



DOJ Toughens Antitrust Consent Decree Enforcement

IN SHORT

The Situation: The U.S. Department of Justice Antitrust Division ("DOJ") has adopted new terms in recent consent decrees that enhance DOJ's ability to enforce its settlements, most importantly by lowering the evidentiary standard for proving a defendant has violated the terms of a consent decree settlement. DOJ indicates that it will insist on this new language in all merger and civil non-merger antitrust settlements.

The Result: In addition to lowering the evidentiary standard, the new consent decree terms require defendants to pay the costs of DOJ enforcement efforts and allow DOJ to extend the term of the decree or terminate it upon notice to the court and defendants.

Looking Ahead: These new terms increase DOJ's leverage over settling in the event there is a dispute about compliance with the consent decree. Companies should be especially careful to comply with settlement provisions to avoid a violation or perception of a violation, given the new, lower standard for a civil contempt action.

DOJ's Assistant Attorney General for Antitrust, Makan Delrahim, previewed last year that changes to DOJ consent decrees were forthcoming. The lower civil contempt standard first appeared in a DOJ settlement in early November 2017, three settlements in December 2017 contained all four new provisions, plus one this month. Jones Day handled two of these four matters, including the first two settlements under the new DOJ terms. DOJ now has outlined the policy reasons for these changes, in a speech delivered by Principal Deputy Assistant Attorney General Andrew Finch.

Mr. Finch stated that the changes improve "significantly" DOJ's ability to enforce its consent decrees. According to Mr. Finch, the long-standing burden of proof in civil contempt cases sometimes forced DOJ to conduct burdensome investigations to prepare its contempt case and encourages defendants to delay and "exacerbate the situation." Mr. Finch also stated that the fee-shifting provision should encourage speedy resolution of consent decree violation investigations and compensate taxpayers for the cost of enforcement. He analogized DOJ's approach to that employed by private parties who commonly contract around "inefficient legal rules."

We question whether one should analogize the dynamics in private, voluntary contractual agreements to the leverage available to DOJ in settlement of an antitrust enforcement action. Indeed, Mr. Finch reported that DOJ will "insist" that these new terms be included in future civil merger and non-merger consent decrees. Consistent with our experience, DOJ refuses to negotiate these new provisions. Further, Federal Trade Commission settlements do not include similar enforcement provisions, leaving companies facing different compliance standards depending on which agency is involved.



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New Terms

The new DOJ consent decree terms, to be included in DOJ civil enforcement settlements going forward, will make the following changes from current practice:

1. Lower the evidentiary standard for DOJ to prove civil contempt for violation of a consent decree from clear and convincing evidence to a preponderance of the evidence.
2. Require defendants to pay DOJ's attorneys' fees, expert fees, and other costs DOJ incurs related to successful consent decree enforcement efforts.
3. Permit DOJ to extend the term of the decree if a court determines defendants violated the decree.
4. Permit DOJ to terminate the decree upon notice to the court and the defendants.

Implications

Although civil contempt actions to enforce merger and civil non-merger antitrust consent decrees are rare, the consequences of a violation are serious, including substantial monetary penalties and injunctive

relief. With a lower evidentiary burden, DOJ may seek to make an example as a warning to others or use its new leverage to obtain concessions from noncompliant parties, such as the imposition of a ticking fee for each month until a divestiture is completed.

As a practical matter, parties settling DOJ investigations by consent decree should consider how future DOJ consent decree enforcement may affect their consent decree compliance. For example, parties committing to make divestitures to settle a merger challenge typically have agreed to divest a defined set of assets on a certain timeline. In many cases, the precise assets to be divested are not clear at the time the consent decree language is finalized. The terms required to implement the divestiture, the need for supplier and customer consents, financing, or regulatory approvals (state regulators, works councils, CFIUS, etc.) all introduce uncertainty. Moreover, a divestiture buyer, not bound by the consent decree, has a substantial role in affecting how quickly the divestiture is consummated. DOJ's recent position change has increased the risks of misjudgment on these issues.

TWO KEY TAKEAWAYS

1. New DOJ consent decree language enhances DOJ's leverage over parties who have settled merger and non-merger civil antitrust investigations.
2. Settling parties should take into account that there will be less flexibility in negotiating compliance details and greater potential risks associated with any order violations.

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