Issues in Antitrust Consent Decrees

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Comments for Department of Justice, Antitrust Division
Roundtable on the Proper Role of Antitrust Consent Decrees

Thanks to the Antitrust Division for inviting me to this Roundtable. I want to start by commending Assistant Attorney General Makan Delrahim for creating this opportunity to consider the proper role of consent decrees within antitrust law. I am here today as a representative of the American Bar Association's Section of Antitrust Law, but make these comments on my own behalf, not on behalf of the Section or anyone else.

Resolving antitrust matters via consent decree has become significantly more common over the last few decades and, today, the vast majority of the DOJ's (and the Federal Trade Commission's) caseload is resolved via consent.[1] In the light of these developments, it is critical to evaluate how this important tool can be best deployed to protect consumer interests.

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[1] Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, *in* 1 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE 177, 178 (Charbit et al. eds. 2013) ("By the 1980s, 97 percent of civil cases filed by the Division resulted in a consent decree, and that percentage remained relatively constant at 93 percent in the 2000s. This trend has continued, with the Division resolving nearly its entire antitrust civil enforcement docket by consent decree from 2004 to present." (citing Joseph C. Gallo et al., *Department of Justice Antitrust Enforcement, 1995-1997: An Empirical Study*, 17 REV. INDUS. ORG. 75, 111-12 (2000); George Stephanov Georgiev, *Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements in EU Law*, 2007 UTAH L. REV. 971, 1006-07 (2007); Department of Justice Antitrust Division, Congressional Submission FY 2012 Performance Budget 27)); E. Thomas Sullivan, *The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition*, 64 WASH. U.L. REV. 997, 1001 (1986) ("[T]he Antitrust Division has changed from a traditional, litigation-oriented enforcement agency to a regulatory agency.").

There are two particular considerations I would like to address in my written remarks. *First*, I understand the DOJ is considering requiring parties to agree to lower the standard of proof relating to consent decree violations, from the clear and convincing to a preponderance of the evidence standard, as a condition of entering into consents. This approach has much to commend it, but also has several significant implications that should be considered before applying it across the board. *Second*, while structural remedies are typically preferred in mergers, there is also an important role for behavioral remedies—particularly in tech mergers, where terms like non-discrimination may be effectively incorporated and where failure to proceed by consent could have negative consequences for consumer welfare.

I. THE STANDARD OF PROOF FOR CONSENT DECREE VIOLATIONS

It is well-established that a party seeking to prove a violation of a consent decree term must do so with clear and convincing evidence—not just within antitrust law, but for any alleged civil contempt.[2] General Delrahim has

[2] *See, e.g.*, *FTC. v. Kuykendall*, 371 F.3d 745, 756 (10th Cir. 2004) ("[I]n the civil contempt context, a plaintiff must prove liability by clear and convincing evidence."); *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999) ("The standard for finding a party in civil contempt is well settled: 'The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court.'" (quoting *Stone v. City and County of San Francisco*, 968 F.2d 850, 856 n.9 (9th Cir. 1992))); *United States v. Microsoft Corp.*, 147 F.3d 935, 940 (D.C. Cir. 1998) ("A party seeking to hold another in contempt faces a heavy burden, needing to show by 'clear and convincing evidence' that the alleged contemnor has

reported that DOJ is considering whether to require parties entering into consent decrees to agree to a lower preponderance of the evidence standard as a condition of accepting any consent.

The justification for revising the burden of proof is substantial. In a typical case, the DOJ will have devoted significant resources to understanding and analyzing the conduct at issue long before the possibility of a consent was ever raised. After entering into a hard-earned consent, it is odd that DOJ would face a higher burden of proving a violation of that consent than it would of proving the original unlawful conduct which, in effect, triggered the consent. And we certainly do not want to assist defendants (or especially repeat offenders) in evading mandatory consent decree terms.

However, there are a number of important, additional considerations that should be taken into account before changing the standard for proving a consent

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violated a 'clear and unambiguous' provision of the consent decree." (quoting *Armstrong v. Executive Office of the President,* 1 F.3d 1274, 1289 (D.C. Cir. 1993))).

"Moreover, it is well settled in the law that a motion for contempt is the proper way to seek enforcement of a consent decree." *Hawkins v. Dep't of Health & Human Servs. for New Hampshire, Com'r*, 665 F.3d 25, 30 (1st Cir. 2012) (citing *Brewster v. Dukakis,* 675 F.2d 1, 3 (1st Cir. 1982) (stating that enforcement of a consent decree is sought by "an action for enforcement (i.e., contempt)"); *see also, e.g., Whitehouse v. LaRoche,* 277 F.3d 568, 578 n. 6 (1st Cir. 2002); *Martel v. Fridovich,* 14 F.3d 1, 3 n. 4 (1st Cir. 1993); *Johnson v. City of Tulsa,* 489 F.3d 1089, 1103–04 (10th Cir. 2007); *NLRB v. Ironworkers Local 433,* 169 F.3d 1217, 1219 (9th Cir. 1999); *United States v. O'Rourke,* 943 F.2d 180, 189 (2d Cir. 1991); *DeGidio v. Pung,* 920 F.2d 525, 534 (8th Cir. 1990); *Green v. McKaskle,* 788 F.2d 1116, 1123 (5th Cir. 1986)).

decree violation, including not only incentives for domestic antitrust agencies but also potential spillover effects for other domestic agencies—and especially for foreign competition agencies. These factors may not warrant retention of the clear and convincing standard in every case, but they do warrant some flexibility in any policy change to account for those instances in which a lower standard of proof could have unintended negative consequences. These factors, discussed in turn below, include: (a) incentives for regulatory leveraging; (b) development of antitrust rules; and (c) spillovers relating to foreign competition agency behavior.

A. Incentives for Regulatory Leveraging

"Regulatory leveraging" refers to situations where an agency exploits its authority over private parties.[3] An agency can do this in several ways, including by exerting its gatekeeping function in one area (such as competition) to alter a party's behavior in another policy area (such as consumer protection) or, similarly, using its authority to alter behavior within different components of the same policy area.[4] As former FTC Chairman William E. Kovacic and Professor David A. Hyman have explained, conditions that tend to invite regulatory leveraging include *ex ante* approval authority and pre-notification requirements—conditions that are not infrequently in display in U.S. merger

[3] William E. Kovacic & David A. Hyman, *Regulatory Leveraging: Problem or Solution?*, 23 GEO. MASON L. REV. 1163, 1165 (2016).

[4] *Id.* at 1166.

enforcement matters under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.[5] Most mergers are time-sensitive, and time-constrained parties are likely willing to agree to more agency demands than they would were approval not required *ex ante* and expeditiously. This dynamic—of which the agencies are certainly aware—would, accordingly, allow the agencies to extract additional concessions from the parties that would not be warranted otherwise.

During merger review, for example, agencies have obtained consents related to alleged conduct issues that did not implicate the issues raised by the merger.[6] For agencies like the FTC, that house both competition and consumer protection authority, such incentives to leverage regulatory authority may be enhanced. But in a world where competition and consumer protection issues increasingly are entangled, such concerns are not clearly limited to agencies with clear jurisdiction over both policy spheres.[7]

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[5] *Id.* at 1166-67; *see also* Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 883 (1997) ("Practice before a regulatory agency often requires that you bite your tongue and swallow hard, simply because the agency staffer has something you need or want—approval.")

[6] *See* Kovacic & Hyman, *supra* note 3, at 1169-70, discussing the FTC's review of Robert Bosch GmbH's acquisition of SPX Service Solutions U.S. LLC.

[7] *See id.* at 1173 n.57 ("Privacy is a fundamental human right under EU law. For this reason, one might argue that all competition authorities within the EU, at the Commission level and within the member states, have an obligation to account for privacy in applying competition law." (citing ORLA LYNSKEY, THE FOUNDATIONS OF EU DATA PROTECTION LAW 8-9 (2015)).

Regulatory leveraging also tends to degrade the quality of antitrust enforcement outcomes, both substantively and procedurally.[8] Essentially, when regulatory leveraging occurs, agencies take their eye off the ball of consumer welfare—and the strict criteria they would need to meet in litigation, as opposed to a consent. As a result, substantive decisions may suffer because the agency is acting beyond its ideal scope; and procedure might likewise be subverted, as the agency exercises leverage over private parties in a manner not practically subject to judicial review.

[8] *Id.* at 1179 ("[R]egulatory leveraging leads to less disciplined decisionmaking by governmental agencies. Substantive antitrust law governs merger reviews, but regulatory leveraging encourages agencies to ignore or downgrade those controls. The result is the discounting of both process and substance, in favor of the unimpeded pursuit of more nebulous (and often contestable) goals. . . . [R]egulatory leveraging leads to decisionmaking that is less transparent and less accountable."). *See also* Elyse Dorsey, Jan M. Rybnicek & Joshua D. Wright, *Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent Seeking* (forthcoming Competition Policy International, April 2018) (describing public choice implications for antitrust enforcement and developing why laws imparting more discretion to government agencies tends to further rent-seeking and corporate welfare behavior). *Cf.* FTC, Closing Statement, Google/DoubleClick, FTC File No. 071-0170, at 2 (Dec. 20, 2007), https://goo.gl/1pvDZo ("At the outset, we note that some have urged the Commission to oppose Google's proposed acquisition of DoubleClick based on the theory that the combination of their respective data sets of consumer information could be exploited in a way that threatens consumers' privacy. . . . [however] the sole purpose of federal antitrust review of mergers and acquisitions is to identify and remedy transactions that harm competition."); Pamela Jones Harbour & Tara Isa Koslov, *Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets*, 76 ANTITRUST L.J. 769 (2010) ("[T]he agencies should consider framing relevant product markets around privacy issues.").

B. Development of Antitrust Rules

As D.C. Circuit Judge Douglas H. Ginsburg and Former FTC Commissioner Joshua D. Wright have explained, the "culture of consent" that characterizes modern antitrust enforcement has important impacts upon the development of antitrust case law.[9] Specifically, consent decrees do not offer the same development to case law or precedent as litigated cases—they are not binding on courts and, while they provide some (limited) insights into why the agencies might condemn or seek to remedy certain factual scenarios, they tell us nothing about those cases where the agency decides no wrongdoing has occurred. This is an important point, especially for industries, like high-technology, that are fast moving or where agency stances are less well-developed.

Yet even insights regarding what the agencies might conclude constitutes a violation or appropriate remedy are often difficult to discern from consent decrees. Confidentiality rules limit what information may be publicly disseminated, and so parties attempting to read the tea leaves from existing consents may be missing facts critical to the agency's decisions.[10] The

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[9] Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, *in* 1 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE 177 (Charbit et al. eds. 2013); Joshua D. Wright & Douglas H. Ginsburg, *The Economic Analysis of Antitrust Consents*, EURO. J.L. & ECON. (forthcoming 2018).

[10] *See* Sims & Herman, *supra* note 5, at 883 ("Given that consent decree negotiations are private, and confidentiality rules (and sometimes agency prudence)

ambiguous instructions such consents offer undermines any limited precedential value they may offer.

Lowering the standard of proof required in contempt hearings would likely provide additional incentives for agencies to utilize consents rather than actual litigation. This may be particularly true given that, if the government were to prevail at the end of trial and achieve a court-ordered remedy, it would likely have to abide by the higher clear and convincing standard to establish a violation. We should think critically about whether moving further in the direction of consents is desirable in terms of developing antirust case law, for reasons related to clarity and predictability for parties as well as to ensuring that we are appropriately holding agencies accountable for their actions.[11]

C. Spillovers relating to Foreign Competition Agency Behavior

Today, approximately 130 jurisdictions worldwide have active antitrust regimes.[12] Many of these regimes were adopted within the last couple decades—

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limit what can be disclosed about why the agency did what it did, it is increasingly difficult for those who are not interacting regularly with the agency and other merger lawyers to be fully informed about how the agencies (and, to an even greater degree, particular staffers) are approaching specific types of problems.").

[11] *See* Dorsey, Rybnicek & Wright, *supra* note 8 (developing the importance of mechanisms holding antitrust agencies accountable for their actions to ensuring and enhancing consumer outcomes).

[12] European Commission, Competition Policy Brief (May 2016), http://ec.europa.eu/competition/publications/cpb/2016/2016_002_en.pdf ("In the past 25 years, the number of competition regimes around the world has increased from around

meaning they are still in their relative infancy. As such, foreign jurisdictions often look to more established competition jurisdictions—like the U.S.—in creating and implementing competition policy. DOJ has demonstrated it takes its role as a model for foreign jurisdictions seriously, and determining the proper application of consent decrees should be no different.

Factors to consider in the international sphere include both obvious and unintended consequences of altering the standard for ascertaining consent decree violations. For instance, to the extent other jurisdictions perceive such a change as a regulatory agency crafting an exceptional rule for competition violations under its authority, that may be undesirable and inappropriate. Particularly when foreign jurisdictions appear at times to suffer from serious due process issues and, as this DOJ has recognized, when certain foreign jurisdictions tend to approach U.S. companies—particularly IP companies—with heightened scrutiny.[13]

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20 at the beginning of the 1990s to around 130 today."); William E. Kovacic, *The United States and Its Future Influence on Global Competition Policy*, 22 GEO. MASON L. REV. 1157, 1158 n.7 (2015).

[13] *See, e.g.*, Makan Delrahim, Assistant Att'y Gen., Antitrust Div., Dep't of Justice, Remarks as Prepared for Delivery at *Antitrust in Developing Countries: Competition Policy in a Politicized World*, NYU School of Law and Concurrences, at 12 (Oct. 27, 2017), https://goo.gl/VhEb7A ("Unfortunately competition agencies in some countries may have, from time to time, treated antitrust as somehow exempt from the fundamental requirement of non-discrimination, using it to favor domestic companies or discriminate against foreign firms. When they do, they not only violated universal norms, but they engage in short-sighted and counterproductive public policy.");

The risk of foreign jurisdictions engaging in regulatory leveraging, like the risk of domestic agencies doing so, should also not be overlooked or underestimated. Newer jurisdictions seeking to establish their antitrust expertise on the global stage, for instance, might be especially susceptible to entering into consent decrees that are aggressive, but not necessarily narrowly tailored to strict competition issues. Regulatory leveraging might also exacerbate any due process concerns, further undermining effective competition law enforcement. Here again, preserving local courts' abilities to evaluate agency decisions would provide important constraints and help facilitate effective antitrust enforcement.

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Dissenting Opinion of Commissioner Hong Tsai-Lung at 110, The Taiwan Fair Trade Commission Decision against Qualcomm, Inc., https://goo.gl/P5Dx2M ("Although I have declared that the review period was too hasty and there were issues of dispute that have yet to be clarified through reasonable examination period such *as a thorough investigation, detailed examination by all commissioners and a full discussion*, etc. However, this case was hastily passed by vote, which is hard to determine the decision was in conformity with due process."); Joshua D. Wright, *The Taiwan Fair Trade Commission's Problematic Qualcomm Decision Highlights the Urgent Need for U.S. Leadership in International Enforcement*, THE FEDERALIST SOCIETY BLOG (Dec. 13, 2017), https://goo.gl/GcL24D ("The TFTC's process and substantive analysis in the Qualcomm decision demonstrate quite clearly that the TFTC failed to comport with some of the most basic and fundamental requirements for proper adjudication of antitrust laws. Indeed, three of the TFTC's seven commissioners found the decision was sufficiently detached from established norms to take the relatively rare step of issuing strong dissenting opinions.").

The proposal to lower the burden of proof required for consent decree violation has a lot of merit. It also, however, carries with it the risk of unintended negative consequences. I urge the Division both to keep those concerns in mind when negotiating decrees in particular cases, and to explain the rationale and limitations of the revised standard when applied.

II. NON-STRUCTURAL MERGER REMEDIES

Antitrust courts and agencies typically favor structural remedies for otherwise problematic mergers.[14] Structural remedies can and do effectively preserve competitive incentives in many circumstances.[15] There are, however,

[14] *See* Robert Pitofsky, *The Nature and Limits of Restructuring in Merger Review*, at The Cutting Edge Antitrust Conference (Feb. 17, 2000), https://www.ftc.gov/public-statements/2000/02/nature-and-limits-restructuring-merger-review#N_14_ ("Most restructuring proposals accepted by the FTC are successful and consumer welfare is protected. . . . The Divestiture Study findings confirm that feasible divestitures play a constructive role in the overall merger review process."); *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 326 (1961) (describing divestiture as the "most effective[] of antitrust remedies").

[15] *See, e.g.*, U.S. FED. TRADE COMM'N, THE FTC'S MERGER REMEDIES 2006-2012: A REPORT OF THE BUREAUS OF COMPETITION AND ECONOMICS, at 1-2 (Jan. 2017), https://goo.gl/Z8UHwA [hereinafter FTC Merger Remedy Review] ("In evaluating the 50 orders in the case study component, the Commission staff considered a merger remedy to be successful only if it cleared a high bar—maintaining or restoring competition in the relevant market. Using that standard, all of the divestitures involving an ongoing business succeeded. . . . Overall, with respect to the 50 orders examined, more than 80% of the Commission's orders maintained or restored competition.").

also important roles for non-structural remedies within merger analysis, particularly in high-tech markets.[16]

Transactions in high-tech spaces often differ importantly from transactions in more traditional spaces. Mergers or acquisitions in more traditional industries (such as retail, hospitals, oil and gas) typically entail physical assets and/or discrete business units that may be more easily identified and divorced from the primary business units—meaning both (1) the merger continues to make sense for the parties even with the divestiture, and (2) a properly crafted divestiture can meaningfully replace competition that would otherwise be lost as a result of the merger.[17] High-tech transactions, on the

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[16] *See* Scott Sher & Kellie Kemp, *A Comparative Analysis of the Use of Merger Remedies in Technology Industries*, COMPETITION POLICY INTERNATIONAL (December 2014); U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE ANTITRUST DIVISION, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES, at 4 (June 2011), https://goo.gl/QHoXqK ("The Division's focus is on effective relief for the particular merger presented. In certain factual circumstances, structural relief may be the best choice to preserve competition. In a different set of circumstances, conduct relief may be the best choice. In still other circumstances, a combination of both conduct and structural relief may be appropriate.").

[17] *See* FTC Merger Remedy Review, *supra* note 15, at 1-2; Sher & Kemp, *supra* note 16, at 2 ("Remedies involving non-technology mergers often are easier to administer than those in technology mergers, as the divestment of an 'autonomous, on-going business unit' often is a relatively straightforward task in non-technology industries: an airline merger can be resolved with the divestiture of airport slots; a retail or supermarket merger can be resolved with the divestiture of brick-and-mortar locations in a geographic region. These are options not always available as remedies in technology company mergers."); *Ford Motor Co. v. United States*, 405 U.S. 562, 573-74 (1973) ("Complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws.").

other hand, are frequently motivated by intellectual property and/or network effects.[18] Particularly for these kinds of transactions, non-structural remedies may provide meaningful antitrust relief.[19]

For example, a given merger might be desirable because it would allow the combined firm, with command of each party's IP, to create entirely new products and innovations or to accelerate such developments. But simultaneously, such a combination might facilitate the merged company's incentives and ability to exclude rivals from necessary IP. These concerns might be particularly acute if the merger would involve IP that is part of an industry standard or if it would allow the merged firm to expand its network effects. Both standards and network effects can have tremendously important procompetitive effects, allowing firms to provide new, improved products for consumers—but they also have the potential for anticompetitive exploitation.

Another important consideration is the potential impact on investment and innovation. Many vertical technology mergers occur because that was the acquired firm's objective from the outset. Significant funds are invested every

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[18] *See* Scott A. Sher, *Non-structural Remedies in High-technology Markets*, 3 CLAYTON ACT NEWSLETTER 19, 20 (2002) ("Several types of high-tech markets and mergers are particularly suited for non-structural remedies, including (1) mergers in networked industries, (2) mergers where the combined company's primary source of market power rests with its intellectual property portfolios, and (3) mergers where the relationship between the merging entities is vertical, rather than horizontal.").

[19] *Id.*; Sher & Kemp, *supra* note 16, at 5.

year on the basis that, if the product is successful, it can be sold to a Facebook or an Intel to improve their offerings. Consumers benefit when these larger platforms can make the innovative product available more broadly. Allowing these acquisitions with non-structural remedies can benefit consumers in a way that blocking the transaction cannot.

The predominant anticompetitive concern in these cases is often that the combined firm would be able to exclude competitors from critical technology. Resolving such concerns may be best accomplished, not through divestiture or a full-stop injunction, but through behavioral restrictions mandating, for instance, access on non-discriminatory terms for rivals. Such behavioral remedies may more effectively address the competitive concerns at issue.

It is also important to note that divestitures in such circumstances may be unworkable. This might be the case either because practically it is too difficult to discern where to draw the necessary lines for divestiture or because the appropriate divestiture package would vitiate the value of the deal for the parties.[20] In such cases, if the choice is framed as structural remedies or blocking the deal, consumers might lose out on the valuable innovations the deal

[20] Sher, *supra* note 18, at 27, ("In high-technology markets, the agencies should consider non-structural remedies to resolve competitive concerns not only because such remedies have the potential to better preserve the efficiencies of a merger, but also because structural remedies are often impossible to fashion to address the competitive concerns in many of these industries.").

would facilitate because structural remedies proved unmanageable. Behavioral remedies, then, might allow consumers to realize the value of the innovations from the deal, while forbidding the anticompetitive behaviors causing concern.

In the DOJ's investigation of *Google/ITA* (2011), for instance, the DOJ was concerned the transaction would allow Google anticompetitively to degrade or even deny rivals' access to ITA Software's airfare pricing and shopping systems (P&S systems).[21] The DOJ also recognized, however, that the transaction would help the combined company to realize significant procompetitive efficiencies. Accordingly, DOJ permitted the transaction to proceed with certain behavioral remedies, including that Google must continue to license ITA's P&S systems software to other companies, impose a firewall to prevent Google from obtaining sensitive competitive information (to mitigate concerns regarding future discrimination), and establish a formal process for addressing customer and competitor complaints and agree to DOJ monitoring for five years. These remedies effectively preserved competition in the market while allowing the parties to realize the efficiencies from the merger—benefits that could not have been obtained with structural remedies. (This and a few other example of successful decrees are summarized in the attached addendum.)

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[21] Final Judgment, *United States v. Google, Inc. & ITA Software, Inc.*, Case No. 1:11-cv-00688, (D.C. Oct. 5, 2011), http://www.justice.gov/atr/cases/f275800/275897.pdf.

It is true enough that behavioral remedies place a burden on the Division to monitor the remedy for compliance, and that violations may be difficult to detect. This is an important consideration. But it should not outweigh the procompetitive effects of allowing an otherwise beneficial acquisition in every case. What is needed, rather, is a close examination of the likely enforcement costs against the consumer benefits of allowing the transaction subject to behavioral conditions. There is no "one-size-fits-all" approach that can be expected to work.

The DOJ (and the FTC) have extensive experience in reviewing mergers, and have previous examples—both successful and unsuccessful—to turn to in crafting workable, effective remedies. Where the costs of non-structural remedies are outweighed by their benefits, which is often the case, consumers will benefit from the prospect for enhanced dynamic competition and innovation.[22]

III. CONCLUSION

This roundtable creates an important opportunity for the antitrust community to analyze how consent decrees can be crafted and enforced so as to

[22] *See* Sher, *supra* note 18, at 27 ("If non-structural remedies ultimately benefit consumers by preserving and maximizing merger efficiencies, then such relief may indeed be more appropriate regardless of the cost to enforce it.").

best protect consumer interests. I thank the DOJ for inviting me to join this discussion and look forward to a valuable conversation on these issues.

Addendum

Below are case summaries describing four acquisitions that were subject to behavioral remedies in the U.S. and Europe. The summaries provide a (1) short description of the transaction; (2) an overview of the reviewing agency's concerns; (3) a description of the potential efficiencies stemming from the transaction; and (4) an explanation of the behavioral commitments put forth.

1. Northrop Grumman Corp. / TRW Inc. (DOJ cleared in 2002 subject to conduct remedies)

- *Key Message: The behavioral commitments preserved the synergies gained from vertical integration while preventing the merged entity from discriminating against upstream or downstream rivals or using rivals' sensitive information to gain a competitive advantage.*

- Description of Transaction: In 2002, Northrop Grumman Corp. ("Northrop") announced its intent to acquire TRW Inc. ("TRW") for $7.8 billion.[23] Northrop was one of only two U.S. companies that manufactured the payload used in reconnaissance satellites, while TRW was one of the only companies with the ability to serve as a prime contractor on U.S. government reconnaissance satellite programs. Importantly, the Department of Defense relied on prime contractors to select the best payloads for their satellites.

- Agency Concerns: The DOJ was concerned that the vertical integration would give Northrop the ability and incentive to lessen competition by (1) favoring its in-house payload if it was selected as the prime contractor, and (2) by refusing to sell its payload to competing prime contractors.[24] Additionally, the DOJ noted that the merger could pose a threat to the proprietary information of rival prime contractors and payload suppliers that entered into partnership agreements with Northrop.

- Potential Efficiencies: The vertical integration would allow Northrop to be both the prime contractor and the payload provider for reconnaissance satellites. Markedly, the Department of Defense (the only customer

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[23] https://news.northropgrumman.com/news/releases/northrop-grumman-to-acquire-trw-for-60-per-share-in-stock.

[24] https://www.justice.gov/archive/atr/public/press_releases/2002/200543.htm.

affected by the transaction) determined that the acquisition "offered the possibility of increased competition for its space requirements."[25]

- Behavioral Commitments: The DOJ required Northrop to enter into a consent decree as a condition to approving the merger. The decree required Northrop to act in a non-discriminatory manner in: (1) choosing a payload for a satellite program where Northrop is acting as the prime contractor, and (2) supplying its payload to prime contractors competing with Northrop for U.S. satellite programs. Northrop was also required to maintain a firewall between its payload business and its prime contractor business. In reaching this conclusion, the DOJ noted that given the "significant competitive benefits" that would not occur absent the merger, "strict behavioral prohibitions and significant potential sanctions [was] the best available means of satisfying the public interest in competition."[26]

2. Google/ITA (DOJ cleared in 2010 subject conduct remedies)

- *Key Message: The behavioral commitments allowed the combined entity to develop new flight search tools while preventing the merged firm from denying its OTI competitors access to a key input (i.e., QPX software).*

- Description of Transaction: In 2010, Google announced its intent to acquire travel software company ITA for $700 million dollars. ITA was the developer and licenser of QPX software, which was used by airlines, travel agents, and online travel intermediaries ("OTIs") to provide customized flight searches.

- Agency Concerns: The DOJ alleged that the merger would give Google the ability and incentive to deny OTIs access to (or raise their prices) for QPX software, as Google planned to introduce its own competing OTI site. Additionally, the DOJ alleged that Google could gain access to competitively sensitive information from OTIs via QPX licensing agreements.

- Potential Efficiencies: Although DOJ did not explicitly reference the efficiencies stemming from the vertical integration, Google argued that the acquisition would allow it to pursue the creation of new flight search tools

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[25] https://www.justice.gov/atr/case-document/competitive-impact-statement-165.

[26] *Id.*

that would enable users to find better online flight information and drive more customers to airlines' and online travel agencies' websites.[27]

- Behavioral Commitments: Recognizing that the merger would generate significant procompetitive effects, the DOJ allowed the transaction to proceed but required Google (1) to honor existing QPX licenses and renew existing licenses under similar terms and condition; (2) offer licenses to other OTIs on reasonable, non-discriminatory terms; (3) devote substantially the same amount of resources to R&D for QPX as ITA did before the merger; (4) to not use certain restrictive terms in its agreements with airlines and OTIs; and (5) to firewall OTIs' competitively sensitive information from personnel involved in Google's travel search service. Google also agreed to establish a formal process for customer and competitor complaints and submit to government monitoring for five years.

3. Intel/McAfee (EU cleared in 2010 subject to conduct remedies)

- *Key Message: The behavioral commitments allowed the combined entity to develop more sophisticated chipsets using McAfee's security know-how, while ensuring interoperability between the merged entity's products and those of their competitors.*

- Description of Transaction: In August 2010, chipset manufacturer Intel announced its intention to purchase security technology company McAfee in a deal valued at $7.68 billion.[28] Although the parties didn't directly compete, their products were closely related from both a technical and a commercial point of view.

- Agency Concerns: The European Commission expressed concern that Intel might favor its McAfee business by interfering with interoperability between its CPUs and endpoint security solutions offered by McAfee's rivals, or that Intel might bundle McAfee's products with Intel's hardware. The Commission also feared that Intel might prevent McAfee from interoperating with non-Intel CPUs and chipsets.

- Potential Efficiencies: Although the Commission didn't explicitly describe the efficiencies stemming from the merger, experts noted that the

[27] https://www.google.com/press/ita/faq.html.

[28] https://newsroom.intel.com/news-releases/intel-to-acquire-mcafee/.

purchase of McAfee would give Intel access to more security specialists and the ability to hardwire more of these security tools into its chips.

- **Behavioral Commitments**: In February 2010, the Commission conditioned approval of the merger on Intel committing to numerous conduct remedies, including refraining from selling an integrated package of CPU and anti-virus software as well as taking specific steps to ensure that its CPUs interoperated with McAfee antivirus competitors. Intel also committed not to actively impede competitors' security solutions from running on Intel CPUs or chipsets. The Commission concluded that the "commitments were suitable to remove the competition concerns identified while preserving the efficiencies of the merger, because they are designed to maintain interoperability between the merged entity's products and those of their competitors, thereby ensuring competition on an equal footing between the parties and their competitors."[29]

4. AlliedSignal/Honeywell (EU cleared in 1999 subject to divestiture and conduct remedies)

- ***Key Message**: The behavioral commitments prevented the combined entity from foreclosing competition in the developing IHAS market while preserving the efficiencies of the transaction (i.e., the development of next generation IHAS technology).*

- **Description of Transaction**: In June 1999, AlliedSignal announced its proposed $13.8 billion acquisition of Honeywell. AlliedSignal was a manufacturing company with operations in aerospace, automotive products and engineered materials. Honeywell was an international controls company that developed and supplied advanced technology products, systems and services for the aerospace industry.[30]

Potential Efficiencies: The Commission found that Honeywell's engineering know-how paired with AlliedSignal's TAWs technology would permit the successful development of a next generation Integrated Hazard Surveillance Systems (IHAS).[31]

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[29] http://europa.eu/rapid/press-release_IP-11-70_en.htm.

[30] http://www.nytimes.com/1999/06/07/business/allied-signal-and-honeywell-to-announce-merger-today.html

[31] http://ec.europa.eu/competition/mergers/cases/decisions/m1601_en.pdf.

- **Agency Concerns**: The parties both competed in the following three markets: (1) the Airborne Collision Avoidance Systems ("ACAS") market; (2) radar systems for civil helicopters market; and (3) for Terrain Awareness Warning Systems ("TAWS") market. One of the commission's main concerns was that the combined entity could foreclose TAWs competitors by preventing them from interoperating with the combined entity's other avionics products. Additionally, the Commission expressed concern that the combined entity could foreclose competition in the next generation IHAS market by refusing to license AlliedSignal's TAWs technology (an essential input for IHAS) to potential IHAS competitors. One other issue concerned the ability of the new entity to bundle offers of avionics products and non-avionics products, which would give it substantial commercial advantages in the marketplace.

- **Behavioral Commitments**: The Commission authorized the merger subject to the combined entities' compliance with a number of divestiture and behavioral commitments, including (1) supplying third parties with open interface standards of other avionics products, so that new Terrain Awareness Warning Systems (TAWS) suppliers could have their products installed on airplanes which are equipped with other avionics from the parties; (2) supplying third parties with TAWS technology as well as interface data, so that third parties could continue to carry out IHAS product developments with crucial AlliedSignal technology; and (3) not pursuing a policy of selling avionics and non-avionics jointly.[32]

[32] http://europa.eu/rapid/press-release_IP-99-921_en.htm.