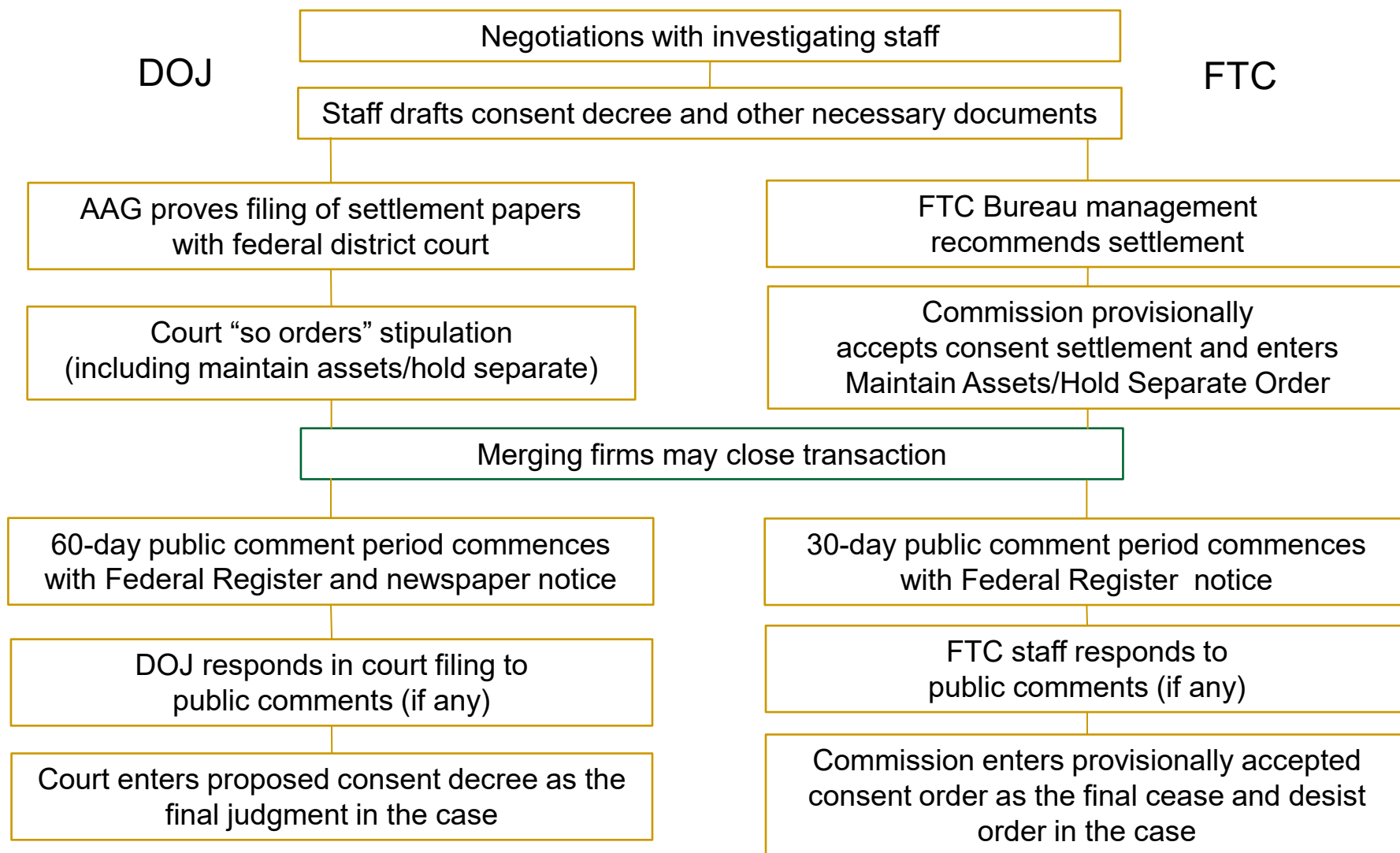
- If the consent decree has a divestiture obligation, it will contain a provision for the appointment of a “trustee” in the event the combined firm fails to divest in the time required by the decree
 - Proposed by the merging parties but subject to the approval of the agency
 - Paid for by the merging parties but obligations run to the agency
 - *Key:* Once appointed, the power to divest is removed by the combined firm and lodged solely with the trustee
 - The combined firm must cooperate with the trustee but has no control or influence over the sales process, the selection of bidders, the selection of the divestiture buyer, or the sales price
 - Trustee required to sell the divestiture package to a buyer acceptable to the agency
 - No minimum reservation price—the primary obligation is to divest to an acceptable buyer regardless of price

Consent Remedies: The Process

Consent settlement documents

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)

Typical settlement process—Overview



Consent Decree Violations

Consent decree violations

■ DOJ

- DOJ consent decrees are technically injunctions ordered by a federal district court
- Violations are punishable by civil or criminal contempt
- Actionable contempt requires a showing by “clear and convincing evidence” that the defendant violated a “clear and unambiguous” prohibition in the consent decree

■ FTC

- FTC consent orders are technically cease and desist orders issued by the FTC
- Violations are subject to civil penalties in federal district court
 - 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 FTC Act § 5(l), violations of that injunction are subject to civil and criminal contempt sanctions

Consent decree violations

■ DOJ

- 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 decree¹
- New innovation in the Trump administration
 - Recent DOJ consent decrees contain language designed to lower the evidentiary standard for DOJ to prove civil contempt for a consent decree violation from clear and convincing evidence to a preponderance of the evidence:

The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including its right to seek an order of contempt from this Court. Defendants agree that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of the decree and the appropriateness of any remedy therefor by **a preponderance of the evidence**, and they waive any argument that a different standard of proof should apply.²

¹ 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.

² See *United States v. TransDigm Grp. Inc.*, No. 1:17-CV-02735-ABJ, 2018 WL 2382602, at *9 (D.D.C. Apr. 4, 2018).

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 contempt 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.¹

- The maximum amount of the penalty today has been inflation-adjusted to \$43,792 for 2021
- Civil penalty actions are subject to the preponderance of the evidence standard
- Enforcement injunctions
 - 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

¹ 15 U.S.C. § 5(l).