Unit 1B. Merger Antitrust Divestiture Solutions in Remedies and Settlements

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Outcomes in DOJ/FTC Reviews

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
"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

Some Recent History

Some recent history

- Agency practice
  - Historically, from at least 1982 until the Biden administration, the vast bulk of transactions that the antitrust agencies concluded were likely to violate Section 7 have been settled by a consent decree
    - Horizontal transactions typically were settled by a consent decree requiring one or the other party's overlapping business and assets in each problematic market to be divested to a third party acceptable to the investigation agency
    - Vertical mergers were consistently settled by "behavioral" consent decrees—that is, consent decrees designed to ensure that the combined firm would not foreclose or discriminate against rivals at one level that was a customer or supplier of the firm at the other level

Some recent history

- Obama and Trump 1.0 administrations
  - Over time, however, both agencies grew increasingly skeptical that consent decrees—whether structural or behavioral—would preserve the competition that they believed otherwise would have been lost due to the transaction
    - Beginning in the late Obama administration, the agencies became increasingly demanding that—
      - Greater confidence that the business and assets to be divested be sufficient to preserve premerger competition in the markets of concern
      - The divestitures involved operating business units and not isolated assets, *and*
      - A signed definitive divesture agreement with an "upfront" divestiture buyer

      would be sufficient to preserve premerger competition in the markets of concern
    - Beginning in the Trump 1.0 administration, the agencies categorically rejected "behavioral" consent decrees—the traditional solution to problematic vertical mergers—on the grounds that they were too difficult to monitor and enforce

Some recent history

- The Biden agencies
  - The DOJ took skepticism of consent decrees to the extreme
    - During Jonathan Kanter's tenure as the AAG (November 16, 2021 − December 20, 2024), the Antitrust Division did not accept a consent decree to settle any merger antitrust investigation
      - When the agency concludes there a problem, the parties have only two choices—
        - Put the agency to its proof in litigation in federal district court, *or*
        - Voluntarily terminate the merger agreement and abandoned the transaction
      - In some instances, however, the Antitrust Division has agreed to a "fix it first" solution without a consent decree
        - This requires the merging parties to divest one party's overlapping business to a divestiture buyer acceptable to the agency before the main transaction is consummated
        - In a normal consent decree, the merging parties would close the main transaction first and then have a short period of time (often measured in days) to consummate the divestiture transactions—this means that the merged company would own and operate both sides of a problematic overlap for a short period of time
        - As a result of the preclosing divestiture, the merged company never own both sides of a problematic overlap, so there is nothing for a consent decree to fix
        - While "fix it first" solutions allow the DOJ to keep its record of not accepting consent decrees, they are troubling from a public policy perspective because they achieve the same solutions as a consent decree but without the protections of a consent decree.
    - The FTC, under Chair Lina Khan, accepted only 15 divestiture consent decrees out of 67 total enforcement actions--about 22%, much less than historical FTC average[1]

[1] *See* Fed. Trade Comm'n, Accomplishments: June 2021–January 2025 (Jan. 19, 2025).

Some recent history

- The Trump 2.0 agencies
  - Trump 2.0 administration appears to be returning to the more traditional practice of accepting properly tailored consent decrees to settle merger investigations
  - Although it remains early in the administration, statements by senior DOJ and FTC officials indicate that:
    - Structural remedies will once again be the preferred tool for resolving horizontal mergers that raise competitive concerns
    - The agencies are open to using divestiture consent decrees, subject to rigorous standards for buyer suitability and asset scope
    - Behavioral remedies remain disfavored, particularly in vertical mergers, though not categorically rejected
  - This return to traditional practice restores the full range of settlement options that merging parties and agency staff have historically relied on to resolve investigations: litigation, abandonment, consent settlement, and fix-it-first restructuring

Consent Decree Divestiture Solutions[1]

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

The basic idea

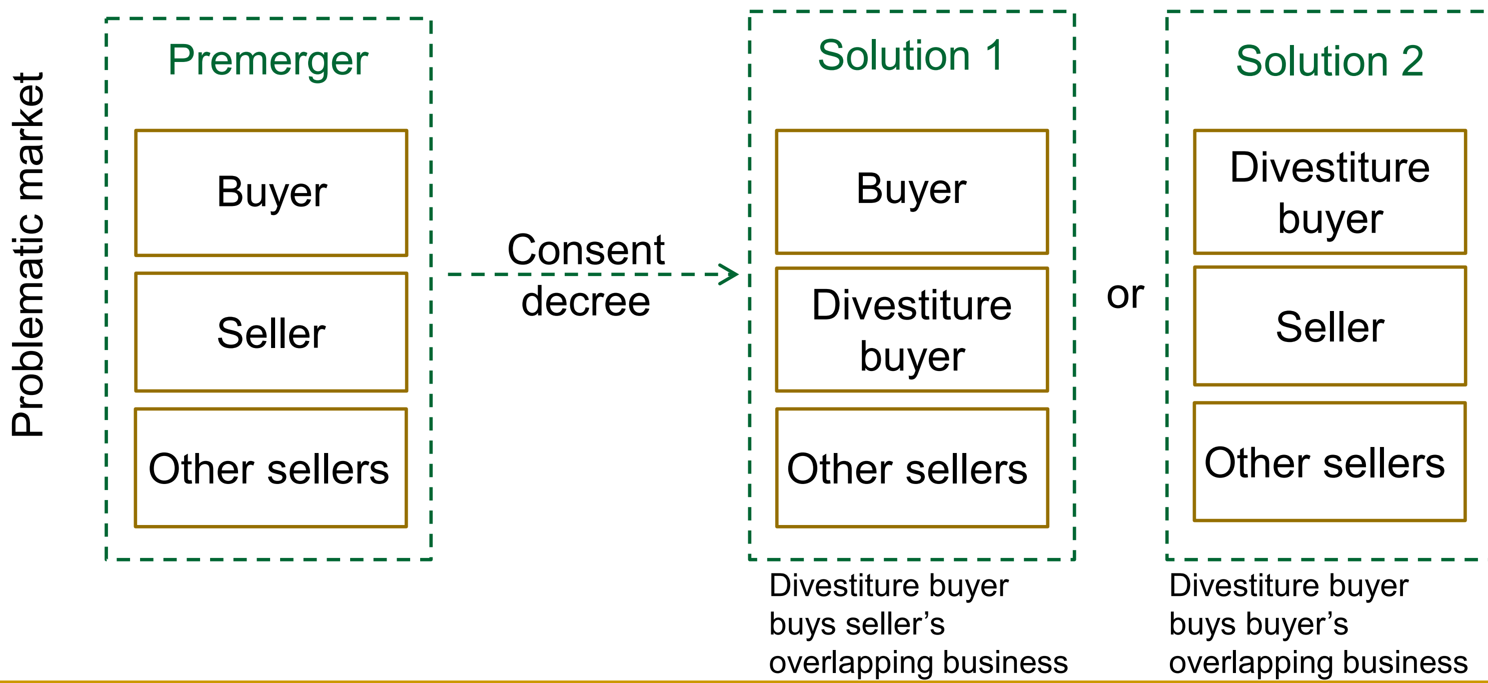
- Divestiture solutions in horizontal mergers
  - A horizontal transaction violates Section 7 because the combination of the respective businesses of the parties would likely result in a substantial lessening of competition or a tendency to monopoly in some relevant market
  - The violation could be avoided if the parties did not combine the problematic businesses in the relevant market
  - *Solution*:
    - Divest the overlapping business of one of the parties to a third party capable of operating the divested business postmerger with the same competitive force as the divestiture seller did premerger.
    - *Schematically*: Buyer is to acquire multiple businesses from Seller. The only business in which both parties manufacture and sell (“overlap”) is widgets, which are sold nationwide. The FTC alleges that the combination of two widget businesses would violate Section 7. The merging parties sell the Seller’s widget business to a Divestiture Buyer who can operate the business with the same competitive force postmerger as did the Seller premerger. Premerger, Buyer competed with Seller in the manufacture and sale of widgets. Postmerger, Buyer competes with Divestiture Buyer in the manufacture and sale of widgets. In principle, with this divestiture, no competition will be lost from Buyer acquiring Seller.

The basic idea

- The basic requirement:

  The divestiture buyer must preserve the level of premerger competition in the market of concern following the closing of the main transaction

  - The divestiture buyer is said to "step into the shoes" of the divestiture seller
    - The identity of the owner of the divestiture business changes, but the structure of the problematic market remains unchanged:



The basic idea

- The legal nature of a consent decree
  - The obligation to divest is entered as a final judgment in a judicial or administrative proceeding
    - A judicial or administrative complaint must initiate these civil proceedings
  - DOJ consent decrees are federal district court 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)
    - 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

Basic Divestiture Relief Practice

Basic divestiture relief practice

- There are three keys to a consent decree—
  1. The existence of parts of the deal that do not present antitrust problems (preferably where the main transaction has demonstrable significant procompetitive effects)
  2. The separability of the parts of the deal from the buyer or the seller that do have antitrust problems
  3. The divestiture of the problematic parts to a divestiture buyer that has the ability and incentive to operate the divestiture assets with the same competitive force postmerger as the divestiture seller had premerger

Basic divestiture relief practice

- *Illustration*: DaVita/University of Utah
  - 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 are only three dialysis providers: UoU (3 clinics); DaVita (4 clinics); Fresenius (1 clinic)
    - 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
  - The FTC found no antitrust problems with DaVita’s acquisition of the other 15 UoU clinics

Basic divestiture relief practice

- *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 ← Requires a "buyer upfront" (standard in most cases)
      - Provide transition services to SRS for up to one year ← Standard provision
      - Assist SRS in hiring the employees at the divested clinics and refrain from soliciting those employees for 180 days ← Standard provision
      - Prohibits DaVita from entering into or enforcing noncompete agreements with any University nephrologist ← New provision
      - Prohibits DaVita from entering into any non-solicitation agreement with SRS that would prevent SRS from soliciting DaVita's employees for hire ← New provision
      - Requires DaVita to obtain prior approval from the Commission for any future acquisition of any ownership interests in any dialysis clinic in Utah ← 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.

Basic divestiture relief practice

- 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 after the restructured deal closes
  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
  7. DOJ files a complaint and motion for entry of the consent decree in federal district court/FTC provisionally accepts an administrative 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 decides if entry of the consent decree as a final judgment is in the public interest

Basic divestiture relief practice

- Some observations
  1. The divestiture assets must encompass everything necessary for the divestiture seller to operate the divestiture business postmerger with at least the same competitive force as the divesture seller premerger
     - The agencies strongly prefer complete, stand-alone businesses to be divested
  2. The divestiture buyer must have the incentive and the ability to operate the divestiture assets postmerger with at least the same competitive force as the divesture seller premerger
     - The agencies will insist on approving the divestiture buyer and will vet the divestiture buyer, its experience, financial condition, and business plan to operate the divesture assets
  3. The divestiture seller must operate the business independently in the ordinary course until the closing of the divestiture sale with the divestiture buyer
  4. The divestiture buyer must be able to operate in the divestiture business immediately upon the divestiture's closing to ensure that there is no temporary loss of competition in the relevant market
     - This often requires the combined company to offer the divesture buyer some short-term *transition services* as the divestiture buyer gets up and running
  5. The divestiture seller must be able to operate the divestiture business without any entanglements with or impediments from the combined company
     - For example, the combined company cannot supply the divestiture seller with a critical input (apart from any transition services agreement) or provide the divestiture buyer with financing, and the combined company may have to release key employees from any noncompete employment restrictions to enable the employees to accept employment with the divestiture buyer
  6. The divestiture to the divestiture buyer cannot create its own antitrust problems

Divestiture Consent Decree Paradigms

Divestiture consent decree paradigms

- Three basic divestiture consent decree paradigms
  1. Divest standalone business
     - Complete with all necessary back office and other support
     - *Example*: Ardagh/St. Gobain[1]
       - Ardagh agreed to divest Anchor Glass Container Corporation, which Ardagh acquired in 2012 to build its U.S. glass bottle business, to Glass Container Acquisition LLC, an affiliate of KPS Capital Partners L.P., a private equity firm, in connection with Ardagh's acquisition of Saint-Gobain Containers, Inc.
       - In addition to Anchor's manufacturing facilities, the divestiture operation included U.S. management and all Ardagh's U.S. back office operations
       - Given that Anchor Glass was a standalone business unit, the Commission was willing to entertain and ultimately approve a private equity firm as the divestiture buyer
     - Observations
       - Divestiture of a legal entity—a corporation or an LLC—is desirable since all employees and contacts with the company follow the sale to the divestiture buyer
       - Since the Commission was unsure whether an acceptable divestiture buyer would emerge, the Commission insisted on a "buyer upfront"—that is, it would not accept the consent decree until the Commission vetted and approved the divestiture buyer and the definitive purchase agreement
         - This delayed the closing of the main transaction for several months
       - Today, buyers upfront are much more the rule than the exception

[1] Complaint, Ardagh Group, S.A., 157 F.T.C. 1548 (June 28, 2013); Application for Approval of Divestiture of Anchor Glass Business to Glass Container Acquisition LLC, Ardagh Group, S.A., No 9356 (F.T.C. Apr. 28, 2014); Decision and Order, *id*. (F.T.C. June 17, 2014); Letter Order Approving Divestiture of Certain Assets, Ardagh Group, S.A., 157 F.T.C. 1879 (June 17, 2014).

Divestiture consent decree paradigms

- Three basic divestiture consent decree paradigms

  2. Divest an operating business
     - Core business operations divested—Divestiture buyer to provide back office and other support
     - *Example*: Koninklijke Ahold/Delhaize Group[1]
       - Merging parties
         - Ahold owns and operates supermarket chains in ten states in the United States, including supermarkets operating under the Giant, Martin's, and Stop & Shop banners
         - Delhaize owns and operates supermarket chains in 17 states in the United States, including supermarkets operating under the Food Lion and Hannaford banners
       - Ahold and Delhaize agreed to sell 81 stores to settle FTC concerns that their proposed $28 billion merger would likely be anticompetitive in 46 local markets in Delaware, Maryland, Massachusetts, New York, Pennsylvania, Virginia, and West Virginia
       - The 81 stores were divided into seen regional packages and sold to seven different divestiture buyers
       - Each divestiture buyer operated a supermarket chain in the region and was able to provide management, wholesale supply, back office support, and strategic direction to the divestiture stores
         - Back office support includes, for example, customer service, information technology and data processing, human resources, accounting, and related administrative functions
     - Agencies almost always demand an upfront buyer

[1] Complaint, Koninklijke Ahold, N.V., C-4588, 162 F.T.C. 945 (July 22, 2016); Decision and Order, *id*. at 964 (F.T.C. provisionally accepted June 22, 2016); Decision and Order, *id*. (F.T.C. Oct. 14, 2016) (final acceptance).

Divestiture consent decree paradigms

- Three basic divestiture consent decree paradigms
  2. Divest an operating business (cont.)
     - Core business operations divested—Divestiture buyer to provide back office and other support
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Divestiture consent decree paradigms

- Three basic divestiture consent decree paradigms
  3. Divest assets necessary for divestiture buyer to operate the divestiture business
     - Divestiture buyer to provide all support necessary to operate the business
     - *Example*: Danaher/GE Biopharma[1]
       - Danaher agreed to divest to Sartorius AG all rights and assets to research, develop, manufacture, market, and sell ten products that companies use to manufacture biopharmaceutical drugs to resolve the FTC's concerns about overlapping chromatography equipment businesses in connection with Danaher's $21.4 million acquisition of GE Biopharma (General Electric's biopharmaceutical business)
       - Sartorius AG, the divestiture buyer, had to satisfy the FTC that it could provide all the infrastructure, management, and distribution necessary to operate the divestiture assets and maintain competition in the problematic market
       - Although Sartorius AG, the divestiture buyer, was a new entrant into the business, in approving the divestiture sale, the FTC found that "Sartorius's existing biopharma business includes products that are highly complementary to the divestiture assets. Sartorius has the expertise, worldwide sales infrastructure, and resources to restore the competition that otherwise would have been lost due to the proposed Acquisition."[2]
     - Agencies always demand an upfront buyer

[1] Decision and Order, Danaher Corp., No. C-4710 (F.T.C. May 29, 2020); *see* Petition for Prior Approval of Sartorius Stedim Biotech S.A.'s Proposed Acquisition of Novasep Process SAS's Chromatography Equipment Business, *id*. (F.T.C. Oct. 28, 2021); Letter Order Approving Acquisition, *id*. (F.T.C. Jan. 31, 2022).

The Bargaining Game

The bargaining game (postclosing solutions)

- Agency's leverage over the merged firm to accept agency terms
  - The commencement or continuation of litigation
    - Imposes litigation costs and burdens on the merged firm (especially in discovery)
    - Broad interlocutory hold-separate/asset-preservation order can freeze further integration of the nonproblematic portions of the acquisition
      - The nonproblematic parts may be large and more profitable compared to the problematic parts
    - Most importantly, burdens senior decision-makers and distracts them from running the business
  - Risk that agency will win and the court will impose more invasive and burdensome relief than the agency is proposing
  - Unlikely to provide leverage:
    - Reputational risk of litigation to the merging parties
      - Experience shows the business community views merger cases as routine regulation, not misconduct; reputational damage is negligible

The bargaining game (postclosing solutions)

- Merged firm’s leverage over the agency to accept their proposal
  - Risk that the merged firm will be able to successfully defend the acquisition and the agency will lose on the merits
  - Risk that—even after a liability finding—the court adopts the firm’s narrower remedy
  - Unlikely to provide leverage:
    - The threat of continued litigation
      - The agencies are amply funded and junior lawyers relish trial work, so the ‘threat of continued litigation carries little weight
      - The agencies are also willing to invest in a “signal” to future merging parties that they are willing to fully litigate the merits of a problematic merger

Postclosing Divestiture Examples[1]

[1] We will examine the more common preclosing settlements later in the course. The tests and boilerplate the DOJ and FTC use, however, are essentially the same for both pre- and post-closing divestiture solutions.

TransDigm/Takata[1]

- DOJ concern
  - The acquisition by TransDigm of SCHROTH from Takata (which had already closed) 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: 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: 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 matter

    whichever is later
  - Combined company had to operate the divestiture assets separately from the rest of its business pending the closing of the divestiture sale ("hold separate")

[1] *See* the TransDigm/Takata case study in supplemental reading materials.

D&B/QED[1]

- The FTC complaint
  - Dun & Bradstreet and QED signed the acquisition agreement on January 29, 2009, and presume closed the transaction shortly after that. The purchase price was $29 million.
  - Dun & Bradstreet's MDR subsidiary held a 90% share of the K-12 educational marketing data market
  - *Claim*: The acquisition eliminated D&B's only significant competitor in the market, thereby creating a de facto monopoly likely to raise prices, reduce quality, and stifle innovation
- Consent decree: Significant provisions—
  - D&B to divest all assets used in QED's U.S. marketing data business, including:
    - A copy of the database updated to match D&B's internal current version as of the divestiture date
    - Proprietary algorithms, software codes, IP, customer contracts, and key personnel
    - Purge all data acquired from QED imported into the MOR database after June 1, 2010
  - D&B required to permit any current or former employee—
    - who was employed by QED or Scholastic on the day before the acquisition , or
    - whose responsibilities primarily involved the sale of K-12 data

    to be hired by the divestiture buyer without restriction or interference
  - D&B must permit any MDR customer to terminate its MOR contract for 21 months
  - D&B required to provide transition services for up to 12 months
  - Divestiture
    - Within 5 days of the order becoming final: Divest QED K-12 Data Business Assets
    - Within 30 days of the order becoming final: Divest the Augmented QED K-12 Database
  - Monitor to monitor compliance with consent decree obligations

[1] For the significant litigation and consent decree filings, see D&B/QED in AppliedAntirust.com ..

D&B/QED

- Observations
  - Non-HSR reportable transaction, investigated postclosing, settled mid-litigation
  - The consent decree essentially create a clone on the MOR database, which was significantly larger in coverage than the acquired QED database was at the time of acquisition or would have been if QED had not been acquired

    As a result, D&D was required to divest much more than it had acquired— a significant risk in all postclosing divestiture solutions when the acquiring company integrates the assets of the acquired company
  - Upfront buyer required
  - D&B was able to retain all data imported from the QED database prior to June 1, 2010
- Final notes
  - The K-12 data included in the database were publicly available from most schools or school districts for the asking. The major cost of the business was the costs of asking
  - MCH, the upfront buyer, was the smallest of the three companies that supplied K-12 educ
    - lacked a K-12 database comparable to MDR or QED's,
    - generally served a different customer base,
    - was not viewed by many MDR and QED customers as capable of meeting their needs,
    - and had a very small share of the K-12 data market
  - It appears that MCH, after acquiring the divested business, did little to continue to update the database or market it

[1] *See* Analysis of Agreement Containing Consent Orders To Aid Public Comment 1 (Nov. 23, 2009).

Parker-Hannifin/CLARCOR[1]

- The deal
  - December 16, 2016: Parker announces it will acquire CLARCOR for $4.3 billion in cash
  - January 17, 2018: HSR waiting period expired (no second request)
  - February 28, 2017: Parties closed deal
  - Following customer complaints, the DOJ opened an investigation
- DOJ complaint (filed Sept. 26, 2017)
  - *Claim*: Merger to monopoly in EI-qualified aviation fuel filtration systems, which likely to result in increased prices, longer delivery times, less favorable terms of service, and reduced innovation
    - CLARCOR sold aviation fuel filtration products through its PECOFacet subsidiary
- Consent decree: Significant provisions—
  - Parker to divest to divest the Facet filtration business, including its—
    - Aviation fuel filtration assets (including its international facilities)
    - Commercial marine, offshore drilling, and military marine filtration applications sold under the PECOFacet brand,
    - Oil/water filtration and separation systems and sewage treatment systems sold under the PECOFacet brand.
    - The assets of Parker used in the design, development, manufacturing, testing, marketing, sale, distribution or service of aviation fuel filtration products used in aviation ground fuel filtration and sold under the Facet or PECOFacet brands

[1] For the significant litigation and consent decree filings, see *Parker Hannifin/CLARCOR* in AppliedAntirust.com..

Parker-Hannifin/CLARCOR

- Consent decree: Significant provisions (cont.)—
  - Intellectual property
    - The divestiture assets only included a license the "Clarcor," "PECO," or "PECOFacet "tradenames for a maximum period of one (1) year and then only to the extent the divestiture buyer was required under existing U.S. military contracts to use those names
    - However, Parker was required within two (2) years to use reasonable best efforts to transition retained (non-divested) products sold under the "PECOFacet" brand to a brand that does not include the "Facet" name
  - Parker required to provide transition services to obtain back office and information technology services and support for the Facet Filtration Business for a period of up to twelve (12) months
  - As to all personnel primarily involved in the design, development, manufacturing, testing, marketing, sale, distribution or service of the divestiture products (except employees specifically exempted in an appendix), Parker must—
    - Provide the acquirer with detailed information on and access
    - Not obstruct or interfere with the divestiture buyer's hiring of these employees
    - Waive noncompete and nondisclosure agreements for employees hired by the divestiture buyer
    - For 12 months, not solicit or hire any employee hired by the divestiture buyer unless the divestiture buyer (1) terminates or lays off the employee or (2) consents in writing to the solicitation or hire
  - Parker-Hannifin and Clarcor prohibited from reacquiring any part of the divestiture assets that is primarily related to aviation fuel filtration products qualified to EI standards during the term of the final judgment
    - CLARCOR, then operating as a Parker subsidiary, was named a party-defendant in the litigation and bound by the final judgment
  - Term: 10 years (with an early termination option by the DOJ after 5 years)

[1] For the significant litigation and consent decree filings, see Parker Hannifin/CLARCOR in AppliedAntirust.com..

Parker-Hannifin/CLARCOR

- Observations
  - Scope of divestiture
    - The complaint alleged a problem only in EI-qualified aviation fuel filtration systems, but the divestiture assets also included CLARCOR's—
      - Aviation fuel filtration products business
      - Marine and offshore filtration systems
      - Environmental filtration systems
    - Undoubtedly, the DOJ's reason to including problems outside the relevant market was to—
      - Ensure the viability of the divested business in the hands of the divestiture buyer
      - Divest all business lines produced in the divestiture plants (to avoid problems of separation)

> *Rule*: In most cases, the DOJ and FTC will insist that the divested assets comprise an operating business unit
>
> Except in the rare case where the divestiture buyer can easily absorb the divested assets into its own operations without the need of an operating business unit
>
> *Example*: When the divestiture buyer is major pharmaceutical company and the divested product is a drug that the buyer can easily manufacture

[1] For the significant litigation and consent decree filings, see Parker Hannifin/CLARCOR in AppliedAntitrust.com..

MSC.Software/Nastran acquisitions[1]

- The acquisitions
  - June 24, 1999: MSC acquires Universal Analytics, Inc. for approximately $8.4 million
  - November 4, 1999: MSC acquires Computerized Structural Analysis & Research Corp. (CSAR) for about $10 million
  - Following each acquisition, MSC integrated its technologies and customer bases into its own operations and discontinued the acquired software products
- FTC complaint (filed Oct. 9, 2001)
  - Claim: Acquisitions would substantially lessen competition and result in a merger to monopoly in the market for advanced versions of the Nastran engineering simulation software
- Consent decree: Significant provisions—
  - Divestiture of software assets and IP
    - MSC was required to divest perpetual, royalty-free, non-exclusive worldwide licenses for:
      - The most current version of MSC.Nastran
      - All intellectual property and code acquired from UAI and CSAR
    - Divestiture could be made to up to two FTC-approved acquirers within 150 days of the public comment date or 90 days from the effective date of the order, whichever was later
    - Acquirers could use, develop, sublicense, and make derivative works of the licensed software.

[1] For the significant litigation and consent decree filings, see *MSC.Software/Universal Analytics/CSAR* in AppliedAntirust.com..

MSC.Software/Nastran acquisitions

- Consent decree: Significant provisions (cont.)—
  - Transfer of supporting materials and customer information: MSC had to provide—
    - Copies of customer files, sales and marketing materials, and support logs relating to MSC.Nastran U.S. customers
    - Documentation and manuals necessary for installation, migration, and development of the licensed software
  - Personnel access and hiring
    - Acquirers were granted the right to interview and hire current and former MSC, UAI, and CSAR employees knowledgeable about Nastran
    - MSC was required to:
      - Provide personnel lists and facilitate employment transfers
      - Waive noncompete and confidentiality restrictions to allow employee movement to acquirers
    - Refrain from re-hiring transferred employees for one year
  - Technical assistance and transitional support
    - MSC had to provide 12 months of technical assistance to acquirers for MSC.Nastran at cost
    - Acquirers could use MSC.Nastran trademarks for up to 3 years to identify themselves as licensees
  - Customer contract rescission rights
    - For one year postdivestiture, MSC customers who had switched from annual to paid-up MSC.Nastran licenses (25-year terms) after the acquisitions could:
      - Rescind their contracts in whole or part
      - Receive a pro rata refund (based on the lesser of 4 years or the contract term)
    - MSC had to notify affected customers of rescission rights within 14 days of the divestiture

MSC.Software/Nastran acquisitions

- Consent decree: Significant provisions (cont.)—
  - Interoperability and non-retaliation requirements
    - For 3 years post-divestiture, MSC had to—
      - Maintain interoperability between MSC's complementary software (like MSC.Patran) and the divested Nastran
      - Maintain input/output file formats
      - Avoid retaliating against customers or vendors that did business with the acquirer
  - Prior approval and notice of future Nastran-related acquisitions
    - For 10 years, MSC must:--
      - Notify the FTC before acquiring any Nastran developer or related assets that would otherwise escape HSR review
      - Comply using a modified HSR notification form filed only with the FTC
  - Compliance, monitoring, and trustee provisions
    - The FTC could appoint—
      - A Monitor to oversee compliance
      - A Trustee to complete the divestiture if MSC failed to do so.
    - MSC had to—
      - Submit compliance reports every 60 days until divestiture and every 6–12 months afterward as required
      - Maintain the assets in good condition pending divestiture
  - Term: 10 years

MSC.Software/Nastran acquisitions

- Observations
  - Non-HSR reportable acquisitions challenged more than two years after closing
    - The transactions presumably came to FTC's attention from postclosing customer complaints
    - NOTE: Even MSC.Nastran customers could have complained about the acquisitions if they wanted to keep the acquired companies as independent companies that could be competition to MSC
  - Consent decree required MSC to clone its software and divest copies to FTC-approved buyers
    - Consent decree provided for the divestiture of "at least one clone copy" of the software
      - Presumably designed to require two divestitures to restore two independent competitors
      - BUT MSC would satisfy obligations if, as was the case, only one qualified buyer cam forward
    - Divestiture to be accomplished with a non-exclusive, perpetual, royalty-free license
      - This amounted to a "sale" of a copy of the cloned software
  - Only one firm—Unigraphics Solutions (UGS)—stepped forward as a qualified acquirer.

As we have seen before, MSC was required to divest much more than it had acquired—the acquired software almost surely lacked the full functionality of MSC.Nastran. Yet MSC was required to divest clones of the current version of its own software, not the software it had acquired.

Four Types of Divestiture Solutions

Four types of divestiture solutions

1. Consent decree to settle an ongoing investigation
   - The investigating agency and merging parties agree on a divestiture (and usually a divestiture buyer) that will negate the agency's antitrust concerns
   - The settlement agreement—
     - Is reduced to a proposed final judgment ("consent decree") in a litigation the agency will file simultaneously with the complaint, and
     - Once the proposed consent decree is entered as a final judgment, will be enforceable through sanctions for a violation of the judgment
   - The merging parties will be allowed to close their transaction pending final approval of the consent order
   - The divestiture must be completed following final approval of the consent decree within a time specified in the decree

Four types of divestiture solutions

2. Consent decree to settle an ongoing litigation
   - The investigating agency and merging parties fail to agree on a divestiture solution to resolve the investigation, the agency challenges the transaction in court, and sometime during the litigation the parties reach agreement on a divestiture solution to settle the litigation
     - The divestiture solution usually is a somewhat augmented version of the solution the merging parties advanced in the investigation
       - The agency would like to be able to say that it got something for pursuing litigation, which is why the solution proposed in the investigation needs to be expanded, but the additional relief is usually competitively insignificant (i.e., not worth much)
       - The reason for this is straightforward: Having initiated litigation, the agency will want a decision on the merits *unless* it appears during the litigation that the agency will lose—once it is apparent that the agency is likely to lose, it has little bargaining leverage to demand significant additional relief.
       - The merging parties, however, are usually willing to give some additional relief to avoid even a low probability of losing at trial and to make it easier for the agency to accept a consent settlement without losing face
     - The mechanics are essentially the same as for a consent decree to settle an investigation

Four types of divestiture solutions

3. "Litigate the fix"
   - The investigating agency and merging parties fail to agree on a divestiture solution, the agency challenges the transaction in court, and merging parties defend by entering into a (contingent) divestiture agreement with a divestiture buyer (the "fix") early in the litigation and making their case that the "restructured" transaction does not violate the antitrust laws
     - The fix almost always embodies a consent decree solution that the merging parties proposed to the agency during the investigation and the agency rejected
   - Unless the parties settle mid-litigation with a consent decree, the litigation will proceed to a final judgment on the merits.
     - Although as we shall see later, there is a dispute over the standard and burdens of proof courts should use in assessing the adequacy of the "fix," courts have consistently reviewed the competitive merits of the restructured transaction and not the original transaction in both DOJ and FTC merger antitrust challenges
     - If the merging parties prevail in court, judgment will be entered in their favor and the transaction will proceed subject to the fix presented to the court
     - If the agency prevails in court, judgment will be entered in its favor and the transaction enjoined

Four types of divestiture solutions

4. Negotiated “fix it first”
   - During the investigation, the investigating agency and merging parties agree on a divestiture solution (almost always including a divesture buyer) that the parties will implement *before* closing their transaction
     - Since the problematic overlap will be eliminated before the main deal is closed, the main acquisition will not be anticompetitive and the agency will permit the transaction to proceed without requiring a consent decree or taking other enforcement action
   - The Antitrust Division under AAG Kanter has accepted a number of negotiated “fix it first” solutions
     - As noted above, Kanter has an apparent policy not to accept consent decrees to settle investigations
     - A negotiated “fix it first” solution allows what amount to a consent decree solution without the protections afforded to the agency by a consent decree
     - Perhaps because of this lack of protections, the Antitrust Division has not publicized when it accepts “fix it first” solutions

Some Important Legal Technicalities

Some important legal technicalities

1. Exercising agency discretion
   - The decision whether to enter into consent decree negotiations is committed to the investigating agency's discretion
   - The investigating agency also can refuse to accept a proffered consent decree for any reason, including an arbitrary reason
     - Agency decisions to refuse to accept a consent decree are not subject to review under the Administrative Procedure Act
       - Unless provided by statute, only "final agency actions" are reviewable under the APA[1]
       - A decision to refuse to settle an investigation is not a "final agency action" because it is interlocutory and does not impose an obligation, deny a right, or fix a legal relationship[2]
         - Agency action is "final" within the meaning of the APA only if—
           - The action marks the "consummation" of the agency's decision-making process, *and*
           - the action is one by which "rights or obligations have been determined" or from which "legal consequences will flow"[2]
         - Moreover, it is likely that a decision to refuse to settle is "committed to agency discretion by law" within the APA and so separately exempt from APA review[3]

[1] 5 U.S.C. § 704.
[2] *See* Chicago & S. Air Lines v. Waterman S. S. Corp., 333 U.S. 103, 112-13 (1948) ("But administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.")
[3] Bennett v. Spear, 520 U.S. 154, 177 (1997).
[4] 5 U.S.C. § 701(a)(2).

Some important legal technicalities

2. Dispensing with finding of facts and liability
   - 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 provide the court or administrative tribunal with subject matter jurisdiction to enter the consent decree

Some important legal technicalities

3. Understanding 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 party[2]
       - 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 Cleveland, 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

4. Entering consent decrees as final judgments
   - A consent decree "embodies an agreement of the parties" and is also "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."[1]
   - As such, the litigation must be commenced by the filing of a complaint
   - As a final judgment, a consent order has the same res judicata/claim preclusion effect as a litigated judgment[2]
     - Special rules may apply in some areas of the law (e.g., patent validity and infringement), but there is no reason to believe that antitrust consent decrees are not claim preclusive absent a clear indication in the decree to the contrary
     - *WDC*: But no doubt antitrust consent decrees could be clearer on the preclusive effect. The standard boilerplate that the agencies use, for example, contains no language to the effect that the final judgment settles all claims raised by the complaint

[1] Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378 (1992).

[2] *See* United States v. S. Ute Tribe or Band of Indians, 402 U.S. 159, 174 (1971); United States v. Int'l Bldg. Co., 345 U.S. 502, 506 (1953) ("Certainly the [consent] judgments entered are res judicata of the tax claims for the years 1933, 1938, and 1939, whether or not the basis of the agreements on which they rest reached the merits."). *See generally* 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4443 (update Apr. 2022) ("In most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented. Thus settlement agreements and consent judgments ordinarily support claim preclusion but not issue preclusion.") (footnote omitted).

Some important legal technicalities

5. Recognizing the 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 purposes[1]
     - 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 it[3]
     - 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 Cleveland, 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' consent:

> We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions, though it was entered by consent. . . . Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative. The result is all one whether the decree has been entered after litigation or by consent. In either event, a court does not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.[1]

[1] 286 U.S. 106, 114-15 (1932) (internal citations omitted); *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)
     - Some different scenarios
       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 interest
          - 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]
       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 expressly contemplates such changes in light of changed circumstances.
       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.

[1] 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).

An important aside: *Cleveland Firefighters*

- *Cleveland Firefighters*
  - *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 litigated proceeding

> [A] consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction. Furthermore, consistent with this requirement, the consent decree must com[e] within the general scope of the case made by the pleadings, and must further the objectives of the law upon which the complaint was based. However, in addition to the law which forms the basis of the claim, the parties' consent animates the legal force of a consent decree. *Therefore, a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.*[1]

- *Corollary*: An agency may demand relief in a consent decree that a court could not award the agency in a litigated proceeding
- 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 an attack that discharging their consent decree obligations does not violate some other law or breach 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, 525 (1986) (internal quotation marks and citations omitted; emphasis added).

An important aside: *Cleveland Firefighters*

- *Cleveland Firefighters*
  - Facts*:*
    - In 1980, the Vanguards, an organization of Black and Hispanic firefighters, filed a class action against the City of Cleveland alleging employment discrimination on the basis of race and national origin in hiring, assigning, and promoting firefighters
    - The district court entered a consent decree that encompassed race-conscious relief (including specific numbers of promotions to be given to minority firefighters and minority promotional goals)
    - The Cleveland firefighters union, which had intervened as a party-plaintiff, objected on the grounds that—
      - the consent decree's racial preferences (embodied in the quotas) may benefit individuals who are not themselves actual victims of illegal discrimination, *and*
      - the statute (Title VII) on which the plaintiffs' claims were premised prohibits a court from ordering relief requiring the promotion of an individual for a reason other than illegal discrimination[1]
  - Holding
    - Whether or not Title VII's enforcement provision precludes a court from ordering race-conscious relief after trial, that restriction does not apply to relief awarded in a consent decree
      - The Court found that in fashioning the enforcement provision, Congress sought to avoid undue federal interference with managerial discretion
      - But with a consent decree, management agrees with its terms, and hence there is no interference with managerial discretion

[1] Civil Rights Act of 1964, § 706(g) (current version at 42 U.S.C. § 2000e-5(g)) (Title VII enforcement provision).

The Consent Decree Approval Process

The Tunney Act

- Statutory framework
  - The Tunney Act governs DOJ antitrust settlements, including merger consent decrees[1]
  - Enacted in 1974 to ensure transparency and protect the public interest
- Applies only to DOJ—not to FTC settlements
  - FTC settlements are governed by administrative regulations modeled after the Tunney Act[2]

[1] 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)); *see* U.S. Dep't of Justice, Antitrust Div., Antitrust Division Manual Ch. 4 D (5th ed. updated Mar. 2014).

[2] 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.

Tunney Act requirements

- The Tunney Act imposes three requirements before a court can enter a proposed DOJ consent decree as a final judgment:
  1. The DOJ must submit specific materials to the court—
     - A complaint alleging a violation of the antitrust laws to initiate the litigation(if not already filed)
     - The proposed consent decree to be entered as a final judgment
     - A competitive impact statement (CIS), detailing—
       - The nature and scope of the violation alleged in the complaint
       - The relief contained in the proposed consent decree and how it addresses the violation
       - Why the settlement is consistent with the public interest
  2. DOJ must also—
     - Publish the proposed consent decree and CIS in the Federal Register
     - Solicit and receive public comments for at least 60 days after publication
       - In most consent decrees, there are no comments filed
       - In some cases, however, comments may be extensive
     - File all comments and DOJ's responses with the court
       - Although not required, the merging parties may file a response to the comments with the court
  3. The court must make a determination that entry of the proposed consent decree is in the public interest

The process

- Settlement negotiations involve close coordination with DOJ leadership
  - DOJ staff keep the AAG and other senior officials closely apprised of the progress of settlement negotiations
  - If the front office has concerns, it conveys them to the staff, who continue negotiating to address the issues
  - Staff negotiations conclude only when the front office is satisfied with the proposed terms of the consent decree
  - As a result, the AAG typically gives final approval to file the proposed consent decree shortly after negotiations conclude

The process

- Once the AAG approves the proposed consent decree, the DOJ simultaneously files with the court—
  - The complaint (if not previously filed)
  - The proposed final judgment (consent decree)
  - The joint motion and stipulation requesting court approval
- Judicial action
  - Courts typically “so order” the stipulation within 2–3 days

The DOJ practice allows the parties to close the main transaction after the judge “so orders” the stipulated order without waiting for final Tunney Act approval

The preclosing stipulated order

- Purpose
  - In settling DOJ investigations, the settlement agreement is memorialized in a joint stipulation and proposed order filed with the court containing the proposed consent decree as an exhibit
- Key provisions
  - Preclosing settlements: Stipulate to—
    - Entry of the proposed hold separate or asset preservation order
    - Compliance with all terms of the proposed consent decree as if already entered as a final judgment
  - Postclosing settlements: Stipulate to—
    - Entry of the proposed hold separate or asset preservation order
- Judicial role
  - The court "so orders" the stipulated proposed orders within a few days
  - Makes the stipulated proposed orders full court orders

The preclosing stipulated order

- Practical effect
  - Once the court "so orders" the proposed stipulated orders, the DOJ permits the transaction to close without interference even though the consent decree has not been entered as a final judgment
    - Allows the merging parties to close several months before the final entry of the consent judgment[1]
  - From the perspective of the merging parties, the ability to close the main transaction quickly after the conclusion of settlement negotiations is one of the most important features of the current consent decree process

[1] At least in one case, the district court judge was surprised—and not too happy—to learn that the merging parties had closed the main transaction before the judge had an opportunity to review the settlement agreement under the Tunney Act. *See* Transcript of Motions Hearing 4-18, United States v. CVS Health Corp., No. 1:18-cv-02340 (D.D.C. Nov. 29, 2018) (Richard J. Leon, J.). The transcript is a good lesson of what can happen in court. It is part of the required reading, and I strongly encourage you to read it. Subsequently, Judge Leon held an evidentiary hearing, including opponents of the transaction, as part of his Tunney Act inquiry. For links to some of the major filings in the case, see Unit 13 in AppliedAntitrust.com.

The Competitive Impact Statement

- Required contents
  - A description of the alleged antitrust violation
  - A description of the proposed final judgment (consent decree)
  - An explanation of how the proposed decree remedies the violation
  - An explanation of any alternatives considered by DOJ and why they were not pursued
  - A description of the impact of the proposed decree on customers and other affected parties
  - An explanation of how the proposed decree serves the public interest
- Who writes the CIS and when
  - Drafted by the DOJ staff who negotiated the settlement
  - Finalized only after the AAG approves the proposed consent decree
  - Filed in court simultaneously with the complaint and proposed final judgment
- Practical function
  - Forms the foundation of the public record justifying the proposed settlement
  - Must be specific and persuasive enough to give the court a basis for finding entry of the proposed consent decree to be in the public interest
  - Often modeled on internal case closing memos or white papers prepared during the investigation

Public comments

- Opportunity for public comment
  - Any person may submit written comments
  - Must be open for at least 60 days after Federal Register publication
  - Comments may support, oppose, or suggest changes
- DOJ obligation to respond
  - Must respond in writing to all comments
  - Must address all substantive criticisms of the remedy
  - The DOJ files both the public comments and its responses with the court
- Timing and effect
  - Court may not enter final judgment until DOJ submits the comments and its responses
  - Court must consider both the comments and DOJ's response
- Practical function
  - Provides a check on agency discretion by enabling public participation
  - Often little impact, but in rare cases may contribute to heightened judicial review or decree modification

Entry as a final judgment

- 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[1]
  - 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

[1] *See* 15 U.S.C. § 16(e).) (reprinted on the next slide).

Entry as a 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.[1]

- Federal courts have interpreted this standard to grant DOJ substantial discretion—but not unchecked authority

[1] *See* 15 U.S.C. § 16(e).

Entry as a final judgment

- DOJ
  - *Public interest standard*: The legal standard—

> **III. LEGAL STANDARD**
>
> The Tunney Act requires courts, "[b]efore entering any consent judgment proposed by the United States," to "determine that the entry of such judgment is in the public interest." 15 U.S.C. § 16(e). The parameters of the Tunney Act's "public interest" standard are well defined by statute, *see* 15 U.S.C. § 16(e)(1), and case law, *see*, *e.g., United States v. Newpage Holdings, Inc*., No. 14–cv–2216, 2015 WL 9982691, at *4–5 (D.D.C. Dec. 11, 2015). The court, therefore, need not provide a fulsome recitation of the applicable standards. It suffices for present purposes to note that the government enjoys "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp*., 56 F.3d 1448, 1461 (D.C. Cir. 1995). And, although a court may not simply "rubber stamp" the government's proposal and is required to "make an independent determination" as to the public interest, *id*. at 1458 (internal quotation marks omitted), it "is not permitted to reject the proposed remedies merely because the court believes other remedies are preferable," *United States v. SBC Commc'ns, Inc*., 489 F.Supp.2d 1, 15 (D.D.C. 2007). Indeed, the court is required to be "deferential to the government's predictions as to the effect of the proposed remedies." *Microsoft Corp.,* 56 F.3d at 1461. In short, "the relevant inquiry is whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlement are reasonable. *SBC Commc'ns, Inc*., 489 F.Supp.2d at 15-16.[1]

[1] United States v. Iron Mountain, Inc., 217 F. Supp. 3d 146, 150 (D.D.C. 2016), *judgment entered*, No. 1:16-CV-00595-APM, 2016 WL 9455556 (D.D.C. Nov. 11, 2016).

The Tunney Act in practice

- Judicial review is real—but limited
  - Courts must assess whether the proposed consent decree is in the public interest
  - However, courts give substantial deference to the DOJ's decision to settle and to the terms of the proposed relief
- Primary function
  - The Tunney Act functions more as a transparency and accountability mechanism than as a substantive hurdle to entry of a consent decree
- Review is based on the record
  - Courts typically do not conduct evidentiary hearings or allow third-party intervention
    - Although rare, courts have occasionally conducted hearings or accepted third-party input[1]
  - The decision is made based on the filings required by the Tunney Act and any responses to public comments
- Rejections are rare
  - Courts have occasionally required additional explanations or disclosures
  - But outright rejections of DOJ consent decrees are extremely uncommon
  - In merger antitrust cases, this process helps ensure that structural remedies proposed in DOJ settlements are subject to a measure of external validation.

[1] A hotly contested evidentiary hearing was conducted in United States v. CVS Health Corp., 407 F. Supp. 3d 45 (D.D.C. Sept. 4, 2019).

FTC procedure

- Terminology
  - DOJ settlements are called *consent decrees* because they are federal district court injunctions enforceable through civil and criminal contempt sanctions
  - FTC settlements are called *consent orders* because they are administrative "cease and desist orders" enforceable through—
    - Federal district court actions for civil penalties
    - Federal court injunctions ordering compliance (which in turn are enforceable through civil and carnal contempt sanctions)

We will adopt the common practice and use consent decree and consent order interchangeably

- Governing law
  - The FTC's consent decree procedures are not governed by the Tunney Act, but rather FTC-promulgated regulations modeled after the Tunney Act[1]

[1] *See* 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.

FTC procedure

- Commonalities: Both—
  - Require a complaint to initiate litigation
    - *DOJ*: Files its complaint in federal district court
    - *FTC*: Issues an administrative complaint to begin an internal FTC adjudicative proceeding
  - Require a consent agreement
    - *DOJ*: Memorialized in a stipulation and proposed orders filed with the court
    - FTC: Memorialized in an *Agreement Containing Consent Orders* filed with the Commission
  - Permit the transaction to close before final entry of the proposed consent settlement
    - DOJ: After the federal district judge "so orders" the proposed stipulated orders
    - FTC: After the Commission provisionally accepts the proposed consent order for public comment and issues the proposed stipulated orders
  - Require a hold separate or asset preservation orders pending the closing of the divestiture sale
  - Require a defense of the proposed consent settlement by the investigating agency
    - *DOJ*: Competitive impact statement
    - *FTC*: Analysis to Aid Public Comment

FTC procedure

- Commonalities: Both—
  - Require publication and an opportunity for public comments
    - *DOJ*: 60-day public comment period
    - *FTC*: 30-day comment period
  - Require a public interest determination
    - *DOJ*: By the presiding federal judge pursuant to the Tunney Act
    - *FTC*: As a matter of historical practice

Typical settlement process—Summary

Negotiations with investigating staff

Staff drafts consent decree and other necessary documents

DOJ

- AAG proves filing of settlement papers with federal district court
- Court "so orders" stipulation (including maintain assets/hold separate)

FTC

- FTC Bureau management recommends settlement
- Commission provisionally accepts consent settlement and enters Maintain Assets/Hold Separate Order

Merging firms may close transaction

DOJ

- 60-day public comment period commences with Federal Register and newspaper notice
- DOJ responds in court filing to public comments (if any)
- Court enters proposed consent decree as the final judgment in the case

FTC

- 30-day public comment period commences with Federal Register notice
- FTC staff responds to public comments (if any)
- Commission enters provisionally accepted consent order as the final cease and desist order in the case