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### **Public Comments Submitted by the Open Markets Institute for the Antitrust Division’s Roundtable on Antitrust Consent Decrees**

The Open Markets Institute welcomes the opportunity to participate in the Justice Department’s roundtable discussion on antitrust consent decrees and looks forward to continuing to engage with the Antitrust Division on competition policy issues.

America’s liberty and democracy depend on competition. Open and competitive markets promote innovation, resiliency, and prosperity. For this reason, we believe that preserving competition requires enforcing the antitrust laws to arrest “the rising tide of economic concentration” in its incipiency and to prevent market power rather than police it.<sup>1</sup>

The question before us today is the effectiveness of antitrust consent decrees. In general, we believe antitrust enforcement agencies should avoid over-reliance on such agreements. In many instances, consent decrees fail to strike at the root of anti-competitive conduct. They often serve as band-aid solutions that seek to regulate the harms generated by market power without addressing the underlying incentive and ability that firms have to wield it. Moreover, consent decrees can introduce unwieldy regulatory regimes that are both difficult to administer and susceptible to runarounds by the private parties they are intended to cover.

In limited and narrow circumstances, however, a consent decree can serve as an appropriate tool to open up to competition markets that private interests have closed through illegal or improper means.<sup>2</sup> As we discuss below, the select use of non-discrimination provisions and mandatory licensing behavioral decrees—especially in network and infrastructure industries—can be key mechanisms for promoting competition.

Below we provide detailed responses to the three questions on which Open Markets will lead discussion at the roundtable. Our answers detail our general philosophy: that targeting the underlying incentive and ability of a firm to wield market power is superior to policing it through

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<sup>1</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 317-318 (1962).

<sup>2</sup> This statement by the Temporary National Economic Committee clarifies the role the consent decree can play in maintaining open and competitive markets:

Its origin stems from the broad power of equity... unlike a decree emerging from litigation, [the consent decree] take[s] into account the potential consequences of its terms. It can make its attack upon the sources, rather than the manifestations, of restraint; give consideration to activities which would never be aired in open court; probe into matters which the prosecution could never prove; explore conduct just outside of restraint; follow wherever the trail leads. It can amend usage, create new trade practices, provide safeguards against unintended harm. Hamilton and Till, TNEC Monograph No. 16, p. 88 (1940).

consent decrees, and that the prophylactic orientation of the antitrust laws must be recovered to tackle market power across our economy.

### QUESTION 1:

**What are the costs and benefits of consent decrees that are designed to constrain the exercise of market power rather than to restore competition lost due to the violation?**

Consent decrees that constrain the exercise of market power and attempt to restore competition may be, on the surface, appealing. But if enforcers recognize that certain market and business structures will enable firms to exercise market power, why not prevent those structures from emerging, rather than hoping that new competitors created through consent decrees will discipline dominant firms?

Relying primarily on consent decrees presents key challenges, including:

- *Continual and Costly Enforcement of Past Decrees Diverts Resources from Future Enforcement:* Ensuring consent decrees are effective requires constant monitoring by the agency. Even in cases involving compliant businesses, the agency must spend valuable labor and expertise analyzing whether any misconduct has occurred. In instances of noncompliance or disagreement between the agency and the parties, courts must intervene, presenting additional costs.<sup>3</sup> In practice, this means that agencies either (1) focus resources on ensuring the compliance of past decrees—at the expense of future investigations or enforcement actions—or (2) fail to ensure the compliance of past decrees.<sup>4</sup>
- *Acting as a Regulator Creates the Risk of Regulatory Capture:* Relying on consent decrees to restrain market power transforms the Justice Department from an enforcement agency to a regulatory agency.<sup>5</sup> This, in turn, incentivizes firms to lobby for restraints that are more easily avoided and creates the risk of capture.
- *Complying with the Letter of the Consent Decree Can Have Perverse Results:* Market-power restraints, such as barring price increases, are a more targeted approach. But, given the limits and asymmetries of information, expecting the Antitrust Division to address through consent decrees the full range of ways that firms with market power could abuse their dominance is unrealistic. Moreover, even with market-power restraints, firms have every incentive to comply with the letter rather than the spirit of the decree, which, as Deputy Assistant Attorney General Bernard Nigro pointed out, has led to increased

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<sup>3</sup> *Id.* at 27-28.

<sup>4</sup> The Federal Trade Commission's consent decree with Facebook in 2011 is a recent example of non-compliance. David C. Vladeck, *Facebook, Cambridge Analytica, and the Regulator's Dilemma: Clueless or Venal?*, Harv. L. Rev. Blog (Apr. 4, 2018), <https://blog.harvardlawreview.org/facebook-cambridge-analytica-and-the-regulators-dilemma-clueless-or-venal/>.

<sup>5</sup> Makan Delrahim, Enforcers Round Table, Remarks Before the ABA Section of Antitrust Law Annual Meeting (Apr. 13, 2018) ("return to the Division's mission as an enforcement agency, not a regulatory agency. ").

complexity and longer negotiations over the terms of the decrees.<sup>6</sup> Furthermore, market-power restraints—on price increases, for example—may incentivize a company to cut quality in order to maintain profitability, resulting in a different form of harm.<sup>7</sup>

Decrees which attempt to restore competition can also prove problematic. In the past few years, two examples especially illustrate how attempts to restore competition through consent decrees can harden incumbents and weaken rivalry among industry players.<sup>8</sup>

*Dollar Thrifty and Hertz (2013):*

In approving the acquisition of rental car company Dollar Thrifty by Hertz, the FTC required Hertz to divest its Advantage Rent A Car subsidiary.<sup>9</sup> The FTC sought to enable Advantage to compete for the business of deplaning passengers at airports, and to inject competition into the largely concentrated rental car industry more generally, given that the FTC’s approval of the merger<sup>10</sup> handed three companies 95% of the market.<sup>11</sup> As the FTC explained in a press release, “the settlement will replace the current and future competition that otherwise would have been lost as a result of the deal...enabl[ing] Advantage to become the fourth-largest car rental competitor in the United States.”<sup>12</sup>

But four months after the government settlement in July 2013, Advantage filed for Chapter 11 bankruptcy.<sup>13</sup> Advantage noted that Hertz had overvalued the 24,000 cars that Hertz was leasing to the newly independent rental car company, leading Advantage to lose more than \$1,600 on each sale.<sup>14</sup> After Advantage could not satisfy the contract’s terms, Hertz terminated the leases,

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<sup>6</sup> Bernard Nigro, Agency Update with the U.S. Department of Justice, Remarks Before the ABA Section of Antitrust Law Annual Meeting (Apr. 11, 2018).

<sup>7</sup> John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, American Antitrust Institute, 26-27 (Nov. 14, 2011), [https://www.antitrustinstitute.org/sites/default/files/AAI\\_wp\\_behavioral%20remedies\\_final.pdf](https://www.antitrustinstitute.org/sites/default/files/AAI_wp_behavioral%20remedies_final.pdf).

<sup>8</sup> See Ángel González, *Struggling Hagggen files for bankruptcy protection, parts with Southwest co-CEO*, Seattle Times, Sept. 9, 2015, available at <https://www.seattletimes.com/business/retail/struggling-hagggen-files-for-bankruptcy-protection/>; see also *Car rental company Advantage to be placed under Chapter 11*, Reuters, Nov. 5, 2013, <https://www.reuters.com/article/advantage-hertz-bankruptcy/car-rental-company-advantage-to-be-placed-under-chapter-11-idUSL3N0IQ1FO20131105> [Hereinafter Advantage under Chapter 11].

<sup>9</sup> Decision and Order, *In re Hertz Global Holdings, Inc.*, Dkt No. C-4376, 12, <https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130711hertzdo.pdf>.

<sup>10</sup> Federal Trade Commission, *FTC Requires Divestitures for Hertz's Proposed \$2.3 Billion Acquisition of Dollar Thrifty to Preserve Competition in Airport Car Rental Markets* (Nov. 15, 2012), <https://www.ftc.gov/news-events/press-releases/2012/11/ftc-requires-divestitures-hertz-proposed-23-billion-acquisition> [Hereinafter Hertz Divestiture].

<sup>11</sup> *Airport market share of major car rental companies in the United States in 2013*, Statista, <https://www.statista.com/statistics/303949/airport-market-share-of-major-car-rental-companies-us/> (Last Visited Apr. 19, 2018).

<sup>12</sup> Hertz Divestiture, *supra* note 10.

<sup>13</sup> Advantage under Chapter 11, *supra* note 8.

<sup>14</sup> *Id.*

leaving Advantage without any rental cars.<sup>15</sup> Following the bankruptcy, Hertz ended up acquiring back some of the very cars that it had divested.<sup>16</sup>

Albertsons and Safeway (2015):

When the FTC cleared the sale of Safeway to Cerberus Institutional Partners (the parent company of Albertsons) pursuant to a consent decree, the agency predicted that the sale of 146 of Safeway, Albertsons, West Coast Von, and Pavillion stores to regional chain Haggen would restore the competitive environment in the Northwest grocery markets.<sup>17</sup>

Eight months after the divestiture, Haggen sued Albertsons for misrepresentations during the sale and for restraint of trade, before filing for chapter 11 bankruptcy.<sup>18</sup> Albertsons ended up taking back 33 of the stores originally purchased by Haggen, along with the 29 “core stores” in a later deal.<sup>19</sup> The saga culminated in a market far more concentrated than it had been prior to the deal, and resulted in Albertsons making a significant profit off of the stores which it had repurchased.

The two examples above illustrate how attempts to introduce competition through divestiture in already concentrated markets ultimately failed. Crafting a consent decree that effectively restores competition is difficult. It requires the agency either to have the capacity to spin-off or to grow a successful competitor with the same skill as an investment bank or M&A lawyer, or to rely on the target of the investigation for information about how it can weaken its competitive position.

Given the difficulty of enforcing decrees that seek to restrain market power in concentrated markets, and the informational limits and asymmetries that exist when crafting decrees that aim to restore competition, the agency should disfavor decrees as a remedial tool. Instead, the agency should prevent market power from arising through targeting it in its incipiency.

In the context of monopolization cases, preventing firms from establishing monopolies through acquisitions and punishing monopolistic conduct through criminal penalties and firm break-ups can be more effective than conduct restraints. In the context of mergers, the agencies should block anti-competitive mergers beforehand, rather than seek to police anti-competitive conduct after the fact. Blocking these mergers would also reduce the chance of a firm acquiring the level of market power that would create risks of monopolization.

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<sup>15</sup> *Id.*

<sup>16</sup> Brent Kendall & Jacqueline Palank, *How the FTC's Hertz Antitrust Fix Went Flat*, Wall Street Journal, Dec. 8, 2013, available at <https://www.wsj.com/articles/how-the-ftc8217s-hertz-antitrust-fix-went-flat-1386547951>.

<sup>17</sup> See Decision and Order, *In re Cerberus Institutional Partners et al*, Dkt. No. C-4504, 18-31, <https://www.ftc.gov/system/files/documents/cases/150702cerberusdo.pdf>

<sup>18</sup> González, *supra* note 8; see also Complaint, *Haggen Holdings, LLC., v. Albertsons LLC., Albertsons Holdings, LLC.*, 1:15-cv-00768-UNA \*38-54 (D. Del. Sept. 1, 2015) available at [https://web.archive.org/web/20150919092745/http://media2.haggen.com.s3.amazonaws.com/website/temp/Haggen-Albertsons-Timestamped\\_copy\\_of\\_complaint.pdf](https://web.archive.org/web/20150919092745/http://media2.haggen.com.s3.amazonaws.com/website/temp/Haggen-Albertsons-Timestamped_copy_of_complaint.pdf).

<sup>19</sup> See Ángel González, *Judge approves sale of Haggen to Albertsons*, Seattle Times, Mar. 29, 2016, available at <https://www.seattletimes.com/business/retail/judge-approves-sale-of-haggen-to-albertsons/>.

## QUESTION 2:

### **Are there situations where a violation of antitrust law should be remedied by behavioral conditions?**

As discussed above, we believe that strong antitrust enforcement involves curbing the emergence of market power. For this reason, we are skeptical of behavioral remedies. They routinely fail to extinguish the conditions that result in a firm's ability to exercise market power; rather, they only delay or aggravate such misconduct. Furthermore, we find that behavioral decrees are difficult to administer and invite firms to circumvent their terms.

Below, we illustrate the problems inherent in this approach by cataloging four examples of behavioral consent decrees in two vertical merger cases and in two horizontal merger cases.

#### **Vertical Mergers:**

##### *Eli Lilly and Company/PCS Health Systems (1995):*

This case involved the acquisition of pharmacy benefit manager (PBM) corporation PCS Health Systems by drug-maker Eli Lilly.<sup>20</sup> PBMs administer prescription drug benefits for third-party payors, and negotiate with drug-makers to lower the cost of drugs.<sup>21</sup> Traditionally, independent PBMs pass back a part of these cost-savings to their plan members.<sup>22</sup>

The combination of the PBM and drug-maker, however, removed the incentive for PBMs to bargain with drug-makers; the combined entity was now “shadow-boxing,” effectively competing against itself. The merger also resulted in the possibility that Eli Lilly could use PCS Health Systems to access the confidential and proprietary drug pricing information of competing drug-makers.<sup>23</sup>

Regarding this latter point, the FTC imposed a behavioral consent decree that ordered Eli Lilly to implement a “firewall” between its drug and PBM businesses, designed to prevent the sharing of this sensitive information.<sup>24</sup> The decree also ordered Eli Lilly to maintain an ‘open formulary.’ This meant that Eli Lilly’s PBM could not advantage Eli Lilly’s drugs over those over competing drug-makers.

While we don’t dispute that these conditions curbed anti-competitive behavior, we question whether blocking the deal outright would have been a more practical and efficient use of agency resources. In particular, we question the costs the FTC spent on supervising and enforcing the

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<sup>20</sup> Federal Trade Commission, *FTC Gives Final Approval to Lilly Order; Pledges Continued Monitoring for Anticompetitive Practices*, (Jul. 31, 1995), <https://www.ftc.gov/news-events/press-releases/1995/07/eli-lilly-and-company>, [Hereinafter FTC Approves Lilly Order].

<sup>21</sup> Brian S. Feldman, *Big pharmacies are dismantling the industry that keeps US drug costs even sort-of under control*, Quartz, Mar. 17, 2016, <https://qz.com/636823/big-pharmacies-are-dismantling-the-industry-that-keeps-us-drug-costs-even-sort-of-under-control/>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Order Reopening and Setting Aside Order, *In re Eli Lilly and Company*, Dkt No. C-3594, <https://www.ftc.gov/sites/default/files/documents/cases/1999/05/elililly.htm>.

decree, which, in our estimation, would have required consistent monitoring of the company's internal drug formulary computing systems.

Indeed, the decision of Eli Lilly three years later to sell PCS to Rite-Aid illustrates the fruitlessness of the FTC's approach. The agency had expended valuable resources in an effort to sustain the newly "efficient" and "competitive" vertically integrated firm—yet it could have spent these resources elsewhere, had it just blocked the merger outright.<sup>25</sup>

Furthermore, the conditions of the behavioral consent decree do not appear to have applied when Rite-Aid acquired PCS. As a result, the same problems that emerged when upstream drug-makers combined with PBMs also manifested downstream—largely because the FTC failed to neutralize the industry's overall market power from the outset. Specifically, the combination of a PBM and a pharmacy allows the entity to advantage its drug stores for the filling of prescription drugs and to extract kickback and rebate schemes from drug-makers that are not in the best interest of patients.<sup>26</sup>

Lastly, the consent order effectively transferred the burden of oversight to third-party industry players, who were to alert the FTC of any violations.<sup>27</sup> This is perverse. Blocking the vertical merger outright would have avoided the need for public enforcers to rely on private entities to monitor compliance. As we stated above, we believe the most effective type of competition policy is to stop anti-competitive behavior in its incipiency, to target underlying market power, and to neutralize the incentives to abuse it.

*Ticketmaster and Live Nation (2010):*

This case involved the acquisition of concert promoter Live Nation by ticketing company Ticketmaster.<sup>28</sup> Ticketmaster provides ticketing services to more than 80% of major concert venues, and Live Nation is the largest concert promoter, earning more than \$1.3 billion in revenue from U.S. promotions.<sup>29</sup>

In a typical contract between ticketing companies and venue owners, the venue owner agrees to use one company as an exclusive service provider.<sup>30</sup> In exchange, the ticketing company pays the venue a portion of the fees the company collects from selling tickets to concertgoers. Without any restraints, the vertical merger would effectively have prevented a rival at any stage in the ticket supply chain from transacting with the combined Ticketmaster-Live Nation entity.<sup>31</sup>

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<sup>25</sup> *Rite Aid in \$1.5 Billion Deal for Lilly Unit*, New York Times, Nov. 18, 1998, available at <https://www.nytimes.com/1998/11/18/business/rite-aid-in-1.5-billion-deal-for-lilly-unit.html>.

<sup>26</sup> Feldman, *supra* note 21.

<sup>27</sup> FTC Approves Lilly Order, *supra* note 20.

<sup>28</sup> *U.S., et al. v. Ticketmaster Entertainment, Inc., et al.*, No. 1:10-cv-00139, 2010 WL 5699134 \*1 (D.D.C. Jul. 30, 2010) available at <https://www.justice.gov/atr/case-document/final-judgment-180>.

<sup>29</sup> *U.S., et al. v. Ticketmaster Entertainment Inc. and Live Nation Inc.*, 75 Fed. Reg. 6709, 6710-6711 (Feb. 10, 2010)(Competitive Impact Statement).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 6713.



As part of its final judgment, the Antitrust Division imposed an “anti-retaliatory” clause. In theory, this was designed to prohibit the newly merged entity from retaliating against a venue owner that contemplated contracting with a competitor. Explaining the final judgment, then-Assistant Attorney General Christine Varney noted, “there will be enough air and sunlight in this space for strong competitors to take root, grow, and thrive.”<sup>32</sup>

In practice, however, the opposite appears to have come true. Ticket prices are at record highs and Ticketmaster tickets 80 of the top 100 arenas in the country.<sup>33</sup> Live Nation, which manages the concert tours of over 500 artists, also is alleged to have pressured venues to contract with Ticketmaster for ticketing services.<sup>34</sup> Additionally, the company has leveraged its dominance to continue expanding its foothold, having been allowed to acquire control over venues in cities like Madison, WI; San Antonio, TX; and Boise, ID.<sup>35</sup>

We believe that blocking this deal outright would have more effectively promoted competition than crafting a consent decree that sought to prohibit anti-competitive conduct. Furthermore, we believe the “anti-retaliatory” clause is often toothless: unless the Antitrust Division has access to the internal decision-making of executives, the motive for “retaliation” is difficult to prove.<sup>36</sup>

### **Horizontal Mergers:**

#### *UnitedHealth Group and Sierra Health Services (2007):*

This case involved the acquisition of Nevada-based insurer Sierra by national insurer United.<sup>37</sup> The deal was slated to give United a 94 percent share of the market for Medicare Advantage enrollees in the Las Vegas area.<sup>38</sup> Indeed, the deal would have eliminated the competition to sell plans that provide seniors with greater benefits than those traditionally available under Medicare.

The Antitrust Division imposed a hybrid consent decree which largely centered on United divesting its Medicare Advantage business, SecureHorizons, to Humana. In conjunction with the

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<sup>32</sup> Ben Sisario & Graham Bowley, *Live Nation Rules Music Ticketing, Some Say With Threats*, New York Times, Apr. 1, 2018, at A1, available at <https://www.nytimes.com/2018/04/01/arts/music/live-nation-ticketmaster.html>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See, e.g., W. Scott Bailey, *Live Nation acquires managing interest in historic downtown San Antonio theater*, San Antonio Business Journal, Aug. 20, 2015, <https://www.bizjournals.com/sanantonio/news/2015/08/20/live-nation-acquires-historic-downtown-san-antonio.html>; Scott Gordon, *Live Nation buys itself a big chunk of Madison's concert scene*, Tone Madison, Jan. 11, 2018, <https://www.tonemadison.com/articles/live-nation-buys-itself-a-big-chunk-of-madisons-concert-scene>; *Live Nation Acquires CT Touring*, IQ Magazine, Jan. 20, 2017, <https://www.iq-mag.net/2017/01/live-nation-acquires-ct-touring/#.Wto0IIjwZPY> (“Live Nation has become the exclusive promoter for several venues in the north-western United States, including Idaho’s CenturyLink Arena (17,000-cap.) and Eagle River Pavilion (4,000-cap.)”).

<sup>36</sup> Kwoka & Moss, *supra* note 7, at n47.

<sup>37</sup> *U.S. v. UnitedHealth Grp., Inc.*, 73 Fed. Reg. 12762, 12770-12774 (Mar. 10, 2008)(Competitive Impact Statement) available at <https://www.gpo.gov/fdsys/pkg/FR-2008-03-10/pdf/E8-4393.pdf>; see also *Nev. Attny. Gen. v. UnitedHealth Grp. Inc.*, No. 2:08-CV-00233-JCMRJJ, 2008 WL 5657751 (D. Nev. Oct. 8, 2008) available at [http://ag.nv.gov/uploadedFiles/agnv.gov/Content/About/Consumer\\_Protection/UnitedAmendedJudgment20110623.pdf](http://ag.nv.gov/uploadedFiles/agnv.gov/Content/About/Consumer_Protection/UnitedAmendedJudgment20110623.pdf).

<sup>38</sup> *UnitedHealth Competitive Impact Statement*, at 12763.

Nevada Attorney General, the decree also mandated a number of behavioral provisions.<sup>39</sup> While we are skeptical of the effects of this divestiture remedy—which appears not to have introduced more competition to the Medicare Advantage market in the Las Vegas area<sup>40</sup>—we are equally skeptical of the behavioral requirements, such as the provision that United provide a \$15 million charitable contribution to various Nevada organizations and agencies.<sup>41</sup>

We believe this type of condition creates the risk of regulatory capture and worry that it incentivizes pay-to-play behavior; a corporation can pledge to donate money in the hopes of achieving a favorable outcome.

*George’s and Tyson Foods Chicken Plant (2011):*

This case involved the acquisition of a Tyson chicken processing complex in Harrisonburg, VA by poultry processor George’s.<sup>42</sup> Prior to the deal, George’s, Tyson, and JBS/Pilgrim’s Pride competed against each other in this area for the services of chicken farmers, known as “growers.”<sup>43</sup> The deal reduced the number of competitors from three to two, and had the effect of creating monopsony power: the deal would give George’s the incentive and the ability to force growers to accept lower prices and less favorable contractual terms.<sup>44</sup>

The consent decree ordered George’s to invest in a variety of capital improvements: an individually frozen freezer with a rated capacity of 5,000 pounds per hour, the installation of a leg or thigh deboning line, and repairs to the roof of the processing plant.<sup>45</sup> The improvements were designed to “increase George’s demand for grower services and thereby benefit Shenandoah Valley growers.”<sup>46</sup>

However, by requiring investment in fixed costs, this behavioral decree only strengthened and entrenched the incumbent’s power. It disincentivized upstart processors from attempting to compete against and dislodge George’s, given the higher barriers to entry. We also are concerned that the effects of this decree may contribute to the prevalence of the “tournament system,” a practice by which powerful buyers drive down the wages of chicken farmers.<sup>47</sup>

**Exceptions—Non-Discrimination Provisions and Mandatory Licensing:**

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<sup>39</sup> *Nev. Attny Gen.*, at 9-14.

<sup>40</sup> See *Nevada health insurance rates face proposed increases*, Las Vegas Sun, Jul. 1, 2017, <https://lasvegassun.com/news/2017/jul/01/nevada-health-insurance-rates-face-proposed-increa/>; see also *Premiums rising 34 percent for most popular health plan*, Las Vegas Sun, Oct. 25, 2017, <https://lasvegassun.com/news/2017/oct/25/premiums-rising-34-percent-for-most-popular-health/>.

<sup>41</sup> *Nev. Attny Gen.*, at 31.

<sup>42</sup> *U.S. v. George’s Foods, LLC. et al*, 76, Fed. Reg. 38419, 38422-38426 (Jun. 30, 2011)(Competitive Impact Statement) available at <https://www.gpo.gov/fdsys/pkg/FR-2011-06-30/pdf/2011-16354.pdf>.

<sup>43</sup> *Id.* at 38420.

<sup>44</sup> *Id.* at 38421.

<sup>45</sup> *Id.* at 38427 (Proposed Final Judgment).

<sup>46</sup> *Id.* at 38423.

<sup>47</sup> See Dan Charles, *The System Supplying America’s Chickens Pits Farmer Vs. Farmer*, National Public Radio, Feb. 20, 2014, <https://www.npr.org/sections/thesalt/2014/02/20/279040721/the-system-that-supplies-our-chickens-pits-farmer-against-farmer>.



Although we generally disfavor behavioral decrees, in limited and narrow circumstances they can serve as effective tools to structure competition. In particular we support the use of non-discrimination provisions and mandatory licensing. History shows that smart use of these decrees can help structure the creation of open marketplaces, enabling firms to compete against patent monopolists, especially in network and infrastructure industries where winner-take-all dynamics emerge.

Below, we catalog three examples where mandatory licensing promoted competition:

*Eastman Kodak (1954):*

The Department imposed a consent decree that abolished Kodak's monopoly of color film processing.<sup>48</sup> The remedy largely hinged on a provision that the company license for a reasonable royalty its pertinent processing and material patents to other industry players.

The move had two effects.<sup>49</sup> First, it broke Kodak's patent monopoly, incentivizing new entrants to enter the color finishing market; within four months of the final judgment order, nine regional and national firms had announced plans to start their own businesses.<sup>50</sup> Second, the decree stimulated investment in the larger photography market. One and half years later, eight additional companies had made investments of over \$100,000 (a bit less than \$1 million today, adjusting for inflation).<sup>51</sup>

*AT&T's Bell Labs (1956):*

In the middle of the twentieth century, antitrust enforcers charged AT&T with foreclosing competitors from the market for telecommunications equipment.<sup>52</sup> For example, AT&T possessed exclusive supply contracts with Western Electric, its manufacturing subsidiary,<sup>53</sup> and also engaged in exclusionary behavior by refusing to license its 7,820 patents, which spanned the transistor to the transatlantic telephone cable.<sup>54</sup> In order to address these harms, the Justice Department in 1956 crafted a consent decree that mandated AT&T make its existing patents available to other competitors without charge.<sup>55</sup>

The final judgment order spurred competition in the electronics industry and made available to all upstarts research from one of era's most innovative industrial laboratories. Indeed, the effects on competition were substantial. One peer-reviewed study notes that five years after the decree,

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<sup>48</sup> *U.S. v. Eastman Kodak Co.*, Consent Decree, C.C.H Trade Cases ¶ 67,920 (1954).

<sup>49</sup> Charles F. Phillips, Jr., *The Consent Decree In Antitrust Enforcement*, 18 Wash. & Lee L. Rev. 39, 51-52 (1964)(quoting *Consent Decree Program of the Department of Justice*, Antitrust Subcommittee, Committee on the Judiciary, House of Representatives, 85th Cong., serial No. 9, p. 433), available at <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=3452&context=wlulr>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Martin Watzinger, Thomas A.Fackler, Markus Nagler, Monika Schnitzer, *How Antitrust Enforcement Can Spur Innovation: Bell Labs and the 1956 Consent Decree* \*1 (CESifo Working Paper No. 6351, 2017), available at [https://www.econstor.eu/bitstream/10419/155593/1/cesifo1\\_wp6351.pdf](https://www.econstor.eu/bitstream/10419/155593/1/cesifo1_wp6351.pdf) [Hereinafter Bell Labs].

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *U.S. v. Western Electric Co.*, C.C.H Trade Cases ¶ 71,134 (D.N.J. 1956).

follow-on innovation increased by 17 percent.<sup>56</sup> New enterprises cited Bell's patents more than 1,000 times in their own inventions, which included, for instance, transistors created by Texas Instruments, Motorola, and Fairchild.<sup>57</sup>

The DOJ also used the AT&T decree as part of a larger strategy to neutralize market power in the electronics industry.<sup>58</sup> In tandem with consent decrees that similarly mandated IBM and Radio Corporation of America to license out their patents, Department of Justice chief Stanley Barnes explained the decree was "part of one program to open up the electronics field."<sup>59</sup> Indeed, between 1941 and 1959, the Department of Justice required the compulsory licensing of almost 50,000 patents.<sup>60</sup>

This provision stimulated competition by neutralizing the power of companies that had used their patents to exclude competition, promoting industry know-how, and promoting innovation among upstart firms.<sup>61</sup>

Xerox (1975):

The DOJ designed a consent decree that opened up the market to new competitors in the copier technology market, which Xerox largely dominated through the holding of key patents.<sup>62</sup> In a peer-reviewed economics study, author Timothy Bresnahan found that 10 years after the consent decree, the industry "saw a great deal of innovative activity from entrants and Xerox." Faced with new competitors on all sides, he adds, "Xerox introduced new products in all segments."<sup>63</sup>

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<sup>56</sup> Bell Labs, *supra* note 52, at \*2-3.

<sup>57</sup> *Id.*

<sup>58</sup> Barry C. Lynn, *Estates of Mind*, Washington Monthly, Jul./Aug. 2013, available at <https://washingtonmonthly.com/magazine/julyaugust-2013/estates-of-mind/>.

<sup>59</sup> *I.B.M. Trust Suit Ended By Decree; Machines Freed*, New York Times, Jan. 25, 1956, at A1, available at <http://sco-vs-ibm.org/review/acrobat/560126.pdf>.

<sup>60</sup> Lynn, *supra* note 58.

<sup>61</sup> *Id.*

<sup>62</sup> *In Re Xerox Corp.*, 86 F.T.C. 364, 368 (1975).

<sup>63</sup> Timothy F. Bresnahan, *Post-Entry Competition in the Plain Paper Copier Market*, 75 Am. Econ. Rev. 15, 18 (1985), available at [https://www.jstor.org/stable/1805563?seq=4#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/1805563?seq=4#page_scan_tab_contents).

### QUESTION 3:

**What role should purported industry reliance on an existing decree play with respect to the decision to eliminate or retain a perpetual consent decree?**

The decision to eliminate or retain a perpetual consent decree should hinge on the degree to which the provision neutralizes the market power of concentrated industry actors and helps to create the conditions for an open marketplace in which new entrants can compete.<sup>64</sup>

For instance, we would support eliminating a perpetual consent decree that would have the effect of dislodging powerful incumbents and spurring entry into the market by upstarts. On the other hand, we would support retaining a perpetual consent decree that creates the conditions for a marketplace in which barriers to entry are low and dominant actors cannot use their market power to thwart competition.

In light of the new “Office of Decree Enforcement” formed by the Antitrust Division, we look forward to the public review of the nearly 1,300 perpetual consent decrees that the DOJ recently identified.

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<sup>64</sup> This philosophy of antitrust enforcement was expressed by Judge Hand: “Throughout the history of these statutes, it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.” *U. S. v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945).