“SHADOW” SETTLEMENTS AND THE TUNNEY ACT

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The U.S. DOJ Antitrust Division has taken pains to defend its consent decree practices against charges that it engages in "shadow" settlements. The premise of these "shadow" criticisms is that the antitrust bar is entitled to know the substantive reasoning behind the Antitrust Division's decision-making regarding challenging or settling merger matters. This article discusses the origins of that premise and argues that the premise is flawed.

The U.S. DOJ Antitrust Division recently has received criticism that its consent decree practices amount to engaging in "shadow" merger settlements. The basic thrust of the criticism is that the Antitrust Division is negotiating merger remedies, including divestitures, without making those settlements public or following the Tunney Act process for consent decrees.

This criticism is related to, but different than, the criticism that the DOJ is reluctant to entertain behavioral or structural remedies. The former criticism is that DOJ is settling cases without publicizing the settlement and its reasoning; the latter criticism is that DOJ is refusing to settle cases.

The DOJ's defense against these criticisms is, similarly, related but different. To defend its reluctance to entertain behavioral or structural remedies, the DOJ conveyed skepticism about merger remedies. To defend against the criticism of "shadow" settlements, it issued a flat denial and professed adherence to the values of the Tunney Act with respect to reasoned and public decision-making assessed in court.

But this invocation of the Tunney Act raises additional questions. It appears to rest on the premise that the Tunney Act properly publicizes and requires judicial assessment of the substantive reasoning behind the Antitrust Division's decisionmaking regarding challenging or settling (or not challenging or settling) merger matters. That premise is deeply flawed. It is constitutionally problematic for a court to review the substantive calculus of Executive Branch officials in investigating and settling a case.

I. CRITICISM OF SHADOW SETTLEMENTS AND DOJ RESPONSE

Criticism of the Antitrust Division's "shadow" settlements spilled out into the open in the past year. It started when astute members of the antitrust press reported that "Quikrete and Forterra closed their deal with divestitures sought by the US Department of Justice without a formalized consent agreement."[2]

Then-FTC Commissioner Phillips around the same time remarked on what he saw as a similar trend from his (slightly different) FTC perspective. He stated hewas "very concerned that we are going to start seeing deals with divestitures but without consents [i.e. consent decrees], that "[t]his is fixing it first with a wink and a nod and no enforceable agreement with the government," and that this practice undermines prior approval requirements.[3]

A few months later, in September 2022, coverage of a similar divestiture involving the DOJ Antitrust Division emerged. The press reported that "[a] pair of West Coast banks have announced that they inked a deal with the U.S. Department of Justice, paving the way to combining their collective $50 billion in assets provided they sell 10 branches."[4] The article noted that "DOJ has not yet made a statement about the agreement."[5]

The Antitrust Division decided to address these criticisms head on at the ABA Spring Meeting. Deputy Assistant Attorney General Andrew Forman told attendees that the claim that the Division is negotiating consent decrees in the "shadows" is "categorically false."[6] Deputy Assistant Attorney General Maggie Goodlander added that negotiating consent agreements outside the scope of the Tunney Act would be inconsistent with fundamental values, including those embodied in the Tunney Act's requirement of reasoned decision-making and transparency. "[W]e honor that," she said.[7]

These statements do not technically address or respond to the practices that prompted the criticisms. There was no charge that the Division is privately negotiating consent decrees, as opposed to settlements or potential divestitures. Indeed, these responses, perhaps unintentionally, elide that distinction.

2 Austin Peay & Jenna Ebserole, Quikrete-Forterra deal received US DOJ sign-off with divestitures without formal settlement, MLex (Mar. 30, 2022).

3 Jenna Ebersole, US FTC's Phillips says agencies are apparently 'fixing it first with a wink and a nod' in deals, MLex (Apr. 27, 2022).

4 Bryan Koenig, DOJ Quietly OKs West Coast Bank Merger, With Branch Sales, Law360 (Sept. 21, 2022).

5 *Id.*

6 Flavia Fortes, Claim that US DOJ does consent decrees in the shadows is 'categorically false,' senior official says, MLex (Mar. 29, 2023).

7 *Id.*

Yet they are attempting to respond to the criticism. In so doing, by invoking the Tunney Act, they hit upon a more fundamental issue: whether the Tunney Act properly publicizes and requires judicial assessment of the substantive reasoning behind the Antitrust Division's decisionmaking regarding challenging or settling (or not challenging or settling) merger matters. Before analyzing that question, it is important first to set forth background principles of transparency in the U.S. antitrust regime.

II. TRANSPARENCY IN ANTITRUST

The U.S. antitrust regime is marked by significant and laudable transparency. That transparency comes from a variety of sources. The Division's historical openness to display its substantive policies — through merger guidelines, remedies manuals, leniency processes, and other remarkably open book policies — is one source. This tradition places the Antitrust Division at one end of a spectrum of openness among DOJ components. It is widely viewed that this transparency is important to economic growth, in that it inculcates predictability that allows businesses to plan transactions, conduct, and other activity.

This transparency, however, is self-imposed. And, as a result, it is inconsistent. There are aspects of the Division's operations that are of course not open to review through the publication of guidelines, manuals, and processes. For example, international cooperation policy and practices, which are the subject of much criticism by the U.S. Chamber of Commerce[8] and even the parties in certain mergers,[9] are generally not discussed publicly. And, although these policies and operations may be criticized, there is not a wellspring of support for opening them to public review.

In addition, and more fundamentally, this transparency generally does not extend from the policymaking space to individual enforcement decisions. The Division generally does not, for example, explain its decisions not to issue a second request. Indeed, apart from occasional closing statements, which tend to be cryptic and terse, the Division does not explain its rationale for closing investigations. And, of course, on the criminal side, the Division's explanations are even rarer.

III. THE TUNNEY ACT

As the front office comments described above indicate, the Tunney Act is another source of transparency. The Tunney Act is not a self-imposed constraint, but rather is imposed by Congress and the courts.

The Tunney Act imposes, as relevant here, two sets of restrictions. First, and in legitimate response to President Nixon's administration's decision to settle a merger case after the RNC received a large donation, the Tunney Act requires the disclosure of lobbying contacts and related items.[10]

Second, and the subject of this article, the Tunney Act requires district courts to determine, after public comment, whether a consent judgment and decree submitted by the Division is in "the public interest." To evaluate the "public interest," courts are to take into account the "competitive impact of such judgment" and "the impact of entry of such judgment . . . upon the public generally . . . including consideration of the public benefit . . . to be derived from a determination of the issues at trial."[11] Congress reaffirmed — indeed, doubled down on — that provision in 2004 in ACPERA, emphasizing that courts "shall" consider these factors.[12]

This provision is rarely litigated in detail. Indeed, the live hearing in the relatively recent CVS-Aetna merger was the first and only in recent memory. But this provision often has been taken to empower courts to review the Division's exercise of prosecutorial discretion, as opposed to the procedures that the Division followed in exercising that discretion. Courts routinely state, for example, that they will not "rubber stamp" the Division's settlements embodied in proposed consent decrees.

8 Diane Bartz, U.S. Chamber of Commerce Sues FTC, Demanding Access to Records, Reuters (July 14, 2022).

9 The United States' Reply On Its Vacatur Motion, Dkt. No. 20, at 4, U.S. v. Sabre Corp., No. 20-1767 (May 29, 2020) ("Appellees' baseless accusations that the United States somehow improperly coordinated with the CMA are false and nonsensical.").

10 15 U.S.C. § 16(g).

11 15 U.S.C. § 16(b)-(e).

12 See Pub. L. No. 108-237 (2004).

IV. CRITICISM OF PART OF THE TUNNEY ACT

To the extent that the Tunney Act provides to courts the authority to review the Division's exercise of prosecutorial discretion, it presents severe constitutional problems under fairly uncontroversial constitutional law principles.

At the outset, one should clearly distinguish against between the procedural and substantive aspects of the Tunney Act. The concerns that led to the Tunney Act — President Nixon's administration settled a merger case after the RNC received a large donation — are legitimate. Courts engage in such procedural review routinely. For example, and most recently, the Second Circuit accepted courts' authority to assess whether consent decrees are "procedurally proper."[13]

The substantive review provisions are, however, different. The basic problem with the substantive review provisions is that it is highly problematic for a court to review the calculus of Executive Branch officials in investigating and settling a case, which inevitably involves the political (not partisan) weighing of potential imperfections in a negotiated remedy with resource allocation decisions. As the Supreme Court put it recently, "[t]he exercise of prosecutorial discretion involves carefully weighing the benefits of a prosecution against the evidence needed to convict, the resources of the public fisc, and public policy . . ."[14] The Tunney Act intrudes on this Executive Branch function.

The Supreme Court recognized this concern could arise in judicial second-guessing of consent decrees even before the Tunney Act. It wrote, in an antitrust case pre-dating the Tunney Act, that "sound policy would strongly lead us to decline appellants' invitation to assess the wisdom of the Government's judgment in negotiating and accepting the 1960 consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government so acting."[15]

Three justices wrote similarly in *Maryland v. United States* after the Tunney Act's enactment: "[t]he question assigned to the district courts by the [Tunney] Act is a classic example of a question committed to the Executive."[16] That is because whether and how to settle a case are the prototypical features of prosecutorial discretion. As the D.C. Circuit put it, "[n]ecessarily included within the prosecutorial power is the discretion to withdraw or settle . . ."[17]

Such decisions also are not easily judged by courts. As the three justices explained in *Maryland v. United States*, "[t]here is no standard by which the benefits to the public from a 'better' settlement of a lawsuit than the Justice Department has negotiated can be balanced against the risk of an adverse decision, the need for a speedy resolution of the case, the benefits obtained in the settlement, and the availability of the Department's resources for other cases."[18]

This concern for the separation of powers is hardly a controversial position, although it is often forgotten: the Department of Justice in administrations of both political parties has expressed these constitutional concerns over the Tunney Act since before its enactment, as have numerous scholars.[19] The Assistant Attorney General for Antitrust testified in 1973 that the Tunney Act "would be inconsistent with both the constitutional nature of the judicial power and the traditional concepts of the adversary process."[20] The FTC Chair said the same: "I doubt that the Court would or should be deemed to have competence in that area which is essentially not a judicial but an executive matter."[21] So, significantly, did members of the bar who served in high-ranking positions in the mid-1960s.[22]

13 *SEC v. Citigroup Global Markets, Inc.*, 752 F. 3d 285, 294 (2d Cir. 2014).

14 *Bond v. United States*, 572 U.S. 844 (2014).

15 *Sam Fox Pub. Co. v. United States*, 366 U.S. 683, 689 (1961).

16 460 U.S. 1001, 1005 (1983) (Rehnquist, J., dissenting, joined by Burger, C.J., and White, J.).

17 *Oil, Chem. & Atomic Workers In'tl Union v. OSHA*, 671 F.2d 643, 650 (D.C. Cir. 1982).

18 Maryland, 460 U.S. at 1006.

19 See Lawrence Frankel, Rethinking the Tunney Act, 75 Antitrust L. J. 549 (2008) (collecting sources).

20 The Antitrust Procedures and Penalties Act, 93 Cong. 95 (1973).

21 *Id.*

22 *Id.* (statement of Robert Hammond III).

This skepticism continued after the Tunney Act's enactment. The Office of Legal Counsel — led then by William Barr — concluded that "there are very serious doubts as to the constitutionality" of the Tunney Act because it "intrudes into the executive power and requires the courts to decide upon the public interest – that is, to exercise a policy discretion normally reserved to the political branches."[23]

In the *Microsoft* litigation, significantly, the Division took the same course. There, the district court had understood the Tunney Act as giving it the ability to reject a consent decree on the ground that the court perceived DOJ's complaint to be too narrow. On appeal, the Division contested that reading of the Tunney Act. Its brief argued that "if the Tunney Act were read to permit an inquiry into the government's exercise of prosecutorial discretion, it would raise difficult, and perhaps insurmountable, questions concerning the Act's constitutionality."[24] The court accepted this conclusion, observing that "constitutional difficulties inhere in this statute."[25]

These criticisms have only become more persuasive as they have aged and as the Supreme Court has come to increasingly recognize the importance of the separation of powers. It was Justice Kagan who recently stated that Justice Scalia's dissent in *Morrison v. Olson*, which upheld a restriction on Executive Branch authority, is "one of the greatest dissents ever written and every year it gets better."[26]

V. CONCLUSION

To the extent that the Tunney Act requires the DOJ to publicize and authorizes courts to review substantive decisions to settle or not settle mergers, it raises severe constitutional concerns. Those concerns have animated antitrust enforcers of administrations of both political parties for decades. A proper evaluation of the current criticism of the Division's "shadow" settlements must take into account these constitutional issues that, in the words of the D.C. Circuit, "inhere" in the Tunney Act.

23 William P. Barr, Asst. Att'y Gen., Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 O.L.C. 2017, 219 (1989).

24 *Br. of U.S., U.S. v. Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995), 1995 WL 17907891.

25 *U.S. v. Microsoft,* 56 F.3d 1448, 1459 (D.C. Cir 1995).

26 Stanford Lawyer (Spring 2015).

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