George Mason University | School of Law

ANTITRUST SETTLEMENTS: THE CULTURE OF CONSENT

Douglas H. Ginsburg,
New York University School of Law;
Senior Judge, United States Court of Appeals for the District of Columbia Circuit

Joshua D. Wright,
George Mason University School of Law

William E. Kovacic: An Antitrust Tribute – Liber Amicorum **(Vol. I) (Charbit et al. eds., February 2013)**

George Mason University Law and Economics Research Paper Series

13-18

Antitrust Settlements: The Culture of Consent[♦]

DOUGLAS H. GINSBURG
dginsburg@nyu.edu
Professor of Law, New York University School of Law
Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

JOSHUA D. WRIGHT
jwrightg@gmu.edu
Professor, George Mason University School of Law and Department of Economics

Abstract

The beginning of a shift toward a more regulatory and less litigation-oriented regime of antitrust enforcement was observable by the mid-1990s, if not earlier. The transition toward this more bureaucratic approach by antitrust enforcement agencies is the subject of our analysis. Consent decrees create potential for an enforcement agency to extract from parties under investigation commitments well beyond what the agency could obtain in litigation—commitments that may impair rather than improve competition and thereby harm consumers. The consequences of such consent decrees, that is, are borne not only by the parties that are subject to them, but also by consumers and by non-parties who glean the agency's enforcement position from the terms of those decrees. Moreover, consent decrees signal to foreign competition authorities that such commitments are appropriate and, consequently, the FTC and the Division lose the ability they might otherwise have to convince other agencies to minimize their own departures from the appropriate standard. We proffer that the culture of consent at antitrust agencies both in the United States and abroad has had an untoward effect upon the agencies' selection of cases to bring and, more certainly, upon the remedies the agencies obtain in settlement agreements.

[♦] We thank Angela Diveley and Daniel Haar for research assistance.

I. Introduction

1. The Antitrust Division's first entered into a consent decree in an case in *United States v. Otis Elevator Company* in 1906.[1] By the 1950s, 87 percent of all civil antitrust cases brought by the Division were settled by consent decrees. 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 1990s.[2] This trend has continued, with the Division resolving nearly its entire antitrust civil enforcement docket by consent decree from 2004 to present.[3] The Federal Trade Commission has experienced a similar increase in the use of consent decrees as a proportion of enforcement activity. FTC consent decrees more than tripled in number from 1992 to 1995.[4] Since 1995, the FTC has settled 93 percent of its competition cases.[5]

2. The beginning of a shift toward a more bureaucratic and less litigation-oriented regime of antitrust enforcement was observable by the mid-1990s, if not earlier.[6] The transition to a new, more regulatory approach to enforcement appears now to be complete. This significant shift in the nature of antitrust enforcement institutions—and its effects—is the subject of our analysis. We have undertaken this analysis in tribute to William E. Kovacic, teacher, scholar, public servant extraordinaire and, we are proud to say, our friend, who has prompted and led a generation of scholarship on the institutions of antitrust law.

3. Some tradeoffs between moves along the continuum toward the regulatory model and away from what might be described as a "law enforcement" model are well known. The regulatory model brings greater reliance upon the consent decree as the principal means of enforcement—and in turn, the benefits of economizing on scarce agency resources—at the cost of potentially stunting the development of the common law arising through adjudication. The

[1] 1 CCH, Decrees & Judgments in Federal Anti-Trust Cases 107 (N.D. Cal. 1906).
[2] 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).
[3] Department of Justice Antitrust Division, Congressional Submission FY 2012 Performance Budget 27.
[4] A. Douglas Melamed, *Antitrust: The New Regulation*, ANTITRUST, Fall 1995, at 13.
[5] FEDERAL TRADE COMMISSION COMPETITION DATABASE (last visited Oct. 19, 2011), http://ftc.gov/bc/caselist/index.shtml.
[6] Harry First, *Is Antitrust "Law"?*, ANTITRUST, Fall 1995, at 11 (observing a similar "shift on the policy continuum toward bureaucratic regulation"); Georgiev, *supra* note 2, at 1026 ("Settlements further the bureaucratic regulation model because they focus not on the actual past violation of the law (indeed, they are purposefully silent on this question), but rather on the future remedies that would best address what the regulator perceives as a market failure."); Melamed, *supra* note 4, at 13 (describing antitrust enforcement as having "moved markedly along the continuum from the Law Enforcement Model toward the Regulatory Model").

regulatory model also focuses more intensely upon the remedy than the underlying violation and thus, unsurprisingly results in consent decrees tending to place the agency in the position of monitoring or supervising the firm's compliance with remedial obligations or imposing conditions that extend beyond what the agency would likely be able to obtain after successful litigation.

4. We focus upon less well-recognized consequences of the institutional shift toward a culture of consent in the antitrust enforcement agencies. Part I outlines the direct welfare costs of antitrust settlements. Part II focuses upon the less direct but nonetheless significantly deleterious effects of the shift toward the culture of consent. Part III briefly concludes, and the Appendix catalogs the antitrust settlements analyzed and other examples of noteworthy settlements both in the United States and in other jurisdictions.

II. Materially Adverse Welfare Effects

5. Antitrust settlements subvert the purposes of antitrust law when they depart from the welfare standard adopted by most jurisdictions—whether progress toward that purpose is measured by the consumer welfare or by the total welfare standard. The most obviously harmful antitrust settlements are those with a substantive provision that directly reduces consumer welfare. There can be reasonable disagreement as to whether certain settlement provisions further consumers' interests; however, a non-trivial number of recent antitrust consents in the United States and other jurisdictions include settlement provisions that will likely make consumers worse off. We denominate these settlements, running as they do, directly counter to the goals of antitrust law, as "abuses" of power by the antitrust enforcement agency. Common examples of abuses include settlement provisions imposing restrictions upon the merging firms' employment decisions,[7] requiring the settling firm to make charitable contributions unrelated to compensating victims of an antitrust violation,[8] and extracting concessions irrelevant to the potential antitrust concerns under review.[9]

6. Consent decrees placing the agency in the role of monitoring competition can also have materially adverse consequences for consumers, even when the decree is targeted at conduct that might reasonably be viewed as reducing consumer welfare. We denominate "misuses" of the

[7] *See, e.g.*, *Providence Health System, Inc. / North Central Pennsylvania Health System*, Case II.B.3 in the Appendix.
[8] *See, e.g.*, *UnitedHealth Group / Sierra Health Services*, Case I.A.4 in the Appendix.
[9] *See, e.g.*, *Leominster Hospital / Burbank Hospital*, Case I.A.6 in the Appendix.

settlement process consent decrees containing provisions that potentially further the goals of antitrust law by preventing arguably welfare-reducing conduct but that do so by placing the enforcement agency in a position of monitoring and supervising competition for an extended period of time. A consent decree with such a provision rises to the level of an abuse, however, if the remedy exceeds what the agency could reasonably have anticipated obtaining in litigation. A paradigmatic example of a recent misuse is the FTC's consent decree with Intel Corporation.[10] That decree restricted Intel's ability to offer certain discounts to its customers, but those provisions at least arguably serve consumer welfare according to the FTC's economic theory of the case. More to the point, the settlement also contains a provision—among others arguably placing the FTC in a significant supervisory role—prohibiting Intel, until the decree expires in 2020, from making any change in the design of its microprocessors or graphics processing units that does not "provide an actual benefit" to the products and degrades the performance of a rival product.[11]

7. The adverse welfare consequences of abusive settlements are not bounded by the transaction-specific costs imposed upon the parties to the consent decree and upon their customers. An abusive settlement can also have a chilling effect upon non-parties, whether in the same or other industries, who glean the agency's enforcement position from the terms of the settlement. Recent examples include the aforementioned FTC settlement with Intel as well as its settlement in *N-Data*. In *Intel*, the FTC not only acquired a role in supervising the product design, innovation, and engineering decisions of a firm engaged at the center of the fast-changing technology sector of the economy.[12] The FTC also communicated its willingness to rely in a future case upon the uniformly disfavored standard for assessing bundled discounts that the Third Circuit had adopted in *LePage's*.[13] Non-parties counseling clients with regard to potential antitrust exposure must pay close attention to the substance of consent decrees that communicate valuable information concerning how the agency is likely to view and seek to remedy certain forms of business conduct. A consent that communicates the agency's willingness to challenge procompetitive or competitively innocuous business arrangements will have a detrimental impact upon consumer welfare; similarly, an agency's endorsement of a legal standard generally

[10] *See, e.g., Intel Corp.*, Case II.A.1 in the Appendix.
[11] *Id.*
[12] Analysis of Proposed Consent Order to Aid Public Comment, 75 Fed. Reg. 48343 (Aug. 10, 2010). The FTC Rules of Practice set forth a procedure for accepting consent decrees that requires the agency to publish the proposed consent for public comment with an explanation of the provisions in the order. 16 C.F.R. § 2.34(c) (2010).
[13] LePage's Inc. v. 3M Co., 324 F.3d 141 (3d Cir. 2003) (en banc).

recognized to deter competition, such as the standard in *LePage's*, almost certainly will harm consumers.[14]

8. The settlements into which the FTC or the Antitrust Division enter also communicate information to state and foreign competition authorities. Like other non-parties to settlements, state and foreign competition authorities pay close attention to the content of the FTC's and the Division's antitrust settlements. To the extent those settlements depart from the objective of protecting consumer welfare, they signal to other competition authorities that such considerations are appropriate. Consequently, the FTC and the Division lose the ability they might otherwise have to convince other agencies to minimize their own departures from the appropriate standard.[15]

III. The Culture of Consent

9. An antitrust agency, or indeed any law enforcement agency, resolving a case by entering into a civil consent decree with a person or firm accused of having violated the law, may be able to extract more favorable terms by agreement than it could reasonably or perhaps even lawfully obtain after litigating its accusations to judgment in a court. The agency's ability to obtain concessions, whether up to or beyond the remedies it might obtain at law, reflects the defendant's comparison of the costs and benefits of litigating as opposed to the costs and benefits of acquiescing in the terms sought by the agency.

10. In all material respects, the civil antitrust defendant's calculus mirrors that of a criminal defendant, whether in an antitrust or other case, weighing the relative merits of putting the prosecution to its proof versus entering into a plea bargain. Among the major considerations are, of course, the relative strength of the parties' arguments and evidence, the cost of litigation, and the uncertainty attending the outcome.[16] Just as the vast majority of criminal cases, for antitrust violations as for other crimes, are resolved by a plea bargain,[17] so too are the great majority of

---

[14] ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 94 (2007) ("[T]he Third Circuit's decision is likely to discourage firms from offering procompetitive bundled discounts and rebates to consumers.").

[15] *See* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L. J. 377, 477 (2003) (discussing the sensitivity of the development of antitrust law in transition economies to developments in the United States).

[16] *See generally* Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LIT. 1076 (1989) (surveying the economic literature on the decision to litigate or settle).

[17] From 1996 to 2006, 307 of 367 (84 percent of) criminal antitrust defendants in the United States pled guilty. *See* F. Joseph Warin et al., *To Plead or Not to Plead? Reviewing a Decade of Criminal Antitrust Trials*, ANTITRUST SOURCE, July 2006, at 2. The DOJ reports the settlement rate in criminal cases over the past twenty years to be "over 90 percent." *See* Ann O'Brien, Cartel Settlements in the U.S. and

antitrust agency civil matters resolved by a settlement agreement. The agreement will be entered as a court judgment if the agency must bring its enforcement actions in court or, as in the case of the FTC, will take the form an agreement settling an administrative complaint brought pursuant to Part III of the Federal Trade Commission Act.

11. As discussed, both the FTC and the Antitrust Division have settled more than 90 percent of the civil cases they have brought in the last twenty years, following a steady increase in the settlement rate over the decades prior.[18] Indeed, trials have long been a thing of extreme rarity in the experience of FTC and Antitrust Division lawyers, including those of the so-called litigation staff; the Division's 2011 case against H&R Block Inc.'s proposed acquisition of the maker of TaxAct tax preparation software was its first matter to go to trial since 2004.[19] As a consequence, the work of the agencies is devoted much less to actual litigation—the presentation of evidence and arguments in a trial-type forum—or even to preparation for trial, than it is to investigation and negotiation.[20]

12. The culture of an agency is inevitably affected by the tasks it predominantly performs. For an antitrust agency that settles the great majority of the cases it brings, most staff time is devoted to investigation. Whether a matter is destined for litigation or for settlement, the necessary investigative skills are the same but it may become apparent, whether at the outset or in the course of an investigation, the agency's case is sufficiently strong, or the defendant's resources sufficiently limited, that settlement is a virtual certainty. A more thorough investigation of the sort needed in anticipation of litigation can be substantially truncated in such a case. Indeed, insofar as the agency is able to find easy cases, that is, cases almost certain to be settled, it will neither need nor acquire nor cultivate more sophisticated forensic skills. In short, a degree of laxity if not sloppiness may come to infect an agency's investigations that are heading inevitably toward resolution by consent.

EU: Similarities, Differences and Remaining Questions, Remarks by Senior Counsel to the Deputy Assistant Attorney General for Criminal Enforcement before the 13th Annual EU Competition Law and Policy Workshop (June 6, 2008), *available at* http://www.justice.gov/atr/publicspeeches/235598.htm.

[18] Comparable data are not available for state or foreign antitrust enforcement authorities but, based upon daily reporting of antitrust developments worldwide, we believe they are generally similar in nature and degree.

[19] Sara Forden & Jeff Bliss, *U.S. Antitrust Enforcers Add Litigators to Bolster Odds at Trial*, BLOOMBERG NEWS, Feb. 3, 2012, *available at* http://mobile.bloomberg.com/news/2012-02-03/u-s-antitrust-enforcers-add-litigators-to-bolster-odds-at-trial.

[20] Another significant use of agency resources is policing compliance with negotiated settlements. The FTC Bureau of Competition Compliance Division currently has a staff of thirteen. *See* BUREAU OF COMPETITION, FED. TRADE COMM'N, INSIDE BC 22-23 (2012), *available at* http://www.ftc.gov/bc/BCUsersGuide.pdf.

13. Insofar as the agency is in a position readily to extract settlements from potential defendants, it might not limit itself to extracting terms of the sort or degree that it could obtain from a defendant in a contested case in court. On the contrary, the agency might well seek to settle upon terms that serve its bureaucratic interests.[21] These include broadening the agency's goals and responsibilities, a vector well-expressed by the phrase "mission creep,"[22] benefitting a politically influential interest group, and accumulating power over the regulated community in general and over the consenting firms in particular.

14. Consider, for example, *Nevada v. UnitedHealth Group*,[23] in which a state Attorney General obtained, as a condition of approval for a merger of insurance companies, an agreement that the merged company would "donate" $15 million to support various health-related activities, including the nursing program at the state university and funding for five years "one position within the Governor's Consumer Healthcare Assistance program for small employer education and advocacy."[24] A properly notorious example is the recent agreement between the Competition Commission of South Africa and Wal-Mart as a condition of that company's acquiring Massmart, which the Competition Appeal Court approved with seeming reluctance under its "public interest" standard.[25] Although the lower court had found the "merger raise[d] no competition concerns" and "the likely consumers [would] benefit" from lower prices, the agreement provided there would be no layoffs for two years and the company would invest at least R100 million within three years.[26] None of the conditions in either of the two cases is even plausibly related to the preservation of competition but rather each serves some other agency interest.

---

[21] *Cf.* MILTON FRIEDMAN, WHY GOVERNMENT IS THE PROBLEM 9 (1993) ("The general rule is that government undertakes activity that seems desirable at the time. \Once the activity begins, whether it proves desirable or not, people in both the government and the private sector acquire a vested interest in it. If the initial reason for undertaking the activity disappears, they have a strong incentive to find another justification for its continued existence.").

[22] "Mission creep refers to an organizational phenomenon in which entities inadvertently, over time, stray from their fundamental mission by engaging in activities or behaviors less closely related to the core . . . purpose." Gary W. Jenkins, *Who's Afraid of Philanthrocapitalism?*, 61 CASE W. RES. L. REV. 753, 805 n.212 (2011);*see also* William E. Kovacic, *Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy*, 74 ST. JOHN'S L. REV. 361, 385 (2000) (Antitrust consent decrees specifically offer "a valuable opportunity for enforcement officials to portray their work as path-breaking and innovative, and thereby distinguish it from the accomplishments of previous management").

[23] *UnitedHealth Group / Sierra Health Services*, Case I.A.4 in the Appendix.

[24] *Id.* Sched. A, Ex. C.

[25] *See S. Afr. Commercial, Catering & Allied Workers Union v. Wal-Mart Stores Inc.*, Case I.B.2 in the Appendix.

[26] *See* Devon Maylie, *Wal-Mart Gets Nod in Africa*, WALL STREET J., June 1, 2011, *available at* http://online.wsj.com/article/SB10001424052702303657404576357132239525222.html.

15. The bureaucratic imperative may also cause an agency in negotiating a settlement to seek concessions that make it easier for the agency to assure the defendant's continuing compliance with the settlement or, indeed, with antitrust law in general. For example, the Antitrust Division negotiated a 33-page consent decree with Google as a condition of approving its acquisition of ITA, a developer of software for the online purchase of airline tickets.[27] The consent decree required the companies to allow the Division to inspect its documents and interview its officers and employees concerning their continuing compliance with the substantive terms of the decree, which prohibited Google from restricting its competitors' access to certain software and committed the company to continue both improving that software and developing a new search product that ITA had started.[28] Quite apart from the objection that the settlement gave the Antitrust Division a continuing role in monitoring the merged business, the Antitrust Division also obtained a means of access to documents and testimony under terms even less demanding than would ordinarily apply to its issuance of a Civil Investigative Demand ("CID").[29] Indeed, if this provision of the settlement had not made it easier for the Antitrust Division to investigate the firm's post-merger compliance than did the ordinary process of the law, then the provision would not have been worth negotiating.

16. This is not to suggest that an agency routinely would seek or enter into settlements that called for it or the defendant to do things that are facially antithetical to its proper, lawful mission. The goals of antitrust law, however, have been subject to notoriously broad and changing interpretations, more so than perhaps any other body of law. Although it is now generally understood that the sole appropriate goal of antitrust law enforcement is to enhance consumer welfare, that goal can be (and in our view should be) understood narrowly to justify only remedial steps that clearly thwart efforts to restrict competition. The antitrust laws are still, however, understood by some enforcement agencies, as reflected in the cases discussed above and epitomized in the Appendix to this article, to include a variety of other interventions that are not relevant to enhancing competition, or that may even tend to frustrate it, notwithstanding their appearance of aiding consumers.

17. Another consequence of an agency bringing cases primarily with an eye to settlement is to change the agency's case selection criteria. In addition and to some extent in lieu of the

[27] *See United States v. Google Inc.*, Case II.A.2 in the Appendix.
[28] *Id.* at 30.
[29] A CID is subject to "the standards applicable to discovery requests under the Federal Rules of Civil Procedure." 15 U.S.C. § 1312(c)(1)(B) (Department of Justice Antitrust Division); *id.* § 57b-1(c)(1) (requiring "reason to believe" a person has information regarding a violation of antitrust law (Federal Trade Commission)).

criteria that would otherwise make a case attractive, such as the benefit to consumers from terminating an anticompetitive business practice, the probability and ease with which the case will settle become part of the mix. That is, instead of pursuing the cases that advance most the agency's law enforcement mission, it will tend to pursue cases with the best prospect for settlement, cases that will consume few investigative resources, settle quickly, and are more likely to result in a consent decree that provides a continuing role for the agency. To the extent that case selection is altered by the prospect of obtaining an easy settlement, the agency is positioned more like a private plaintiff doing a cost-benefit analysis. To that extent also, the agency does not have any special claim to exemption from the constraints placed upon private antitrust plaintiffs in cases such as *Trinko* and *Credit Suisse*, notwithstanding the Commission's call "for Congress to clarify that neither [case] prevents public antitrust agencies from acting under any of the antitrust laws when they conclude that anticompetitive conduct would otherwise escape effective regulatory scrutiny."[30]

IV. Conclusion

18. We submit that the culture of consent at antitrust agencies both in the United States and abroad has had an untoward effect upon agencies' selection of cases to bring and, more certainly, upon the remedies the agencies obtain in settlement agreements. The Appendix further documents examples of the abuses and misuses to which antitrust law has been put in consent decrees and settlement agreements.

[30] *Is There Life After Trinko and Credit Suisse? The Role of Antitrust in Regulated Industries: Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 14 (2010) (Statement of The Federal Trade Commission); *see also* J. Thomas Rosch, Commissioner, Federal Trade Commission. Rewriting History: Antitrust Not as We Know It . . . Yet, Remarks Before the ABA Antitrust Section 2010 Spring Meeting 17-19 (Apr. 23, 2010).

Appendix: Cases of Antitrust Abuse and Misuse

I. Antitrust Abuse

A. United States

1. *Google / Motorola; Apple, Microsoft, & RIM / Nortel; Apple / Novell*[31]

The DOJ issued a closing statement on February 13, 2012, regarding its investigation of (1) Google Inc.'s acquisition of Motorola Mobility Holdings Inc.; (2) Apple Inc., Microsoft Corp., and Research in Motion Ltd.'s ("RIM's") acquisition of patents from Nortel Networks Corp.; and (3) Apple Inc.'s acquisition of patents from Novell Inc. The acquisitions involved patents that would assist the acquiring firm(s) in the development of cellular phone technology, including smart phones and operating systems for those phones. The DOJ had expressed concern that the acquiring companies would use patents essential to various technological standards (called standard essential patents or "SEPs") they obtained to hold up rivals and harm competition and innovation.

Upon investigation, the DOJ concluded that none of the acquisitions was likely substantially to lessen competition. In determining it was proper to close its investigations, the DOJ "took into account the fact that during the pendency of these investigations, Apple, Google and Microsoft each made public statements explaining their respective SEP licensing practices." Specifically, Apple and Microsoft agreed not to seek injunctions for licensing violations. Google's commitment was "less clear" to the DOJ, giving it reason to "continue[] to have concerns about the potential inappropriate use of SEPs to disrupt competition." Concluding its analysis, the DOJ emphasized its role, at the intersection of intellectual property and antitrust, of balancing the "rightful exercise of patent rights" against "the anticompetitive use of those rights." Notably absent from this statement was an indication that the DOJ sought to use the antitrust laws to determine the proper balance. Rather, the DOJ focused upon what it perceived to be the dangers of injunctive relief with little discussion of the potential competitive benefits in the SSO context.

2. *Providence Health System, Inc. / North Central Pennsylvania Health System*[32]

Pennsylvania entered into a settlement agreement with Providence Health System, allowing the hospital's acquisition of North Central to go forward but prohibiting the merged entity from employing more than 40 percent of physicians practicing in certain fields in Lycoming County. The settlement also required the merged hospital to make at least 20 percent of available operating room scheduling times available on a first-come, first-served basis, and it prohibited exclusive contracts with health plans.

---

[31] DOJ, Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd. (Feb. 13, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/280190.pdf.

[32] Pennsylvania. v. Providence Health Sys., Inc., No. 4:CV-94-772, 1994 WL 374424 (M.D. Pa. May 26, 1994).

3. Altoona Hospital / Bon Secours Holy Family Regional Health System[33]

In 2004, the federal district court for the Western District of Pennsylvania accepted approved a consent decree in a state case challenging a merger between two hospitals. The consent decree required the merged hospital to notify the Pennsylvania Attorney General thirty days prior to hiring additional doctors.

4. UnitedHealth Group / Sierra Health Services[34]

In 2008, the Nevada Attorney General entered into a settlement agreement with the insurance companies UnitedHealth Group and Sierra Health Services in conjunction with their merger. Pursuant to the settlement, the defendants agreed to make $15 million in charitable contributions to "health care programs" chosen by the Attorney General. The defendants also agreed to assist in creating a Physician Council with the purposes of "discuss[ing] issues of concern to Nevada physicians, and [of] establish[ing] goals and benchmarks for voluntary compliance relating to the physician-payor relationship and the quality and delivery of health care to Nevada consumers." The defendants agreed in addition to cooperate with the Governor's Office for Consumer Healthcare Assistance in developing and expanding its Healthcare Advocacy and Assistance Program by, among other things, assisting with promulgating guidelines and with preparing and submitting reports concerning relevant healthcare issues.

5. Kenosha Hospital and Medical Center, Inc. / St. Catherine's Hospital, Inc.[35]

The state of Wisconsin reached a settlement with Siena, the hospital formed by the merger of Kenosha and St. Catherine's, prohibiting Siena from employing more than 30 percent of the physicians who practiced certain specialties within a twenty-mile radius of the Kenosha County. The settlement contained an exception allowing Siena to employ up to the same percentage as did any rival hospital. The settlement also authorized the state Attorney General to exempt Siena from the employment limitation when justified by market conditions.

6. Leominster Hospital / Burbank Hospital[36]

To consumate a merger between Leominster Hospital and Burbank Hospital, the hospitals entered into an agreement with the Attorney General of Massachusetts according to which they committed the merged hospital to increase spending on community health outreach programs by $600,000 over a four-year period. The agreement also required the hospitals to commence a demonstration project evaluating the impacts of the merger and to seek public input prior to closing any emergency facilities.

---

[33] *Antitrust Multistate Litigation Database*, NAT'L ASS'N OF ATT'YS GEN., *available at* http://app3.naag.org/antitrust/search/viewCivilLitigation.php?trans_id=466 (last visited Mar. 11, 2012).

[34] Nevada v. UnitedHealth Grp. Inc., No. 2:08-CV-00233-JCMRJJ, 2008 WL 5657751 (D. Nev. Oct. 8, 2008).

[35] Wisconsin v. Kenosha Hosp. & Med. Ctr., No. 96-C-1459, 1996 WL 784584 (E.D. Wis. Dec. 31, 1996).

[36] *Antitrust Multistate Litigation Database*, NAT'L ASS'N OF ATT'YS GEN., http://app3.naag.org/antitrust/search/viewCivilLitigation.php?trans_id=252 (last visited Mar. 11, 2012) (summarizing the agreement).

B. Outside the United States

1. Coca-Cola[37]

Distri-One, a competitor of Coca-Cola Enterprises Belgium (CCEB), complained in 1998 to Belgian competition authorities about CCEB's alleged scheme of discriminatory rebates and other distribution practices. In 2005, Belgium's Competition Council dropped its investigation after CCEB agreed to curtail its challenged practices, and the Coca-Cola Company (CCEB's parent) reached a related settlement with the European Commission. Coca-Cola agreed to refrain from entering into exclusive contracts with customers; from entering into tying arrangements; and from conditioning rebates upon purchase thresholds, growth rates, shelf-space commitments, or the purchase of other beverage products.

2. Wal-Mart / Massmart[38]

In May 2011, South Africa's Competition Tribunal approved a merger between the US-owned superstore, Wal-Mart, and a South African retailer, Massmart. The Tribunal placed several conditions upon the merger even though Wal-Mart had no presence in retail markets in South Africa. Wal-Mart thereby agreed to freeze job cuts for two years, to honor existing collective bargaining rights, to give preference to rehiring Massmart employees who had previously lost their jobs due to retrenchment, to address concerns that it would switch procurement from local manufacturers to imports, and to set up a R100 million ($13.3 million) fund with the purpose of assisting local suppliers and manufacturers. After a challenge to the merger by a union and several government ministries, the South African Competition Appeal Court in 2012 affirmed the decision and approved the acquisition subject to the conditions already imposed by the Tribunal. The Court further ordered three experts to conduct a study and advise the court on the fund's operation.

3. Coca-Cola / Huiyuan[39]

---

[37] *The Belgian Competition Council Accepts Commitments in Order to Improve Competition on the Soft Drink Market*, CONCURRENCES (Nov. 2005), http://www.concurrences.com/article.php3?id_article=389&lang=fr; Press Release, European Commission, Competition: Commission Makes Commitments from Coca-Cola Legally Binding, Increasing Consumer Choice (June 22, 2005), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/775&format=HTML&aged=0&language=EN&guiLanguage=en; Proposed Commitments Case Comp/39.116/B-2 – Coca-Cola, EUROPEAN COMMISSION (Oct. 19, 2004), http://ec.europa.eu/competition/antitrust/cases/dec_docs/39116/39116_5_6.pdf.

[38] S. Afr. Commercial, Catering & Allied Workers Union v. Wal-Mart Stores Inc., 110/CAC/Jul11 (2012), *available at* http://www.comptrib.co.za/assets/Uploads/110111CACJun11-Walmart-judgment.pdf; Press Release, South Africa Competition Tribunal, Tribunal Statement on the Conditional Approval of the Merger Between Wal-Mart Stores Inc. and Massmart Holdings Limited (May 31, 2011), *available at* http://allafrica.com/stories/201105311240.html; *see* Mike Cohen & Robert Brand, *Wal-Mart Wins South African Lawsuit Contesting Massmart Deal*, BLOOMBERG (Mar. 9, 2012, 10:12 AM), http://www.bloomberg.com/news/2012-03-09/south-africa-appeal-court-dismisses-case-against-wal-mart-s-massmart-deal.html.

[39] FRESHFIELDS BRUCKHAUS DERINGER, CHINA'S MOFCOM PROHIBITS COCA-COLA'S ACQUISITION OF HUIYUAN 1 (2009), *available at* http://www.freshfields.com/publications/pdfs/2009/mar09/25486.pdf.

In early 2009, China's Ministry of Commerce (MOFCOM) rejected Coca-Cola's acquisition of Huiyuan, a Chinese fruit juice producer. MOFCOM cited harm to competition, including the potential leveraging by Coca-Cola of its dominant position in market for soft drinks to gain market power in the market for juices, as a reason for blocking the merger. At the same time it indicated the more protectionist concern that smaller domestic juice producers would be unable to compete effectively with the merged firm.

II. Antitrust Misuse

A. United States

1. Intel Corp.[40]

The FTC undertook a regulatory role and placed limits on Intel's freedom to discount in its settlement with Intel in 2010 regarding the company's patent cross-licensing agreement with Advanced Micro Devices, Inc. The settlement contains a provision that prohibits Intel from making engineering design changes to its computer-related products that do not "provide an actual benefit to" the products, thereby giving the FTC the job of overseeing the ongoing design changes Intel will make to its products. The settlement also exempts Intel from liability for "winning all of a Customer's business, so long as [Intel] has not bid for more business than a Customer has asked to be bid." The FTC also implemented restrictions upon the terms on which Intel could deal with its customers, including prohibitions upon applying a percentage discount across all units purchased when the customer purchases a number of units beyond a given threshold and upon the bundling of discounts across purchases of several products if, when all discounts are attributed to one product, the price of that product falls below a specified measure of incremental cost. Thus, the FTC can become involved in particular transactions and opine upon the nature of Intel's dealing with its customers.

2. Google Corp. / ITA Software Inc.[41]

The DOJ, Google, and ITA Software recently consented to entry of a final judgment following the DOJ's filing of a complaint challenging Google's proposed acquisition of ITA, a producer of software designed for online purchases of airline tickets. The DOJ's concern with the merger was that Google would restrict licensing of QPX, a software product many airlines, travel agents, and travel search sites use to provide flight search functionality to consumers. The final judgment prohibited Google from restricting its competitors' access to the software, and it required Google to continue improvement of QPX and development of a new search product ITA had begun to develop.

Google and ITA agreed to allow the DOJ to inspect documents and to interview officers and

[40] *In re* Intel Corp., FTC Docket No. 9341, 2010 WL 4542454 (FTC Nov. 2, 2010).
[41] Final Judgment, United States v. Google Inc., No. 1:11-cv-00688 (D.D.C. Oct. 5, 2011); Competitive Impact Statement at 6, United States v. Google Inc., No. 1:11-cv-00688 (D.D.C. Apr. 8, 2011).

employees in order to ensure compliance. Google and ITA also agreed to submit written reports and respond to interrogatories upon the DOJ's request. The compliance provisions required the DOJ to play an ongoing monitoring role outside the scope of its normal antitrust enforcement responsibilities.

3. Ciba-Geigy Ltd. / Sandoz Ltd.[42]

In *Ciba-Geigy Limited*, the FTC placed itself in an ongoing regulatory role by requiring approval of royalty rates, royalty terms, and patent licensees. After an investigation, the FTC commenced a challenge of a proposed merger between two pharmaceutical companies, Ciba-Geigy and Sandoz. Thereafter, the FTC and the companies entered into a consent agreement that required compulsory licensing of various technology and patent rights to other pharmaceutical companies that requested licenses. The order also stipulated that, in licensing certain patents, the merged company had to seek Commission approval of the licensee and of the terms of the license. The FTC also set a maximum rate at which the company could license certain patents.

4. Transitions Optical, Inc.[43]

In its settlement with Transitions Optical, Inc., the FTC drastically limited Transitions's ability to enter into exclusive or nearly exclusive contracts with its customers. The FTC had alleged that Transitions used such contracts to foreclose its rivals from access to important downstream distribution channels, thereby harming competition. In its analysis to aid public comment, the FTC explained the provision would keep down entry barriers and would allow competition to be restored. It concluded there were no efficiency justifications for the exclusive agreements; e.g., they did not prevent free riding because Transitions' promotional efforts were brand specific, eliminating any interbrand free-riding concern. The FTC did not acknowledge other justifications for exclusive contracts unrelated to free-riding, such as providing retailers with the incentive to increase promotional efforts.

5. McCormick & Co.[44]

The FTC has both taken on an ongoing regulatory role and restricted potentially procompetitive conduct in markets for spice and seasoning products. In its settlement with McCormick, the largest spice and seasoning supplier in the country, the FTC prohibited McCormick from engaging in price discrimination. The Commission's majority reasoned that McCormick's price discrimination harmed its disfavored customers. Price discrimination, however, is often either procompetitive or competitively neutral, and McCormick was thus prohibited from engaging in potentially welfare-increasing conduct. Additionally, the FTC cast

---

[42] *In re* Ceiba-Geigy Ltd., 123 F.T.C. 842 (1997).

[43] *See In re* Transitions Optical, Inc., 2010 WL 1804580 (Apr. 22, 2010); FTC, ANALYSIS TO AID PUBLIC COMMENT: *IN THE MATTER OF TRANSITIONS OPTICAL, INC.* 7 (Mar. 3, 2010), *available at* http://www.ftc.gov/os/caselist/0910062/100303transopticalanal.pdf.

[44] Complaint, *In re* McCormick & Co., 2000 WL 264190 (FTC 2000); Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson, *In re* McCormick & Co., 2000 WL 264190 (FTC 2000).

itself in an ongoing regulatory role by requiring McCormick to document for the next ten years all relevant information relating to price discrimination it determines is justified by the "meeting competition" defense of the Robinson-Patman Act.

6. Pool Corp.[45]

The FTC recently proposed a consent agreement with Pool Corporation (PoolCorp), a distributor of swimming pool products, in which PoolCorp would agree to refrain from refusing to deal with manufacturers that deal with PoolCorp's rivals. The Commission found PoolCorp had, by foreclosing access to essential inputs, prevented potential rivals from entering the market and competing effectively. Although the consent order discusses the potential for such threats to raise rivals' costs and harm competition, it acknowledges that new distributors were able to realign supply contracts in order to avoid potential exclusion. Evidence presented in the settlement, moreover, suggests manufacturers did not honor PoolCorp's demands, no exclusion actually occurred, and there was little or no actual injury to consumers.[46] Such an enforcement action, in the absence of solid evidence of anticompetitive behavior or effect, runs the risk of chilling potentially procompetitive activities by other market participants.

7. Ticketmaster Entertainment, Inc. / Live Nation Inc.[47]

In early 2010 the Division entered into a settlement agreement with Ticketmaster Entertainment Inc., a ticketing-service provider, approving the company's merger with Live Nation Inc., a concert promoter, subject to various conditions. The agreement required Ticketmaster to license its ticketing software to the second-largest US concert promoter for up to five years. The agreement also forbade the merged firm from retaliating against customers who leave to use a competitor's ticketing services. The Division determined the agreement would facilitate entry of competitors, and thereby increase competition in the market for ticketing. Requiring the merged entity to enter into an arrangement to license its ticketing platform to a competitor, however, is fraught with the well-known competitive risks associated with imposing a duty upon firms to assist their rivals.

8. General Motors Corp.[48]

In 1984, General Motors and Toyota entered into a consent agreement with the FTC

---

[45] Order, *In re* Pool Corp., 2011 WL 5881164 (FTC 2011); Complaint, *In re* Pool Corp., 2011 WL 5881164 (FTC 2011).
[46] *See* Dissenting Statement of Commissioner Rosch, *In re Pool Corp.*, 2011 WL 5881164, at *1-2 (FTC 2011) ("This case presents the novel situation of a company willing to enter into a consent decree notwithstanding a lack of evidence indicating that a violation has occurred. The FTC Act requires that the Commission find a 'reason to believe' that a violation has occurred and determine that Commission action would be in the public interest any time it issues a complaint. 15 U.S.C. § 45(b). In my view, the same standard applies regardless of whether the Commission is seeking a litigated decree or a consent decree for the charged violation.").
[47] United States v. Ticketmaster Entm't, Inc., No. 1:10-cv-00139 (D.D.C. July 30, 2010); DOJ, *Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to Its Merger with Live Nation Inc.*, Jan. 25, 2010, http://www.justice.gov/opa/pr/2010/January/10-at-081.html.
[48] *In re* Gen. Motors Corp., 103 F.T.C. 374, 375 (1984); *In re* Gen. Motors Corp., 116 F.T.C. 1276, 1284-85 (1993).

regarding a joint venture between the automobile manufacturers. The FTC agreed not to challenge the joint venture on the condition that the venture exist no longer than twelve years and produce no more than 250,000 new automobiles per year. Although such an output restriction appears to be harmful to consumers, the Commission justified it by reference to a concern that the joint venture would reduce "GM's incentives to continue alternative production of small cars." In the decade following the consent agreement, industry changes including significant entry and expansion by competitors eliminated the need for the output and duration limits on the joint venture, and the FTC reopened and set aside the order.

B. Outside the United States

1. *CATVP - TV Cabo Portugal / TVTel - Comunicações*[49]

The Portuguese Competition Authority placed itself in a regulatory role with its Phase I clearing of a merger between two subscription television providers. The Authority required divestiture of half the acquired firm's cells in geographic areas where the merging parties' service overlapped, with the intent of facilitating entry of competitors in the distribution of cable television. The Authority also required the merged entity to make a national wholesale satellite television offer available to third parties to use in offering subscription television services without the need for a network infrastructure. The Competition Authority appointed an independent trustee to ensure compliance with these conditions.

2. Walcheren Hospital/Oosterschelde Hospitals[50]

The Netherlands Competition Authority approved a hospital merger upon condition that the merged entity "make its facilities available to all parties that wish to offer specialist medical care [and] apply normal charges for the use of its facilities, in line with national market norms." The Authority also imposed a price ceiling, saying "[i]n principle, the price ceiling will apply indefinitely." In a footnote, the Authority indicated it would review and revise the decision if market conditions changed and the parties submitted a "reasoned request."

[49] *See The Portuguese Competition Authority Clears a Merger in Phase I in the Pay-TV Market Subject to Remedies*, CONCURRENCES, Nov. 2008, *available at* www.concurrences.com/article.php3?id_article=26663. For the Competition Authority's decision in Portuguese, *see* Autoridade da Concorrencia, *Decisions Search*, www.concorrencia.pt/vEN/Mergers/Decisoes/Pages/pesquisa.aspx#top (last visited Jan. 5, 2012).
[50] Netherlands Competition Authority, *Decision of the Board of the Netherlands Competition Authority, Within the Meaning of Section 41 of the Competition Act*, NEDERLANDSE MEDEDINGINGSAUTORITEIT (Mar. 2009), *available at* http://www.nma.nl/en/images/6424BCV_UK23-154012.pdf.