

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

COMMITMENT DECISIONS IN ANTITRUST CASES

-- Note by the United States--

15-17 June 2016

This document reproduces a written contribution from the United States submitted for Item 9 of the 125th meeting of the OECD Competition Committee on 15-17 June 2016.

*More documents related to this discussion can be found at
www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm*

1. The United States antitrust agencies the U.S. Department of Justice Antitrust Division resolve most of their civil non-merger antitrust cases with negotiated settlements referred to as

prosecutes criminally, such as price-fixing, market or customer allocation, or bid rigging. The FTC does not

- x The competitive impact of such judgments including termination of alleged violations, provisions

Federal Register, with hyperlinks to the other documents. The Analysis to Aid Public Comment (similar assist the public in understanding and commenting meaningfully. The FTC invites comments for 30 days, after which it again considers the matter.⁹ If no changes are warranted, either based on comments or other reasons, the FTC then issues the Consent Order as a final FTC order, issues the Complaint as final, issues a new press release, and serves the parties with the final documents. The Consent Order does not become final until the FTC votes the second time. Until that point, the Commissioners may reject the settlement, ent), may close the matter without taking enforcement action, or may begin administrative litigation with the parties. These are rare outcomes virtually every proposed Consent Order becomes final as originally negotiated, except for minor modifications to which the parties and staff may agree during the settlement process.

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had the violation not occurred.

that may not itself violate the law but that could bring the parties dangerously close to a repeat violation.

19. The standard provisions of the settlement documents include: jurisdictional and applicability clauses; definitions of key terms; clear prohibitions on the covered conduct; reporting (and sometimes monitoring) provisions; compliance provisions (e.g., right to inspect and copy documents and interview employees), which may vary from one decree to another; notice of corporate changes; and the term of the judgment retention of jurisdiction by the court.

language requires that the consent decree expire on the tenth anniversary of its entry by the court. The -merger cases generally terminate after twenty years. Both agencies may require longer terms, or agree to shorter terms, as appropriate.

20. Monitoring and Enforcement of Consent Decrees decrees

orders include provisions allowing the agency to monitor compliance, such as a requirement that defendants submit written reports or data or allow for staff inspections. Each agency devotes resources to overseeing compliance with remedies. At DOJ, staff that conducted the investigation is responsible for monitoring the decree and ensuring compliance, with the assistance of the Office of Chief Legal Counsel. At the FTC, the Compliance Division attorneys, who help draft the settlement documents and participate in settlement negotiations, are responsible for monitoring and enforcing the Consent Order.

21. Where a decree requires affirmative acts, such as the submission of periodic reports, agency staff determines whether those acts have occurred and evaluates the sufficiency of compliance. Where decrees prohibit certain actions, agency staff (or a monitoring trustee) may conduct periodic inquiries to determine whether defendants are observing the prohibitions. Both agencies also rely on information from third parties (such as firms that may have been injured by the prior unlawful conduct) to alert agency staff if new violations occur.

22. If the agency concludes that a consent decree may have been violated, it can conduct an investigation, using all available investigative tools (including demands for documents and information, and taking testimony) to determine whether there has been a violation, and what action should be taken. DOJ will institute an enforcement action, civil or criminal, in the court that retains jurisdiction over the case.

involve the Division seeking injunctive relief and/or fines. The purpose of a criminal contempt action is not remedial, but is to punish the violator and deter future conduct. Criminal contempt may be punished by fine, imprisonment, or both.

23. The FTC has statutory authority to seek civil penalties and further injunctive relief from a federal court if it concludes there has been an order violation. 15 U.S.C. §45(l).¹² Penalties are designed both to punish the violation and to deter future violations. Additional injunctive provisions may be obtained if

enforcement order issued by a federal court, the FTC may seek the same relief as DOJ does for violations of its consent decrees.

24. Modification of Consent Decrees. Because the parties have consented to the consent decree, there is no appeal from the judgment. As time goes on, however, circumstances may change that make it appropriate to consider modifying a decree. Both agencies have procedures to accomplish this.

¹² Civil penalties for FTC order violations may be up to \$16,000 for each day of violation. Courts consider various factors in determining how much of the maximum to impose. *See, e.g., U.S. v. Boston Scientific Corp.*, 214 F.Supp. 2d 167 (D.Mass. 2002).

25. lying statute and implementing Rules provide that any party under order may seek a modification.¹³ The basis for the modification can be either a change in the underlying facts or law, such that continuing the order as written would be inequitable or unnecessarily limit competition, or that the public interest otherwise supports modification. The burden is on the requesting party to support its own; if the requester fails to make its showing, the request will be denied. For example, a firm under an that over time significant market entry has occurred, and the firm is no longer in a position to abuse a dominant position. Because the goal is to prohibit anticompetitive conduct, and not to prohibit conduct that may be reasonable in other circumstances, a firm may be able to establish that its order should be set and the public is invited to comment on the application, before the Commissioners vote.

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