Unit 1B. The Consent Decree Approval Process

Professor Dale Collins
Merger Antitrust Law
Georgetown University Law Center

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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, 1706-08 (1974) (codified as amended 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] See 16 C.F.R. §§ 2.31-2.34 (precomplaint settlements ("Part 2 settlements")); 16 C.F.R. § 3.25 (postcomplaint settlements ("Part 3 settlements")). After the Commission votes to issue an administrative complaint, whether or not the complaint has been served, the matter is in adjudicative status and subject to the prohibition on ex parte communications. See 16 C.F.R. § 4.7. The Commission may consider a consent agreement or settlement offer, and receive staff advice concerning it, only after the matter is withdrawn from adjudication. Apart from that withdrawal, the documents and 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)
  - A joint stipulation and proposed interim order that, in a preclosing settlement, requires compliance with the proposed final judgment as though it were already in effect and imposes any necessary asset-preservation or hold-separate obligations pending final approval
  - A Competitive Impact Statement
    - Either with or after the filing of the proposed final judgment
- Judicial action
  - Courts typically "so orders" the stipulation within 2-3 days

The DOJ practice is to allow 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 parties file a proposed final judgment together with a joint stipulation and proposed interim order
- 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. 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 here.

The Competitive Impact Statement

- Required contents
  1. The nature and purpose of the proceeding
  2. A description of the practices or events giving rise to the alleged violation
  3. An explanation of the proposed final judgment and its anticipated competitive effects
  4. The remedies available to private parties injured by the alleged violation
  5. The procedures available for modification of the proposed final judgment
  6. A description and evaluation of alternatives to the proposed final judgment actually considered by DOJ

- 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

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 have little impact, but in rare cases may contribute to heightened judicial scrutiny or revision of the proposed decree

Entry as a final judgment

- After the 60-day period, DOJ files any public comments and its responses and moves 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 court injunctions ordering compliance (which in turn are 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 criminal contempt sanctions)

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

- Governing law
  - The FTC’s consent order 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 consent agreement for public comment and issues any Order to Maintain Assets or Hold Separate Orders
  - Require a hold separate or asset preservation order 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 approves 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