THE COSTS AND BENEFITS OF ANTITRUST CONSENTS

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The Costs and Benefits of Antitrust Consents

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Abstract

Over the last three decades, the United States Federal Trade Commission and the Antitrust Division of the Department of Justice have undergone a dramatic shift toward greater reliance upon consent decrees rather than litigation to resolve antitrust disputes. As many national competition agencies examine the desirability of adopting a similar approach, we focus upon identifying and analyzing the costs and benefits associated with a marginal shift along the continuum from an enforcement model of agency behavior to a regulatory regime. We rely upon the U.S. experience to substantiate our claim that the costs associated with such a marginal shift toward the regulatory model, including the potential distortion in the development of substantive antitrust doctrine, are often under appreciated and discernable only in the long run. We acknowledge that consent decrees can and should be a part of an antitrust agency's toolkit for resolving antitrust disputes. We contend merely that a full accounting of the benefits and costs of reliance upon consent decrees is necessary to inform this important strategic decision for competition agencies.

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The United States Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) (collectively, the Agencies) have increasingly moved from actively litigating antitrust cases to settling cases through consent decrees, creating what we have elsewhere called a "culture of consent."[1] The shift from a litigation-oriented regime to a regulatory regime, observable since the 1990s, has had a significant effect on the way the competition agencies make decisions.[2] Indeed, though many OECD jurisdictions did not introduce commitment decisions—the equivalent of consent decrees—as an enforcement tool until the early 2000s, the negotiated settlement of antitrust investigations is now common in both OECD and non-OECD countries.[3]

In the United States, over the last three decades the Agencies have resolved nearly their entire civil enforcement docket by consent decree,[4] making for an interesting and important case study for evaluating the effects of the movement from an enforcement model to a regulatory model.[5] We focus in this article upon the trade-offs

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[1] *See* 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).

[2] *Id*; *see also* George Stephanov Georgiev, *Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements in EU Law*, 2007 UTAH L. REV. 971, 1026 (2007) ("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."); Harry First, *Is Antitrust "Law"?*, 10 ANTITRUST 9, Fall 1995, at 11 (observing a similar "shift on the policy continuum toward bureaucratic regulation"); A. Douglas Melamed, *Antitrust: The New Regulation*, 10 ANTITRUST 13 (1995) (describing antitrust enforcement as having "moved markedly along the continuum from the Law Enforcement Model toward the Regulatory Model").

[3] Secretariat, Organization for Economic Co-operation and Development, *Commitment Decisions in Antitrust Cases*, at 8 (Mar. 30, 2016).

[4] Dep't of Justice, Antitrust Div., FY 2012 Performance Budget, at 27 (2012), https://www.justice.gov/sites/default/files/jmd/legacy/2014/01/19/fy12-atr-justification.pdf; Fed. Trade Comm'n, Competition Enforcement Database, https://www.ftc.gov/competition-enforcement-database.

[5] *See* Ginsburg & Wright, *supra* note 1, at 178 ("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. This trend has continued, with the Division resolving nearly its entire antitrust civil enforcement docket by consent decree from 2004 to present. . . . FTC consent decrees more than tripled in number from 1992 to 1995. Since 1995, the FTC has settled 93 percent of its competition cases."); Melamed, *supra* note 2, at 13

that occur with marginal changes along the continuum from an enforcement model of agency behavior to a regulatory model of agency behavior. Of course, we do not contend that a rational, welfare-maximizing competition agency, economizing on the benefits and costs of settlement relative to litigation, would never choose to settle cases. Rather, we contend merely that a full calibration of the benefits and costs of consent decrees—which are either underappreciated or underweighted in the United States—offers a somewhat cautionary tale to competition agencies contemplating a similar shift.

In this article, we document the costs and benefits of a shift from a litigation-oriented regime to a regulatory regime. We focus throughout upon the importance of achieving the optimal balance between litigation and settlement, keeping in mind the consequences of an overreliance on consent decrees in antitrust cases. Part I outlines the potential costs associated with the increased use of consents by competition agencies. Part II discusses potential benefits of antitrust consents. Part III briefly concludes.

("The Antitrust Division . . . entered into 8 consent decrees in 1993, 19 in 1994, and 12 in the first half of 1995. The number of consent decrees put out for comment by the (Federal Trade) Commission has continually increased. There were 5 in 1992, 9 in 1993, 15 in 1994, and 22 in the first six and one-half months of 1995.").

I. Potential Costs of Increased Use of Consent Decrees

Competition agencies have a variety of tools with which to achieve their purpose of maximizing consumer welfare. Both consent decrees and litigation are among these tools. Certain tools are better suited for certain problems, and each has its own costs and benefits. In order most effectively to pursue the policy goal of maximizing consumer welfare, agencies must strike a balance between litigation and settlement that reflects these costs and benefits.

The costs of consent decrees come in five main forms, discussed in greater detail below. First, consent decrees tend to stunt the development of the law.[6] Second, resolving antitrust cases through consent decrees may exclude agency economists whose economic analysis could improve case outcomes. Third, too great a focus upon remedial conditions as opposed to the underlying harms to consumers caused by the challenged conduct may lead agencies to extract inappropriate settlement terms. Fourth, the reduced transparency and predictability inherent in consent decrees relative to litigation creates uncertainty for third parties. Finally, departures from the objective of protecting consumer welfare in consent decrees may signal to other competition authorities that pursuing noncompetition policy goals is appropriate. Competition agencies must consider these potential costs, as well as the potential benefits discussed in Part II, of enforcement versus regulatory approaches in order to strike the proper balance of litigation and settlement in antitrust cases.

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[6] *See, e.g.*, Ginsburg & Wright, *supra* note 1, at 178; *see also* Jan M. Rybnicek & Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines*, 21 GEO. MASON L. REV. 1287, 1308 (2014). *See generally* Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984); Kobayashi et al., Actavis *and Multiple ANDA Entrants: Beyond the Temporary Duopoly*, 29 ANTITRUST 89, (2015).

A. Increased Usage of Consent Decrees to Settle Antitrust Cases Tends to Distort the Development of the Law

The effect of increased settlement upon the development—and the potential distortion—of competition law presents the greatest concern for agencies considering the optimal balance of settlement and litigation within their own jurisdiction. An agency-wide culture of consent results in less litigation of important issues that would stimulate the healthy development of antitrust jurisprudence.

A culture of consent alters the enforcement system from one that is focused upon *ex post* analyses of market behavior toward an *ex ante*, regulatory perspective. An ex post perspective focuses on detecting anticompetitive behavior, compiling evidence, and otherwise preparing to litigate if necessary to demonstrate that the challenged conduct is indeed unlawful. An ex ante regulatory approach diverts those resources considerably toward designing and extracting consents. The consent process is much more like rulemaking and regulation than it is like law enforcement. Agency resources are allocated not toward compiling evidence that a single firm's business practice is unlawful, but instead to negotiating the terms of a consent decree that will govern not only that particular business practice for the single firm but also will have considerable effects on other firms in the industry.[7] This shift in focus transforms the role of the agency to one that is designing, through consent decrees, the behavioral norms of an

[7] *See* Rybnicek and Wright, *supra* note 6, at 1308 ("In addition, at least part of the reason why the common law has been successful in developing substantive legal rules is because adversarial proceedings between self-interested parties tend to lead to the development of efficient legal rules."); *see, e.g.*, Richard M. Steuer, *Counseling Without Case Law*, 63 ANTITRUST L.J. 823, 823 (1995) ("Administrative guidance likewise serves to provide direction to practitioners, but it can be subject to abrupt change depending on which way the political winds blow.").

industry.[8] It allows competition agencies to assume a role that requires a much different allocation of resources and a different expertise than is needed by a body tasked with promoting competition and protecting consumer welfare. Agencies should strike the proper balance of settlement and litigation from the perspective of both agency resources and the welfare of consumers, who are the ultimate beneficiaries of the development of the law.

The litigation process affords many benefits to the development of antitrust law that are not attainable through settlements alone. One such benefit is the ability of courts to create substantive legal rules that provide the parties with some degree of certainty about the boundaries of lawful business conduct.[9] The ability of courts to adjust those boundaries is another important benefit of the litigation process.[10] As our understanding of economics evolves, repeated litigation allows courts to adapt to changes in our economic knowledge and empirical learning. These adaptations facilitate efficient substantive legal rules.

Here, again, the development of United States antitrust law provides a useful historical lesson. Consider the development of the law governing vertical restraints. Litigation, not consent, was the primary cause of the shift in doctrine from rules of per se illegality governing restraints such as exclusive territories, tying, and resale price maintenance to a rule of reason approach based upon the expected welfare effects of the

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[8] *See* Damien M. B. Gerard, *Negotiated Remedies in the Modernization Era: The Limits of Effectiveness*, *in* EUROPEAN COMPETITION LAW ANNUAL 2013: EFFECTIVE AND LEGITIMATE ENFORCEMENT (Lowe et al. eds. 2013).

[9] *See* Leah Brannon & Douglas H. Ginsburg, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, 3 COMPETITION POL'Y INT'L 1, Autumn 2007, at 4-13.

[10] *See* Mortimer N.S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMP. L. 67, 80-84 (2006).

restraint at issue.[11] This shift in the law, widely heralded as allowing efficient vertical contracts and forms of competition previously condemned under the antitrust laws, was the direct result of courts adapting to changes in our economic understanding and empirical knowledge concerning the competitive consequences of vertical restraints.[12] Litigation, in other words, facilitated the shift from per se condemnation to the rule of reason and thereby improved the quality of the substantive legal rules governing vertical restraints.

When a competition agency relies increasingly upon consent decrees rather than litigation to resolve cases, it accepts some reduction on the margin of the welfare gains associated with the legal process. The case-by-case approach taken by agencies when negotiating antitrust settlements provides little guidance to parties seeking to ascertain what types of conduct are lawful because consent decrees identify only unlawful conduct. Greater agency discretion over liability also may shift resources from productive uses to rent-seeking activities. For example, consent decrees may allow agencies to shape merger enforcement haphazardly by offering favorable deals to settling parties.[13]

Unlike court precedents, which bind or at least inform future court rulings, consent decrees may be less uniform—creating a moving target of liability against

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[11] *Compare* Dr. Miles Med. Co. v. John D. Park & Sons, 220 U.S. 373, 404-05 (1911), *overruled by* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877 (2007) (applying a per se rule to resale price maintenance), *and* United States v. Arnold Schwinn & Co., 388 U.S. 365, 382 (1967), *overruled by* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (applying a per se rule to vertical non-price restraints), *with Continental T.V.*, 433 U.S. at 57-59 (applying the rule of reason to vertical nonprice restraints), *and* State Oil Co. v. Khan, 522 U.S. 3, 21-22 (1997) (applying the rule of reason to maximum resale price maintenance), *and Leegin Creative Leather*, 551 U.S. at 906-07 (applying the rule of reason to minimum resale price maintenance).

[12] *Continental T.V.*, 433 U.S. at 57.

[13] *See* 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, 887-88 (1997) (tracking the use of consent decrees to pressure parties to accede to agency wishes).

which companies may waste resources in an attempt to avoid antitrust liability and impeding businesses' ability to plan procompetitive conduct. Likewise, disregarding precedent and determining liability on a case-by-case basis may allow agencies inappropriately to expand or to contract the scope of the law to the detriment of consumer welfare.[14] The ability of self-interested parties to engage in adversarial judicial proceedings has led to the successful development of efficient legal rules. A shift from enforcement toward regulation will likely distort the further development of substantive legal rules to the detriment of consumer welfare.

B. Consent Decrees May Allow Agencies to Suppress Crucial Economic Analysis

When an agency is negotiating a settlement agreement rather than preparing for litigation, agency economists can be left out of the process. If economists and economics are to play a critical role in constraining the agency from entering into consents that reduce consumer welfare, reducing their role in cases deemed likely to settle raises potential problems. Within the Agencies, cases identified by the lawyers as likely headed for settlement rather than litigation often proceed to negotiation without the involvement of economists at all, or with their involvement only after a consent decree has been agreed to by the agency and the parties. At that stage, it is often too late for the economist to provide valuable input on the likely welfare effects of the consent or to suggest potential improvements. Further, an agency may have a reduced incentive or willingness to collect the data and evidence required for economic analysis if it assumes that cases will typically be resolved by a negotiated consent decree. This can erode the agency's capacity for substantive economic analysis. A shift from

[14] *See* Rybnicek and Wright, *supra* note 6, at 1312 ("In a world without precedent, every case stands on its own and decisionmakers have broad discretion to apply liability standards without regard for earlier pronouncements about the appropriate scope of the law.").

litigation toward settlement might also reduce the quality of the agency's economic analysis of the business conduct at the core of the antitrust dispute.

Institutional competency and agency expertise are also significant factors to consider when determining the proper balance of litigation and settlement. Whether generalist judges, specialized judges, or specialized agencies have a comparative advantage in antitrust decision making is an important question facing the design of antitrust institutions.[15] Proponents of expanding an agency's adjudicatory decision-making authority argue that expert agencies are better equipped "to resolve technical questions more efficiently than if those questions were left to the judicial system."[16] If, however, greater adjudicative authority creates or enhances a culture of consent, then the gains from specialized expertise relative to generalist judges may be more than offset by the suppression of economic analysis in the settlement process.

C. *Antitrust Settlements Are Often Too Focused on Remedial Conditions Rather than the Underlying Harm, Leading to Adverse Effects for Consumers*

Increasing the frequency of consents relative to litigation is also likely to reduce the cost to the agency of straying from its core antitrust mission. This departure, in turn, risks harming consumers. A culture of consent will inevitably lead agencies to less disciplined decision making and toward the pursuit of settlements that advance their own interests.[17] For example, an agency may negotiate settlements that allow it to

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[15] *See* Michael R. Baye & Joshua D. Wright, *In Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J. L. ECON. 1, 2 (2011); Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Courts: Specialists Versus Generalists*, 36 Fordham Int'l L.J. 788, (2013); Joshua D. Wright & Angela M. Diveley, *Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission*, 1 J. ANTITRUST ENFORCEMENT 82 (2012).

[16] *See* Wright & Diveley, *supra* note 15, at 5.

[17] *See* William E. Kovacic & David A. Hyman, *Regulatory Leveraging: Problem or Solution?*, 23 GEO. MASON L. REV. 1163, 1179 (2016) ("[R]egulatory leveraging leads to less disciplined decisionmaking by governmental agencies. Substantive antitrust law governs merger reviews, but regulatory leveraging

broaden its goals and responsibilities, provide benefits to a politically influential interest group, or accumulate power over the consenting parties and the regulated community generally.

An agency may also stray from its core antitrust mission by pursuing cases where the parties are highly likely to settle without its having fully establishing a theory of antitrust harm. Cases that are likely to settle are attractive to agencies for obvious reasons—they consume less investigative resources and can be resolved quickly. Further, antitrust settlements are likely to result in a consent decree providing a continuing role for the agency. Consent decrees can adversely affect consumers, however, if the settlement requires the agency to monitor and supervise competition for an extended period of time. Entering into such a settlement may rise to the level of abuse if the agency extracts a remedy that exceeds what it could have reasonably and lawfully obtained through litigation. The FTC's consent decree with Intel Corporation is an example of such a misuse of agency power.[18] The FTC restricted Intel's ability to offer certain discounts to its customers and prevented the company from making any changes in product design that did not "provide an actual benefit" to the user and degraded the performance of a rival product.[19] There is no court case in which a U.S. agency obtained relief of that kind.

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encourages agencies to ignore or downgrade these controls. The result is discounting of both process and substance, in favor of the unimpeded pursuit of more nebulous (and often contestable) goals. Among other consequences, this comes at a considerable cost in predictability for affected commercial parties."). State Attorneys General have also used antitrust settlements to extract remedies untethered from conventional, welfare-based antitrust goals. *See, e.g.*, Nevada v. UnitedHealth Grp. Inc., No. 2:08-CV-00233-JCMRJJ, 2008 WL 5657751, at *16 (D. Nev. Oct. 8, 2008) (as a condition for approval of a merger, a state Attorney General obtained 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 "one position within the Governor's Consumer Healthcare Assistance Program."); *see also* Pennsylvania. v. Providence Health Sys., Inc., No. 4:CV-94-772, 1994 WL 374424 (M.D. Pa. May 26, 1994).

[18] *In re* Intel Corp., FTC Docket No. 9341, 2010 WL 4542454 (Nov. 2, 2010).

[19] *Id*. at 10.

The FTC's consent decree with Graco, Inc. provides another useful example of this type of agency abuse.[20] In approving Graco's acquisition of Gusmer and GlasCraft, the FTC imposed upon Graco behavioral remedies that prohibited the company from entering into exclusive contracts and restricted the scope of loyalty discounts the company could offer.[21] Perhaps the most important fact signaling the consent departed from traditional antitrust objectives is that the defendant had never used loyalty discounts. The inference that the settlement might well have the effect of reducing consumer welfare rather than promoting competition is also supported by the economic analysis of loyalty discounts generally, which suggests they are typically procompetitive.[22] Nonetheless, the consent decree prescribed the maximum threshold levels Graco could set for loyalty discounts and specified that those maximums could be increased by only five percent each year, despite evidence that it had been several years since Graco increased the thresholds.[23] Again, the Agencies have not been able to obtain in court this type of relief for an allegedly anticompetitive merger.

This practice of using the consent process or other regulatory devices to expand their authority beyond the agencies' core mission—termed "regulatory leveraging" by Professors William Kovacic and David Hyman—no doubt has both important benefits and significant costs.[24] Regulatory leveraging promotes more comprehensive settlements, offers agencies flexibility, and may be characterized as an "admirable example of administrative adaptability and creativity."[25] On the other hand, regulatory leveraging can lead to less disciplined decision making, as well as decision making that

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[20] *In re* Graco, Inc., FTC File No. 101-0215 (2013).
[21] *See* Statement of Commissioner Joshua D. Wright, *Graco, Inc.*, FTC File No. 101-0215 (Apr. 17, 2013).
[22] *See, e.g.*, Benjamin Klein & Kevin M. Murphy, *Exclusive Dealing Intensifies Competition for Distribution*, 75 ANTITRUST L.J. 433 (2008).
[23] *Id.*
[24] *See generally* Kovacic & Hyman, *supra* note 17.
[25] *Id.* at 1178.

is less transparent and less accountable.[26] Consequently, businesses are afforded less predictability and may accept settlement terms that are not subject to appeal simply to obtain agency approval.[27]

A consent decree may benefit the parties in a particular case, but a truncated economic analysis as part of settlement negotiations may not reveal all potential benefits and harms to consumers from either the challenged business transaction or the consent decree. The more an agency enters into consent decrees, the more likely it is to act as an interested party rather than a regulatory body tasked with promoting competition and protecting consumer welfare. If this occurs, then consent decrees may be mutually beneficial to the parties but impose unconsidered costs upon consumers or third parties. When determining the overall appropriate balance between settlement and litigation, agencies should consider any external effects on consumer welfare that may stem from proposed consent decrees in antitrust cases.

D. Settlements May Adversely Affect Non-Party Firms

The potential harms from consent decrees may also extend to third parties interpreting the content of a settlement. Businesses make note of the consent decrees entered into by firms in their industry or firms engaging in similar commercial activity.[28] Firms, however, generally have no way of knowing which facts or modes of economic analysis were influential in the settlement process.

For example, the FTC's settlement with Intel signaled to other companies the possibility that the FTC would supervise product design, innovation, and engineering decisions. The FTC also may have deterred competition when it embraced the Third

[26] *Id.* at 1179.
[27] *Id.*
[28] *See*, Ginsburg & Wright, *supra* note 1, at 181 ("An abusive settlement can also have a chilling effect upon non-parties… who glean the agency's enforcement position from the terms of the settlement.").

Circuit's widely criticized standard in *LePage's* for assessing bundled discounts.[29] These signals may have detrimental effects upon businesses attempting to interpret and incorporate content from seemingly pertinent consent decrees. Firms may misunderstand the consent decree process in a manner that could harm them in a subsequent antitrust case. The lesser transparency of settlements adds uncertainty to business decision making for companies that are not parties to prior consent decrees. This, in turn, can chill procompetitive behavior or mistakenly allow anticompetitive practices to continue.

E. Domestic Settlements in Antitrust Cases May Send the Wrong Signals to Other Competition Authorities

Agencies relying upon consent decrees convey information to competition authorities in other jurisdictions. As a consequence, an agency that is departing from competition goals in resolving a particular case by consent may lose the ability to convince other agencies to avoid such departures.[30] Other competition authorities, particularly in the European Union and in Asia, have not failed to notice the shift in the United States toward greater reliance upon consent decrees.[31] Because some degree of transnational exchange of ideas should be expected and promoted, it is important for agencies to consider the international audience when choosing the appropriate balance of litigation and settlement in antitrust cases. There are systematic differences between

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[29] LePage's Inc. v. 3M Co., 324 F.3d 141, 169 (3d Cir. 2003) (en banc).

[30] *See* Kovacic & Hyman, *supra* note 17, at 1181 ("[O]nce it becomes clear that regulatory leveraging is what well-established first-world regulators do, it will be much more difficult to persuade competition authorities in other nations not to take advantage of the same opportunities."); *see also* 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).

[31] *See* Maureen K. Ohlhaussen, Comm'r, Fed. Trade Comm'n, *Antitrust Enforcement In China– What Next?*, Second Annual GCR Live Conference (Sept. 16, 2014), https://www.ftc.gov/public-statements/2014/09/antitrust-enforcement-china-what-next-second-annual-gcr-live-conference.

the US, EU, and Asian regulatory bodies. Superimposing a culture of consent developed in the United States upon the antitrust policies of other countries may be counterproductive. Indeed, the lack of transparency in settlements may amplify differences between antitrust policies in the United States and other jurisdictions, preventing beneficial convergence. Nontransparency may also jeopardize the Agencies' attempts to identify and discourage regulatory behavior in other countries that is inconsistent with established antitrust principles, further creating conflicting antitrust rules that impede business planning across the globe.

Despite the costs outlined above, we certainly do not suggest that competition agencies should refrain from entering into any consent decrees in the future. Agencies must simply weigh the disadvantages of consent decrees, described above, against their benefits, described below. Settlement should not be utilized to close a case quickly without carefully calculating and weighing these costs and benefits.

II. Potential Benefits of Increased Use of Consent Decrees

There are several benefits associated with settling antitrust cases through consent decrees. First, settlement is more convenient for both the agencies and parties and saves litigation resources. Second, a consent decree may be more efficient because it reduces the time it takes to stop anticompetitive behavior. Finally, a settlement may provide a more effective remedy because it precisely addresses the allegedly anticompetitive behavior. These advantages are all real, but agencies must nonetheless weigh these benefits against the aforementioned costs when determining the appropriate balance of litigation and settlement.

A. Settlement is More Convenient

Convenience is a compelling reason for agencies to settle cases with consent decrees. Because agencies need not reach definitive conclusions on the facts of a particular case to engage in settlement negotiations, entering into consent decrees can substantially shorten the duration of an investigation. Settling also allows agencies to allocate more efficiently their resources across their jurisdictional territory. In other words, an agency focused on settlement need not exhaust its resources preparing for litigation and instead can focus on a broader set of activities. The agency faces a resource tradeoff, at least to some extent, between the number of investigations it can conduct and their depth. At least one potential benefit of opening more investigations, *ceteris paribus*, is that it will increase the probability of detecting anticompetitive behavior. Further, consent decrees require less formality: an agency may be able to narrow the theory of harm in a complex case without fully establishing a violation of the law.

If both parties in an antitrust case want to settle, one might wonder, why stop them? The willingness of parties to enter into a consent agreement is best viewed as

necessary but not sufficient to support a settlement. The parties' willingness to settle quickly and without a fight certainly saves agency resources. This willingness can, in turn, produce benefits for the agency and potentially for consumers through allocation of those resources to prohibit other anticompetitive conduct. However, if one accepts the view that settlements should promote consumer welfare, there are several additional necessary conditions that must be satisfied before an agency should be willing to enter a consent agreement.

This is because mutual willingness to settle in competition cases arises for reasons unrelated to the likelihood that the conduct at issue violates the law or has anticompetitive effects. A simple cost-benefit analysis by a party may reasonably lead it to conclude that settling with the agency is less costly than undergoing a full-blown investigation and litigating its case in court. The FTC's settlement with Pool Corporation (PoolCorp) provides a useful illustration.[32] The FTC alleged PoolCorp had prevented potential rivals from entering the market by foreclosing their access to essential inputs.[33] The consent discussed the potential for PoolCorp's conduct to raise rivals' costs and harm competition, but the FTC acknowledged that new distributors were able to avoid potential exclusion by realigning their supply contracts and successfully achieving efficient scale. Even more troublesome is that the evidence presented during settlement negotiations suggested that no exclusion actually occurred and that there was little or no actual injury to consumers.[34] In short, a party may well

[32] *In re* Pool Corp., FTC File No. 101-0115 (2011).
[33] Order, *In re* Pool Corp., 2011 WL 5881164 (FTC 2011).
[34] 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.").

deem it in its best interests to settle with an agency even when it is unlikely it would be found by a court to have violated the law. Thus, it is difficult to disentangle a value judgment regarding the costs and benefits of convenience from the likelihood that the additional consents entered into solely because of the convenience of the settlement process are targeted at conduct that harms welfare.

This is not to say that agencies should never settle cases for the sake of convenience. Agencies should, however, be vigilant in ensuring that settlements do not lead to materially adverse welfare effects for consumers, which may occur if they lose sight of the goal of antitrust law—promoting consumer welfare—in settlement negotiations. Consent decrees containing provisions that directly harm consumers not only run counter to the goals of antitrust law, but are also abuses of agency power.

B. Settlement is More Efficient

Allowing agencies to resolve cases more quickly is another plausible benefit of settlement. Litigation is a long, costly, and uncertain process. Consent decrees provide a quick solution for agencies interested in quickly resolving potential problems in the market. Pursuing litigation in highly dynamic markets risks producing an outdated final decision, as the market conditions that existed when the alleged anticompetitive conduct occurred may have changed by the end of a full investigation and court proceeding.[35] The ability of agencies to intervene more quickly through settlement may

[35] Ronald A. Cass, *Antitrust and High-Tech: Regulatory Risks for Innovation and Competition*, 14 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 25, 26 (Feb. 2013) ("Antitrust inquiries can exact extraordinarily high costs from target firms, both in direct expenditures and in distraction from core business operations. Even inquiries that do not result in suits can be costly and disruptive. And in fields characterized by dynamic competition, there generally is little reason to expect that inquiries into individual firm conduct on dominance grounds will be socially beneficial—at least if pursued beyond an initial, cursory review; not only is it unlikely that there single-firm conduct will generate serious harm to consumers (as opposed to competitors), but whatever benefit in expanded competition might be produced by litigation is apt to be

increase the chance of successful enforcement by restoring effective competition in the market faster.

The uncertainty of litigation can burden businesses and may lead them to allocate substantial resources to opposing agency action even where the ultimate judgment of a court is likely to be that no antitrust violation occurred. The quicker a legal dispute is resolved, the less a business needs to spend on protecting itself from agency enforcement. Even though they do not lead to the development of legal precedents, consent decrees signal an agency's enforcement goals. These signals can help an industry quickly understand the prevailing logic and inner workings of the agency. When the cost savings of a quicker resolution outweigh the benefits of a judicial infringement decision, agencies should consider consent decrees for their convenience and efficiency.

Additionally, settlements may lack the deterrent effect of litigation. According to the economic theory of law enforcement, an optimal fine typically would induce a firm to comply with competition rules and cease participating in future anticompetitive behavior.[36] For firms, the option to settle increases the incentive to engage in questionable behavior if it is possible, when challenged, to avoid an infringement decision by entering into a consent decree. Thus, excessive use of settlements can weaken the deterrent effect of conventional enforcement depending upon the remedies the agency can extract in a consent decree.

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largely attained from market forces in any event. In other words, the incremental remedial benefit from investigation and litigation is apt to be modest when it exists at all.") (citations omitted).

[36] *See* Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); A. Mitchell Polinsky & Daniel L. Rubinfeld, *A Note on Optimal Public Enforcement with Settlements and Litigation Costs*, 12 RES. L. ECON. 1 (1989).

In determining the proper ratio of litigation and settlement, therefore, agencies must weigh the efficiencies of enforcement against the increased incentives for firms to engage in harmful practices. Consent decrees should be adopted only when the benefits of an earlier termination of the infringement and cost savings of shorter proceedings outweigh the full social benefit of litigation.

C. Settlement Provides More Effective Remedies

Agencies entering into consent decrees have the ability to tailor remedies to the particular facts of individual cases and are thus able to address allegedly anticompetitive behavior more precisely. Generalist courts may lack this capability. Further, settlement negotiations give firms themselves the opportunity to propose remedies—an opportunity they frequently exercise. Businesses may decide that the benefits of settling with an agency for a certain remedy outweigh the costs and uncertainty of litigation. Consequently, a potential benefit of consent decrees is that they may provide a mutually beneficial middle-ground between agencies and parties to an antitrust investigation that would be unlikely to arise as the outcome of adversarial litigation.

Allowing agencies to tailor remedies to individual cases is not without accompanying costs, however. While one possibility is that the "compromise" consent provides a more effective remedy, the compromise can also, as discussed above, result in remedies that are detrimental to consumer welfare or that could not lawfully be obtained in litigation. Further, the compromise may be reached by including terms unrelated to the mission of promoting competition. This risk presents a potential cost of settlement that must be internalized by the competition agency.

Consent decrees are rarely subject to judicial review due.[37] Because parties will likely be unable to challenge in court consent decrees that reduce consumer welfare, it is especially important that agencies vigorously evaluate ex ante the likely welfare consequences of each consent decree. As discussed, the trend toward abbreviated economic analysis or a reduced role for economists in investigations headed toward resolution by consent is problematic for precisely this reason.

III. Conclusion

When competition agencies shift along the spectrum from enforcement toward regulation, it is important that they weigh carefully the benefits and costs of the change. Though we acknowledge that negotiated remedies offer many cognizable and non-trivial benefits, experience in the United States suggests the costs of consent decrees are difficult to ascertain and discernable only in the long run. In our view, the potential distortion of and interference in the development of antitrust law is the most important cost of over reliance upon consent decrees. Other important costs include reduced constraints that enable an agency subtly to stray from its core competition mission and to diminish the role of economic analysis in shaping competition policy. Both of these developments are likely to reduce consumer welfare.

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[37] *See* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 383 (1992) ("Although we hold that a district court should exercise flexibility in considering requests for modification of an institutional reform consent decree, it does not follow that a modification will be warranted in all circumstances. Rule 60(b)(5) provides that a party may obtain relief from a court order when "it is no longer equitable that the judgment should have prospective application," not when it is no longer convenient to live with the terms of a consent decree. Accordingly, a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance."). The Second Circuit and the D.C. Circuit have explicitly applied the standard in *Rufo* to cases involving antitrust consent decrees. Both courts also required the defendant to demonstrate that a modification will not undermine the primary purpose of the decree. *See* United States v. Eastman Kodak Co., 63 F.3d 95 (2d Cir. 1995), *and* United States v. Western Electric Co., 46 F.3d 1198 (D.C. Cir. 1995).

This is not to say that consent decrees should never be used by agencies in antitrust cases. They should be. The benefits of convenience and efficiency will inevitably outweigh the costs in some cases. The important point is that agencies must be aware of the social costs associated with over reliance upon settlements rather than upon litigation to promote competition policy.