

CLASS 5 SLIDES

Unit 5. Merger Antitrust Settlements

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Topics

- The basic idea
- Some important legal technicalities
- DOJ/FTC enforcement practice
- Consent decrees
 - Fixing the antitrust concern (the “fix”)
 - Other important provisions
 - The process
- Consent decree violations
- Two variations
 - “Litigating the fix”
 - “Fix it first”

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
("Litigate the fix")

- 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

"Fix it first"

- Merging parties restructure transaction to eliminate problematic overlap by narrowing assets to be purchased or selling assets to a third party
- Merging parties file new HSR notifications for the restructured transaction
 - HSR reports also may need to be filed for the restructured transaction
- When done to the agency's satisfaction, eliminates the need for a consent decree or other enforcement action

The Basic Idea

The basic idea

- The Section 7 concern

Suppose that the investigating agency concludes that a horizontal merger, if consummated, would violate Section 7 in some relevant market

- The “fix”

Require one of the merging parties to sell its business in the relevant market to a third party with the ability and the incentive to run the divested business with at least the same competitive force as the divestiture seller

- The upshot

The market structure does not change: The same number of firms continue to operate in the market with the same competitive force postmerger as premerger

The basic idea

- The fundamental consent decree requirement:

The divestiture buyer must preserve the level of premerger competition in the market of concern so that the putative anticompetitive effect never materializes postmerger

- Two requirements here

1. The divestiture buyer must have the *ability* and the *incentive* to preserve the premerger level of competition postmerger for the foreseeable future
 - *Corollary 1*: The divestiture business must be *financially viable* in the hands of the divestiture buyer
 - *Corollary 2*: Financial viability may require the divestiture of additional assets not strictly necessary to eliminate the antitrust problem
2. The divestiture must preserve competition *ab initio*—there cannot even be a transitory anticompetitive effect postmerger

The divestiture buyer is said to “step into the shoes” of the divestiture seller:

The identity of the owner of the divested assets change, but the structure and competitive performance of the relevant market remains the same

The basic idea

■ *Illustration: DaVita/University of Utah*¹

□ The deal

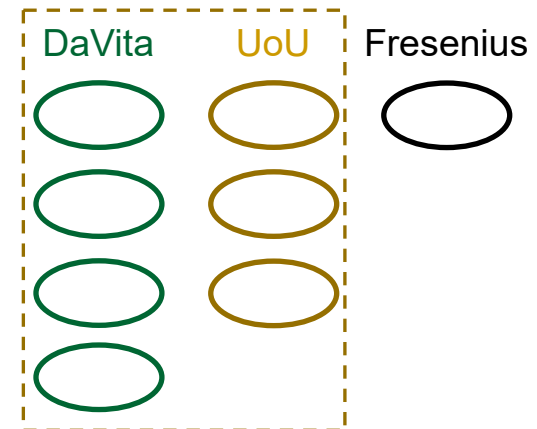
- In September 2021, DaVita, the largest operator of outpatient dialysis clinics in the United States, agreed to acquire the University of Utah's 18 dialysis clinics in and around Utah in a non-HSR reportable transaction

□ The antitrust problem

- In the greater Provo market, there were only three dialysis providers:

- DaVita: 4 clinics
- UoU: 3 clinics
- Fresenius: 1 clinic

Provo market



- Barriers to entry into dialysis clinics are very high and no new entry was likely postmerger
- The transaction would reduce the number of competitors in the Provo market from three to two (a “3 → 2 transaction”), with DaVita operating seven out of the eight clinics in the area

¹ For the consent order and related documents, see the [DaVita/University of Utah case study](#) in the Unit 5 supplemental materials.

The basic idea

■ Illustration: DaVita/University of Utah

□ The consent decree

- The FTC and DaVita resolved the FTC's concerns at the end of the investigation through a consent decree requiring DaVita to—

- Divest the three UoU Provo clinics to Sanderling Renal Services, Inc. ("SRS"), a small but established operator of dialysis clinics nationwide but without any presence in Utah
- Provide transition services to SRS for up to one year
- Assist SRS in hiring the employees at the divested clinics and refrain from soliciting those employees for 180 days
- Prohibit DaVita from entering into or enforcing noncompete agreements with any University nephrologist
- Prohibit DaVita from entering into any non-solicitation agreement with SRS that would prevent SRS from soliciting DaVita's employees for hire
- Requires DaVita to obtain prior approval from the Commission for any future acquisition of any ownership interests in any dialysis clinic in Utah

- Term of the consent decree: 10 years from date of final acceptance

Requires the sale of all the seller's business in the relevant market (standard)

Requires a "buyer upfront" (standard in most cases)

Standard provision

Standard provision

New provision

New provision

New provision

Reflects the FTC's new concerns about the effect of mergers on labor

Once the FTC provisionally accepted the consent order on October 25, 2021, the parties were free to close the main transaction. The settlement, however, required DaVita to divest the three Provo clinics to SRS within ten days of the closing of the main transaction.

The basic idea

- *Illustration: DaVita/University of Utah*
 - The FTC found no antitrust problems with DaVita's acquisition of the other 15 UoU clinics

The keys to a consent decree are—

- 1. the existence of parts of the deal that do not present antitrust problems that are separable from the parts of the deal that do, and*
- 2. A divestiture buyer with the ability and incentive to operate the divested assets with the same competitive force as the divestiture seller so as to preserve competition in the relevant market postmerger*

The basic idea

- There are three ways to restructure a deal to avoid a problematic antitrust overlap:
 1. Postmerger sale to a third party under a (traditional) consent decree
 - Restructure the transaction under a consent decree to sell one side of the problematic overlap (either the buyer or seller) to a third party approved by the agency under a divestiture agreement approved by the agency *after* the buyer and seller close their main transaction
 - Report the original transaction on the HSR filing—shows the overlap
 - (Maybe) The third party could be a newly created “Spin Co.” if properly structured
 2. Leave the seller’s overlap business with the seller
 - Restructure the transaction with the seller so that the seller retains its side of the problematic overlap, so it never passes to the buyer
 - Report only the restructured transaction on the HSR filing—shows no overlap
 3. Premerger sale to a third party (“Fix it first”)
 - Restructure the transaction so that one side of the problematic overlap (either the buyer or the seller) is sold to a third party *before* the buyer and seller close their main transaction
 - = The “fix” without the consent decree
 - Report only the restructured transaction on the HSR filing—shows no overlap

NB: If the agency refuses to accept the fix to settle the investigation, the parties can put the fix in place contingent on the closing of the main deal and “litigate the fix”

The basic idea

- A caution:
 - In some deals, there is a meaningful prospect that the original deal can be successfully defended, and that no “fix” is necessary
 - In other deals, the “fix” is obvious to the parties and the investigating agency
 - In still other deals with multiple horizontal overlaps, it may be difficult if not impossible to determine precisely what overlaps the agency will conclude are problematic and hence have to be fixed
 - The only way to find out for sure is to go through the HSR investigation and negotiate a mutually acceptable solution (if possible) with the investigating agency during the investigation

In the absence of a mutually acceptable solution during the investigation, the only alternatives are to—

- 1. Litigate the merits of the original deal*
- 2. Litigate the fix*
- 3. Voluntarily terminate the transaction*

The basic idea

- Three basic divestiture consent decree paradigms
 1. Divest standalone business unit complete with all necessary back office and other support
 - Divestiture of a legal entity—a corporation or an LLC—is desirable since all employees and contracts with the company follow the sale to the divestiture buyer
 - If the Commission is unsure whether an acceptable divestiture buyer will emerge, the Commission will insist on a “buyer upfront”—that is, it will not accept the consent decree until the Commission vets and approves the divestiture buyer and the definitive purchase agreement
 - Finding an upfront buyer can delay the closing of the main transaction for several months if the divestiture buyer was not identified and signed up during the investigation
 - Today, buyers upfront are usually required
 2. Divest an operating business
 - Core business operations divested—Divestiture buyer to provide back office and other support
 - Agencies almost always demand an upfront buyer
 3. Divest assets necessary for divestiture buyer to operate the divestiture business
 - Divestiture buyer to provide all support necessary to operate the business
 - Agencies always demand an upfront buyer

These three paradigms also apply in “litigate the fix” and “fix it first” solutions

Some Important Legal Technicalities

Some important legal technicalities

1. Consent decrees are **final judgments** in a judicial or administrative adjudicative proceeding
 - ❑ A judicial or administrative complaint must initiate these civil proceedings
 - ❑ DOJ consent decrees are federal district court permanent injunctions
 - Violations are enforceable through civil and criminal contempt sanctions
 - ❑ FTC consent orders are administrative “cease and desist orders”
 - Violations are enforceable through federal district court action for civil penalties
 - ❑ Penalties are inflation adjusted
 - ❑ In 2024, the maximum penalty is \$51,744 per day (adjusted annually)¹
 - The district court will also issue an injunction to prevent future violations of the FTC consent order
 - ❑ 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

¹ 89 Fed. Reg. 1445 (Jan. 10, 2024) (increasing civil penalty from \$50,120 to \$51,744 per day effective January 10, 2024, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114–74, § 701, 129 Stat. 599 (2015) (requiring a catch-up CPI inflation adjustment from the date of the statute’s enactment)).

Some important legal technicalities

2. Committed to agency discretion

- ❑ The decision whether to enter into consent decree negotiations or to reject a consent decree is committed to the investigating agency's discretion
- ❑ Agency decisions to refuse to accept a consent decree are not subject to review under the Administrative Procedure Act

Some important legal technicalities

3. No finding of facts or liability

- As a matter of practice, consent decrees are entered by the court or FTC without adjudication of the merits or the finding of any facts
 - There is typically no active litigation: Most consent decrees are negotiated prior to the filing of the complaint and filed simultaneously with the complaint
 - Antitrust consent decrees historically have contained an explicit disclaimer that the parties' acceptance of the consent settlement—
 1. Is for settlement purposes only
 2. Does not constitute an admission by respondents that they violated the law as alleged in the complaint
 3. Does not constitute an admission by the respondents that the facts as alleged in the complaint (other than jurisdictional facts) are true
 - *Note:* An admission of jurisdictional facts is necessary to ensure that the the court or administrative tribunal has subject matter jurisdiction to enter the consent decree

Some important legal technicalities

4. The role of consent

- In the absence of an adjudication of the merits, the power of the court or agency to enter a consent settlement as a final order rests on the consent of the parties to the settlement:

[I]t is the parties' agreement that serves as the source of the court's authority to enter any judgment at all. More importantly, it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree.¹

- Corollaries

- Because the source of the court's authority to enter a consent decree is the parties' agreement and not a violation of law, no proof or admission of a violation of a legal obligation is needed before a court can enter and enforce a consent decree as a judicial order
- Conversely, a person (including a party in the same litigation) that is not a signatory to a consent decree is not bound by it, nor can a consent decree modify a third-party's rights or impose obligations or duties on a third party²
 - Accordingly, if a consent decree imposes obligations on a party that results in a breach of that party's obligations to a third party, the third party may sue for breach and the consent decree does not provide immunity for the breach

¹ Int'l Ass'n of Firefighters Local 93. v. City of 478 U.S. 501, 522 (1986) (citations omitted).

² *Id.* at 529; United States v. Ward Baking Co., 376 U.S. 327 (1964); Hughes v. United States, 342 U.S. 353 (1952).

Some important legal technicalities

5. Dual nature of consent decrees

- *Basic rule*: United States v. ITT Cont'l Baking Co. (1975):

Consent decrees and orders *have attributes both of contracts and of judicial decrees* or, in this case, administrative orders. While they are arrived at by negotiation between the parties and often admit no violation of law, they are motivated by threatened or pending litigation and must be approved by the court or administrative agency. *Because of this dual character, consent decrees are treated as contracts for some purposes but not for others.*¹

- Whether a consent decree will be treated as a contract will depend upon the particular context in which the issue arises

¹ United States v. ITT Cont'l Baking Co., 420 U.S. 223, 237 n. 10 (1975) (internal citation omitted).

Some important legal technicalities

6. Construing consent decrees

- Courts generally construe consent decrees as contracts between the settling parties
 - Consent decrees “closely resemble contracts” and their “most fundamental characteristic” is that they are voluntary agreements negotiated by the parties for their own purposes¹
 - As a general rule, courts construe consent decrees to give effect to the parties’ intent as expressed in the decree itself
 - “[S]ince consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts, without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation.”²
 - *Query*: Is this still the state of the law?
- But the contract analogy does not extend to third-party beneficiary enforcement
 - A consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it³
 - Even intended third-party beneficiaries of a consent decree lack standing to enforce its terms

¹ Int’l Ass’n of Firefighters Local 93. v. City of 478 U.S. 501, 519, 522 (1986).

² United States v. ITT Cont’l Baking Co., 420 U.S. 223, 236-37 (1975).

³ Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 750 (1975).

Some important legal technicalities

7. Modifying consent decrees

- Modification with consent of all parties
 - Courts generally will modify the terms of a consent decree with the consent of all parties, provided that the modification does not contravene the public interest
- Modification over the opposition of a party
 - In *United States v. Swift & Co.*, the Supreme Court rejected the contention that a consent decree should be considered a contract for purposes of determining whether the courts have the power to modify such a decree absent the parties' consent¹

Consider three different scenarios

¹ 286 U.S. 106, 114-15 (1932); see *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 378 (1992) (“[A consent decree] is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.”).

Some important legal technicalities

7. Modifying consent decrees

- Modification over the opposition of a party (con't)
 - *Scenario 1*: Conditions have changed since the entry of the consent decree, the restrictions in the consent decree now affirmatively harm the public interest, and the private party bound by the restrictions seeks modification. The government opposes.
 - Following *Swift*, courts will modify or terminate a consent order over the government's opposition if, because of changed circumstances, the consent order harms the public interest¹
 - Rule 60(b)(5) also provides that a court may relieve a party from a final judgment or order if "applying [the judgment] prospectively is no longer equitable"²

¹ United States v. Swift & Co., 286 U.S. 106, 114 (1932).

² Fed. R. Civ. P. 60(b)(5); see *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 378 (1992) (noting application of Rule 60(b) to a consent decree).

Some important legal technicalities

7. Modifying consent decrees

- Modification over the opposition of a party (con't)
 - *Scenario 2*: Conditions have changed since the entry of the consent decree, and the government concludes that the restrictions it negotiated in the consent decree are now inadequate to preserve competition and seeks modification to include new or enhanced restrictions. The private party opposes.
 - *WDC*: Most likely, courts will be reluctant to impose new obligations on the respondent over the respondent's opposition unless the consent agreement contemplates such changes in light of changed circumstances

Some important legal technicalities

7. Modifying consent decrees

- Modification over the opposition of a party (con't)
 - *Scenario 3*: Conditions have *not* changed since the entry of the consent decree, but the government concludes it has negotiated inadequate relief to preserve competition and seeks to include new or enhanced restrictions. The private party opposes.
 - *WDC*: In the absence of changed circumstances, courts are likely to deny modifications to strengthen the consent order over the respondent's opposition, reasoning that the government must live with the relief it originally negotiated

An important aside: *Cleveland Firefighters*

■ *Cleveland Firefighters*¹

- **Rule:** A court may enter a consent decree as a final judgment even if the consent decree contains relief that a court could not award in a fully litigated proceeding
 - **Corollary:** An agency may demand relief in a consent decree that a court could not award the agency in a litigated proceeding
- **Qualifications:** The Court qualified this rule in two significant ways:
 1. The consent decree cannot conflict with or violate the law on which the complaint was based
 2. Inclusion of relief in a consent does not immunize the parties from a collateral attack that discharging their consent decree obligations—
 - Violates some other law, *or*
 - Breaches some contractual obligation to a third party

Query: Would the court abuse its discretion if it entered a consent decree that it knew required the respondent to violate some law or breach some contract?

¹ Int'l Ass'n of Firefighters Local 93 v. City of Cleveland, 478 U.S. 501 (1986).

Agency Perspectives

Agency perspectives

- Consent settlements
 - The acceptance of a consent settlement is in the unfettered discretion of the investigating agency
 - The agency's willingness to accept a consent decree settlement depends largely on the confidence the agency has that the settlement will in fact negate the anticompetitive effect the agency believes the unrestructured transaction will create
 - Depending on administration, the requisite level of confidence can be anything from likely to a near-certainty that the consent settlement will negate all anticompetitive effects of the merger

Agency perspectives

- Consent settlements

- To satisfy the agency, the consent settlement must—
 1. Give the agency sufficient confidence that the settlement will eliminate the agency's competitive concerns with the main acquisition
 2. Be workable in practice
 3. Must not involve the agency in continuous oversight or affirmative regulation
 4. Must not create its own antitrust concerns

The history

- Since at least 1982 until 2021, the DOJ/FTC has accepted divestiture consent decrees in most cases to resolve competitive concerns

Year	Consent Decree*	Abandoned	Litigation	Closing Statement	Total
2011	20	2	4	2	28
2012	18	1	3	6	28
2013	13	1	3	5	22
2014	22	2	3		27
2015	24	3	7	3	37
2016	26	1	6		33
2017	23	1	3		27
2018	16	1	3	3	23
2019	15	2	7	2	26
2020	22	2	8	1	33
2021	17	4	6		27
2022	8	2	10		20
2023	1	5	6		12
2024 H1	2	6	3		11

NB: 2023 and 2024H1 each contains one Section 8 interlocking directorate consent decree, and 2024H1 also contains one "fix-it-first." So, neither 2023 nor 2024H1 contained a traditional Section 7 consent decree.

* Includes two "fix it first" resolutions in 2012

Source: Dechert LLP, [DAMITT Q2 2024: Abandonments Dominate the Podium in Merger Enforcement](#) (Aug. 6, 2024); Dechert LLP, [DAMITT 2018 Year in Review](#) (Jan. 24, 2019). Dechert declines a "significant" investigation as one that involves a deal that is HSR reportable for which the result of the investigation is a consent order, a complaint challenging the transaction, an official closing statement by the reviewing antitrust agency, or the abandonment of the transaction with the antitrust agency issuing a press release. It does not include an in-depth second request investigation in which the investigating agency concludes there is no antitrust concern but issues no closing statement, resulting in the number of investigations in which the agency takes no enforcement action is undercounted. Dechert calculates the duration of an investigation from the date of announcement to the completion of the investigation (presumably including any time necessary to negotiate a consent decree).

The history

- 1982 through early Obama administration
 - The agencies believed that consent decrees provided the best way to resolve the agency concerns from society's perspective
 - *Social benefits*: The agencies presumed that there were likely significant efficiencies in the nonproblematic parts of the deal, and if the agency did not accept a consent decree and the deal collapsed, consumers would lose the benefits of the nonproblematic parts of the deal
 - *Compromise*: So even if the consent decree did not completely negate the transaction's anticompetitive effect, there was an offsetting social benefit from the efficiencies from the part of the transaction that was allowed to close

The history

- Late Obama/Trump administrations
 - Beginning late in the Obama administration and continuing to some degree in the Trump administration, the agencies began to become more skeptical that consent decrees would cure their perceived competitive problems
 - Two sources for this skepticism—
 1. The emergence of several studies purportedly finding anticompetitive price increases in the market in the wake of a divestiture consent decree, *and*
 2. An increasing view that the nonproblematic parts of a merger did not yield significant efficiencies

NB: Both results are subject to vigorous academic dispute

The history

■ The Biden administration

□ DOJ

- As a matter of principle, consent decrees are not usually an acceptable solution to a problematic merger¹
 - Consent settlements fail frequently and unpredictably
 - The proper remedy for a problematic horizontal merger is a blocking permanent injunction
- Since Jonathan Kanter was sworn in as AAG On November 16, 2021, the DOJ has not accepted a consent settlement in an investigation
 - The court essentially forced the DOJ to accept a consent decree in litigation

□ FTC

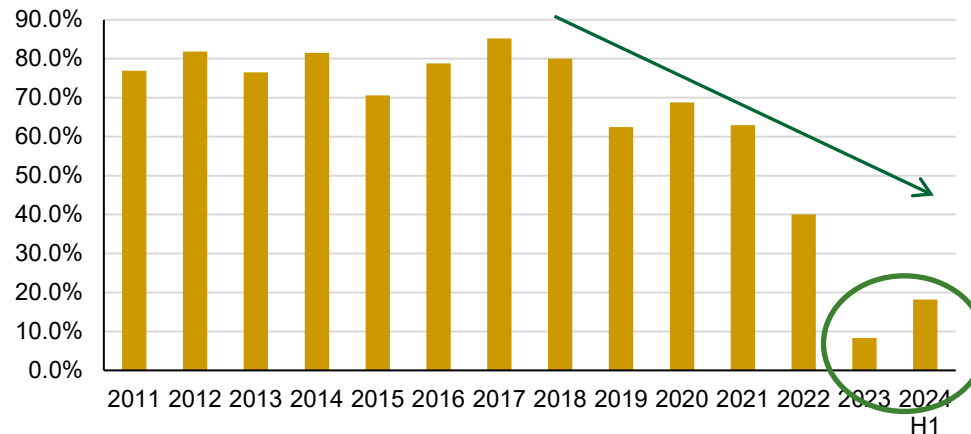
- Since Lina Khan was sworn in as FTC Chair on June 15, 2021, the Commission has exhibited increasing resistance to accepting consent decrees to settle investigations
 - In 2022, the FTC accepted consent decrees in ten merger investigations
 - After 2022, the FTC has accepted no consent decrees to settle a Section 7 merger concern

¹ Jonathan Kanter, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, [Antitrust Enforcement: The Road to Recovery](#), Prepared Remarks at the University of Chicago Stigler Center, Chicago, IL (Apr. 21, 2022).

The history

- Consent decree settlements of investigation over time

Significant U.S. Antitrust Merger Interventions:
Percentage Settled with Consent Decrees



Observe the decline in the Trump administration and the Biden administration to date

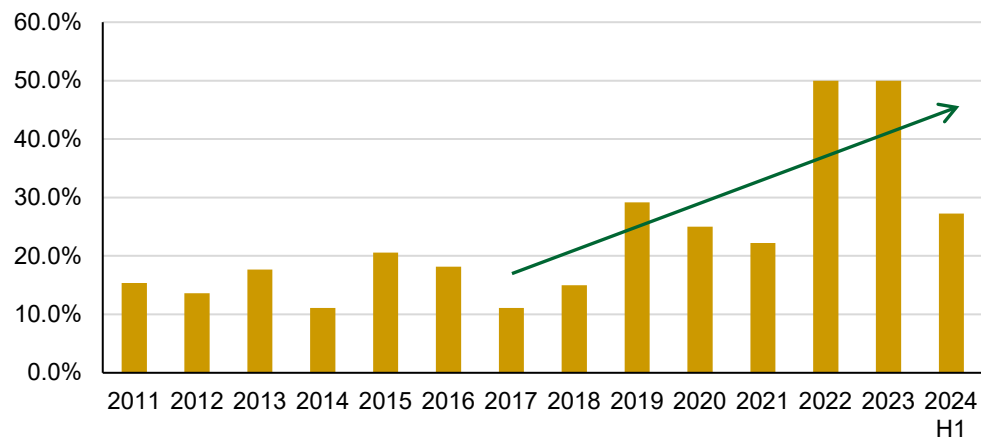
These are not Section 7 consent decrees

Source: Dechert LLP, [DAMITT Q2 2024: Abandonments Dominate the Podium in Merger Enforcement](#) (Aug. 6, 2024); Dechert LLP, [DAMITT 2018 Year in Review](#) (Jan. 24, 2019). Interventions occur when the investigation concludes that the transaction violates Section 7, which is resolved either by consent decree, a complaint, or the parties voluntarily abandoning the transaction.

The history

■ Nonsettlement complaints over time

Significant U.S. Antitrust Merger Interventions:
Percentage Concluded with Complaints



- Agencies increasingly less willing to accept consent settlements at the end of an investigation
- Merging parties increasingly more willing to litigate

Source: Dechert LLP [DAMITT Q2 2024: Abandonments Dominate the Podium in Merger Enforcement](#) (Aug. 6, 2024); Dechert LLP, [DAMITT 2018 Year in Review](#) (Jan. 24, 2019).

The history

■ The Biden administration: “Fix It First”

□ An emerging work-around:

- In a “fix it first,” the parties restructure the transaction to eliminate the problematic horizontal overlap and file their HSR notifications only on the restructured, nonoverlapping transaction
- The divestiture sale must be consummated *before* the main transaction closes because the HSR filings will not cover a transaction with the overlap
 - However, the divestiture closing of the divestiture sale may be delayed until the main (restructured) transaction “clears” the merger review
- The antitrust concern presented by the original overlap must be entirely eliminated by the “fix it first” divestiture to the satisfaction of the investigating agency in—
 - in the business and assets to be divested
 - the manner of divestiture (including any ancillary transaction agreements), *and*
 - the identity of the divestiture buyerOtherwise, the agency will challenge the transaction as violating Section 7
- The merging parties can “litigate the fix” if the investigating agency rejects the “fix it first” solution
- *The idea*: Since the buyer never takes control of the two overlapping businesses, there is no need for a consent decree

Applies to the DOJ—the FTC will want a consent decree rather than a “fix it first”

Consent Remedies in Horizontal Cases: The Details

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 other types of transactions later in the course.

Agency requirements

1. Almost always require the sale of a complete “business”
2. Will permit “trade up” solutions
3. Typically 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 so that the divestiture can immediately compete
6. Often will require a “monitor” to oversee performance of obligations
7. No long-term entanglements between the merged firm and the divestiture buyer

Agency requirements

8. Agency will require the right of approval over divestiture buyer *and* the divestiture sales agreement
 9. Agency will require a very tight deadline for closing the divestiture after final approval of the consent decree
 - 10 business days for buyers upfront
 - 3 months otherwise
- } Typical
10. If the consent decree has a divestiture obligation, it will contain a provision for the appointment of a “trustee” to sell the divestiture assets in the event the merged firm fails to divest in the time required by the decree
 11. Agency can withdraw consent, in its discretion, any time before the entry of the final judgment

Agency requirements

12. New development: Prior approval provisions

- ❑ The idea
 - Prior approval provisions block the closing of a subsequent transaction within the scope of the provision until the responsible agency provides its written approval for the transaction
- ❑ The current practice
 - Employed by both the DOJ and FTC
 - Applies to all future acquisitions by the merged firm in the relevant market
 - ❑ When used in the past, applied only to acquisitions that were not HSR-reportable
 - Likely to be included to consent decrees for all types of mergers
 - The FTC has started including provisions in some consent decrees that purport to require the divestiture buyer to obtain the prior approval of the Commission before any sale of the divestiture assets during the term of the consent decree
 - ❑ *Query:* Are these provisions enforceable against the divestiture buyer that is not a party to the consent decree?
- ❑ Fears
 - The agencies could extend the scope of a prior approval provision beyond the relevant market
 - ❑ Could include nationwide wide coverage
 - ❑ Could include other products
 - There is no time limit for the responsible agency to act on an application
 - ❑ Could kill off a deal through a “pocket veto”

Consent Remedies: The Process

The basic idea

■ The process

1. The enforcement agency and parties agree on the antitrust concern to be resolved
2. The parties negotiate a package of business operations, assets, and ancillary commitments that would permit a qualified third-party divestiture buyer to maintain the premerger level of competition
3. The parties memorialize the divestiture package in a proposed consent decree and related documents
4. The merging parties find a divestiture buyer
5. The divestiture buyer applies for agency approval
6. The agency approves the divestiture package and divestiture buyer
 - Assumes the agency requires a “buyer upfront”
 - In some cases, the agency will accept a consent agreement that provides for the identification of the divestiture buyer after the agency accepts the consent settlement
7. DOJ files complaint and motion for entry of consent decree in federal district court/
FTC provisionally accepts consent order
8. The agency publishes the proposed consent decree in the federal register and other venues inviting public comments
9. The court/FTC considers public comments and agency response
10. The court/FTC enters the consent decree as a final judgment

Consent settlement documents

DOJ (federal district court proceeding)	FTC (FTC administrative proceeding)
Complaint	Administrative complaint

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

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

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)

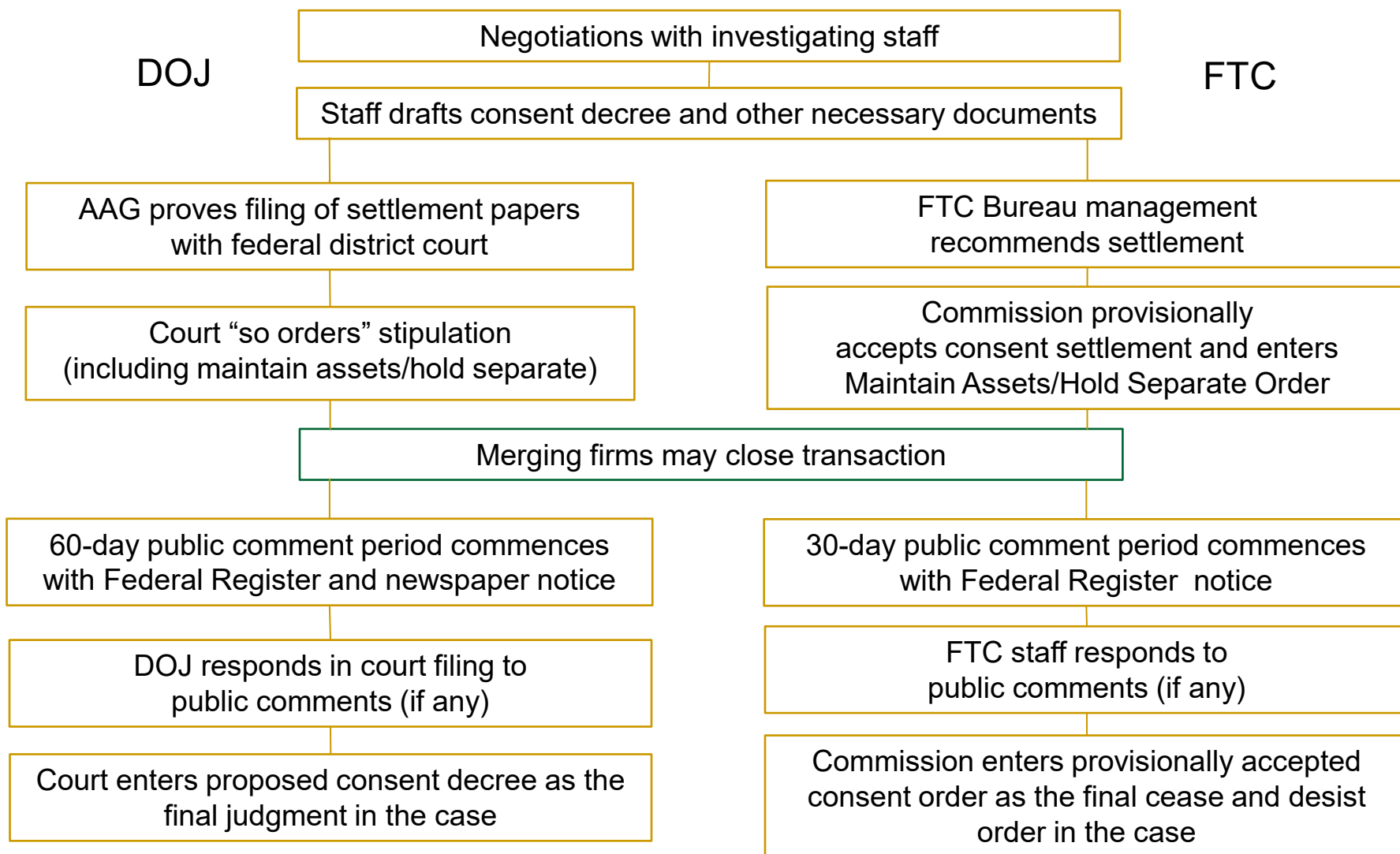
Consent settlement documents

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
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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 \$51,744 for 2024
 - 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 \$51,744 for 2024
- 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).

“Litigating the Fix”

Options if the agency refuses to settle

- If the agency refuses to settle at the end of an investigation, the merging parties have three choices—
 1. They can preempt litigation by voluntarily terminating their merger agreement and withdrawing their HSR filings
 2. They can proceed to court and litigate the merits of the original deal
 - The agency will litigate to obtain what the agency believes is a suitable permanent injunction (almost always a blocking injunction in a preclosing challenge)
 3. They can “litigate the fix”
 - That is, they can contractually implement their proposed divestiture consent decree by agreeing to sell the proposed divestiture business and assets to a third party
 - The court will evaluate the merits of the transaction with the “fix” in place, that is, it will evaluate—
 - Whether the main transaction, without the business and assets subject to the fix, violates Section 7, *and*
 - Whether the fix—including the business and assets to be divested and the qualifications of the divestiture buyer—is sufficient to preserve competition in the alleged problematic market
 - If the fix will not preserve competition, then the main transaction violates Section 7

“Litigating the fix”

- Reasons the agency might reject a proffered fix—
 1. Does not cover all the relevant markets of concern to the agency,
 2. Fails to include all the assets the agency believes are necessary for the divestiture buyer to preserve the premerger level of competition, *or*
 3. Does not involve a divestiture buyer with the ability or resources the agency believes—
 - a. Is financially viable, *or*
 - b. Lacks the ability or incentive to preserve the premerger level of competition

“Litigating the fix”

■ Burden of proof in litigating the fix

- The burden is on the parties to show that the fix defeats the agency prima facie case against the original deal
- Depending on the case, this may require the merging parties to—
 - Defeat the agency prima facie case in the relevant markets not addressed by the fix
 - Persuade the court that the necessary assets in the hands of a qualified divestiture buyer will eliminate any reasonable likelihood of an anticompetitive effect in the relevant market in which the fix operates
 - Persuade the court that the divestiture buyer has the incentive and ability with the divestiture assets to preserve the premerger level of competition in the relevant market in which the fix operates

In many if not most cases, the merging parties will have to do all three

If the “fix” does not defeat the government’s prima facie case in some market, then the restructured transaction violates Section 7

“Litigating 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.