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THE QUEEN'S AWARDS  
FOR ENTERPRISE  
2006

# The FTC Goes to Court

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The US merger control regime consists mainly of the enforcement of section 7 of the Clayton Act,<sup>1</sup> which prohibits mergers and acquisitions that may substantially lessen competition, and the Hart-Scott-Rodino Act (the HSR Act),<sup>2</sup> which requires parties to most mergers or acquisitions above a certain dollar threshold to observe a 'waiting period' before closing the deal, during which the government can review the competitive effects of the transaction.

The number and value of mergers and acquisitions have continued to rise over the past few years, and the most recent year is no exception. As reported by the Federal Trade Commission (FTC) and Department of Justice (DoJ) in their annual review for the fiscal year ended 30 September 2006, the number of transactions reported under the HSR Act rose to 1,768, with a collective value of about \$1.3 trillion.<sup>3</sup> Enforcement activity also increased. The FTC challenged 16 transactions, leading to nine consent decrees and seven abandoned transactions, while the DoJ also challenged 16 transactions, resulting in eight consent decrees, two abandoned transactions, and significant restructuring of 6 others. The DoJ also successfully challenged one consummated transaction, achieving a consent decree just before trial that completely unwound the deal. The agencies have not yet issued their official report for the fiscal year ending in 2007, but interim results suggest continued increases in transactions and HSR Act filings, but also a marked jump in enforcement activity. At the half-year mark, the FTC reported HSR Act filings running about 19 per cent ahead of the previous year and the number of enforcement actions running more than 80 per cent ahead of the previous year.<sup>4</sup>

The following summarises recent initiatives regarding HSR Act compliance, including the most recent filing thresholds, the FTC's recent efforts in three merger challenges contested in federal district court, and an update on a case that raised the prospect of heightened judicial scrutiny of the DoJ's consent decrees negotiated with merging parties.

## Improved HSR processes and revised thresholds

US merger review and enforcement policy remain generally the same, but there have been significant procedural changes. In addition to raising the filing thresholds, as required annually, the DoJ has updated its 'second request' process for in-depth reviews of mergers, in some respects paralleling the FTC's reforms of almost a year before.

The HSR Act continues to require parties to a proposed merger to file a pre-merger notification form and pay a filing fee, if certain threshold circumstances and other jurisdictional requirements are met. The filing is reviewed by either the Antitrust Division of the DoJ or the FTC's Bureau of Competition. Which agency will review a given merger depends primarily on the industry involved and the agencies' respective areas of expertise. Once the notification form is filed, the parties cannot close the merger until an initial waiting period has elapsed. During this period, the reviewing agency will assess the likely competitive effects of the transaction. The agency may decide to grant 'early termination' of the waiting period, allowing the transaction to close. If competitive concerns exist, the agency may decide to issue a 'second request', a demand for additional

information and documents that can often be time-consuming and burdensome.<sup>5</sup> The second request effectively extends the waiting period until 30 days after the parties have reached substantial compliance with the government's demand. During the second request period, the government may try to reach a remedial agreement or consent decree with the parties to alleviate competitive concerns regarding the transaction. If no such agreement can be reached, the government may ultimately seek a court injunction to prevent consummation of the merger. The FTC also has the power to review mergers in administrative proceedings in addition to a court challenge.

Whether a transaction must be reported to the agencies depends on the sizes of the transaction and of the parties,<sup>6</sup> dollar value thresholds for which are established by statute and revised annually to remain constant in real terms.<sup>7</sup> As of 21 February 2007, all transactions must be reported (regardless of the size of the parties) if the acquiring person will hold an aggregate amount of the voting securities and assets of the acquired person in excess of US\$239.2 million.<sup>8</sup> Furthermore, if as a result of the transaction the acquiring person will hold more than \$59.8 million (but less than \$239.2 million) of the voting securities and assets of the acquired person, the transaction must be reported if:

- the seller has at least \$12 million in total assets (or, if engaged in manufacturing, annual net sales or total assets), and the buyer has at least \$119.6 million in net sales or total assets; or
- the seller has at least \$119.6 million in annual net sales or total assets and the buyer has at least \$12.0 million in such sales or assets.<sup>9</sup>

Comparable US dollar values incorporated into the HSR Rules implementing the statute and specifying various exemptions have also been adjusted. The filing fees remain the same, but the thresholds for the different levels were also adjusted upward.<sup>10</sup> For transactions in which the acquirer will hold less than \$119.6 million of the stock and assets of the seller, the fee is \$45,000. For transactions over \$119.6 million but less than \$597.9 million, the fee is \$125,000, and for transactions involving stock and assets of over \$597.9 million, the fee is \$280,000.

In December 2006, the DoJ updated its 2001 Merger Process Initiative policy,<sup>11</sup> to a certain extent following the lead of its sister-agency, the FTC. Like the FTC's reforms announced in February 2006,<sup>12</sup> the DoJ's were intended to reduce the burdens of 'second requests' for information at the beginning of more in-depth investigations of HSR-notified transactions. The changes include a voluntary option for companies to limit the document search required to certain central files and 30 employees (subject to later addition of up to five additional employees if deemed necessary), in exchange for:

- providing key information and data usually requested on a 'voluntary' basis before the issuance of a second request;
- providing organisational charts and personnel directories;
- making knowledgeable employees available for interviews about the organizational structure, data and document retention, and databases of the company; and
- a 'process and timing agreement' that specifies when various

milestones will be reached and provides for ‘sufficient time to conduct post-complaint discovery’, should the DoJ file suit to challenge the transaction.

Like the FTC’s similar adoption of a ‘presumption’ that only 30 custodians need be searched if parties agree to certain timing limitations, the DoJ’s option to limit custodians makes a big difference in most significant second requests, as the time and cost of compliance are often directly proportional to the number of employees whose documents must be reviewed and produced by merging parties. Like the FTC’s 30-custodian option, however, which could be exercised only by parties agreeing to double the 30-day waiting period after complying with the second request and to 60 days of discovery in any court challenge, the DoJ’s option also comes at a steep price. The DoJ’s updated policy notes that in its experience four to six months of discovery is often required after the filing of a complaint, thus serving notice that merging parties may need to wait up to half a year, on top of however long the response to the second request and subsequent waiting period lasted, before a trial on the merits of a challenge. In contrast, the FTC’s merger process reform incorporates a similar timing agreement but accepts a 60-day period of post-complaint discovery. Nonetheless, on balance, the dramatic reduction in the number of custodians – for many transactions by as much as two thirds or three quarters of the number that would have been required before these reforms – often more than makes up for the possibility of a longer wait.

The DoJ also changed its model second request, reducing the default search period from four to two years before issuance of the second request for documents and to three years for data; limiting somewhat the obligation to conduct a ‘second sweep’ for documents if responses take an extended period of time; and adopting a few other limitations relating to computer backup tapes, electronic documents, and logs of documents withheld on the basis of legal privilege. Unfortunately, the DoJ declined to follow the FTC’s lead and accept a ‘partial privilege log’ in which parties provide the bare minimum of information about documents being withheld from the agency and then agree to provide a fuller description of such documents for a subset of custodians to be identified by the agency’s staff. Preparing these logs can often be a surprisingly expensive and time-consuming task. Perhaps the FTC’s experience will alleviate the DoJ’s concerns.

Although some of the DoJ’s changes differ from those adopted earlier in the year by the FTC, with this update both agencies have made good to a certain extent on promises to reduce the burdens of second requests. In practice, many of the reforms were already recognised as best practices by experienced agency personnel and outside counsel for merging parties. Enshrining them in official policy, however, has already helped to shorten the time required to negotiate modifications on recent mergers and to avoid unnecessary friction, particularly with less experienced investigating staffs.

### **The FTC goes to court (1) – *Western Refining/Giant Industries***

In addition to an upswing in merger challenges leading to consent decrees resolving agency concerns with remedies agreed to by the merging parties, the past year has also seen more parties willing to fight the FTC in court. During the summer of 2007, the FTC found itself forced to sue three times. Although final results are not yet in on all three, its record in these challenges has been mixed at best.

The first of these forays into court was on 12 April 2007, when the FTC sought to block Western Refining’s attempt to acquire competing oil refiner Giant Industries, both of which supply petroleum products to northern New Mexico. Although the FTC has the power to adjudicate merger challenges and to order remedial actions like

divestment it lacks the power to issue a preliminary order to block the transaction for the duration of its own adjudication. For such a preliminary injunction, the FTC must turn to federal district court, which it did in the *Western Refining* case, filing a complaint in federal court in New Mexico requesting an injunction blocking the deal pending the outcome of the administrative proceeding filed at the FTC itself the same day. It also moved for a temporary restraining order (TRO) to give the court time for a proper hearing on the request for preliminary injunction.

As it turned out, the requirement to convince a federal district judge may have served a good purpose in this case. Although the FTC’s news release at the time contended that the transaction would lead to “higher prices for the bulk supply of light petroleum products to northern New Mexico”,<sup>13</sup> its own complaint alleged only that Western Refining would use its control of Giant to prevent it from increasing supply to the area and thereby prevent a decrease in prices.<sup>14</sup> Although a legitimate economic theory of harm,<sup>15</sup> this certainly is not the traditional allegation that combining two companies would lead to higher prices. The complaint also alleged that supply of light petroleum products (motor gasoline, jet fuel, and diesel fuel) was highly concentrated, but described a total of five or six companies active in the area with the ability to respond to anti-competitive effects of a merger. It even acknowledged that some large competitors had significant unused capacity that could be used to supply products to the area. After the TRO hearing the day after the complaint was filed, the court recognised the weakness of the case. Although it granted the requested TRO, based partly on representations by the FTC about the acquisition’s likely effects, it also noted concerns about whether the proper geographic market had been alleged and whether all competitors had been considered.

After slightly less than one month of discovery, the FTC sought a preliminary injunction, and the court held several days of evidentiary hearings. Having reviewed the evidence and heard experts, the court rejected the challenge, finding that the FTC had failed to prove a relevant geographic market, had failed to take into account supply responses by some competitors, including trucking of light petroleum products, and had failed to offer expert testimony consistent with its complaint or sufficient to show that prices would decline less thanks to the merger.<sup>16</sup> Interestingly, the court also cited the FTC’s own retrospective analyses of prior petroleum product cases showing that the FTC had refrained from challenging mergers involving much higher levels of concentration and had never challenged a merger involving a decrease in the number of competitors from eight (as found by the court) to seven.<sup>17</sup> After losing emergency requests to enjoin the merger pending an appeal of the decision, the FTC abandoned its challenge.

The seeming weakness of the case has left some observers wondering why the FTC brought it at all. In this regard, perhaps it is relevant to note that the FTC highlighted the case on 23 May 2007 – after the TRO had been granted, but before the preliminary injunction had been denied – during testimony defending its actions on petroleum industry mergers.

### **The FTC goes to court (2) – *Equitable Resources/Dominion Resources***

The FTC’s second foray into court took place one day after its first, on 13 April 2007, when it sued to block the acquisition by Equitable Resources of a competing gas utility company owned by Dominion Resources. The FTC alleged a straightforward merger to monopoly: the two regulated local distributors of natural gas were the only two such companies serving certain residential customers in western Pennsylvania. Those customers would no longer benefit from price competition below the maximum rates established by the Pennsylvania Public Utility Commission (PPUC).<sup>18</sup> Despite

these apparently compelling factual allegations, the court quickly dismissed the case, before discovery had even been completed.<sup>19</sup> Why? Because the PPUC had that day approved the merger as in the public interest under state utility laws regulating local distribution of natural gas. As regulated utilities, the two companies needed the approval of the PPUC for their combination. That state regulatory body had determined that a loss of competition to some 500 mainly industrial and commercial gas customers was outweighed by the improved efficiency of combining the two operations, which would benefit over 600,000 residential customers. The parties and the PPUC argued that this action by a competent state authority effectively displaced competition and thus qualified the merger for immunity from federal antitrust law. The court agreed, finding that state law had granted the PPUC broad and explicit powers to regulate gas distribution and related mergers and that the PPUC had retained sufficient ongoing oversight of the merged entity pursuant to the approval that the doctrine of state action immunity applied.

This result is somewhat surprising. Both the FTC and the DoJ have long reviewed gas, electric and other utility mergers that were also subject to mandatory regulatory review and approval by state public utility commissions. The statute and regulations implemented by the PPUC in this case seemed little different from those of other states. Indeed, like many other such statutes, Pennsylvania's requires the PPUC to consider whether a transaction would have any anti-competitive effect, as the court in this case even acknowledged.<sup>20</sup> If read broadly, the district court's decision could mean that many decisions by state public utility commissions approving utility mergers would effectively divest federal antitrust agencies of authority to block the transaction. Even read narrowly, the decision raises significant questions about the scope of the state action immunity when, as nearly always happens in utility mergers, state public utility commissions with broad regulatory powers and statutory mandates trade off competitive effects against labour and other public policy benefits foreign to traditional antitrust analysis.

We will have to await the answer to these questions. The FTC has lodged an appeal with the Court of Appeals for the Third Circuit, which has granted a preliminary injunction pending the appeal. Briefing and oral argument are scheduled for the early autumn of 2007.

### The FTC goes to court (3) – Whole Foods/Wild Oats

The FTC went to court a third time on 5 June 2007, challenging an attempt by the leading natural foods supermarket chain, Whole Foods Market, Inc, to acquire a leading rival, Wild Oats Markets, Inc. Unlike the other two challenges, filed in the parties' local federal courts, this one was filed on the FTC's home turf, the District Court for the District of Columbia.<sup>21</sup> It also alleges a relatively traditional theory that consumers would lose the benefits of head-to-head competition between these two retailers in some 25 local markets. The FTC's complaint distinguishes itself, however, in two ways.

First, the complaint alleges a product market of premium natural and organic supermarkets. In its many prior food retailing cases, however, the FTC has usually alleged a broader product market for supermarkets. The main deviation from this broader definition for retail-sector mergers has been for large, high-volume, discount or 'box' stores, which differentiate themselves from general supermarkets by offering deep price discounts. Here, the FTC is interestingly deviating in the other direction, essentially alleging that Whole Foods and Wild Oats differ from normal supermarkets by being able to charge premium prices above those found in supermarkets. Like its price effect theory in the *Western Refining/Giant Industries* merger, the FTC's differential pricing theory in the *Whole Foods/Wild Oats* merger may be unusual but could be economically sound. A right bloody battle of the experts analysing mind-numbing data

sets can be expected as the case proceeds.

It is the complaint's second distinction, however, that has made this case irresistible to watch and has even drawn in the popular business press and scrutiny by non-antitrust regulators.<sup>22</sup> The complaint led with a truly remarkable quote by Whole Foods CEO John Mackey, in which he explained to his board of directors that the purpose of the acquisition was to "avoid nasty price wars" in specified cities and "to eliminate forever the possibility" of regular supermarkets launching a competitive natural foods chain and identified Wild Oats as "the only meaningful springboard . . . for another player to get into this space". The remaining 17 pages are also laced with similarly trenchant quotes by Mr. Mackey, a few other high-level Whole Foods officials, and documents filed by the company with securities regulators. The FTC readily drew support from these quotes for its theories about product markets and anticompetitive effects. Indeed, so strong are these quotes that this case may quickly become one of those classics fondly brought out by antitrust counsellors and professors everywhere to explain the hazards of 'bad documents'. Whether these particular 'bad documents' or the FTC's interesting product market and the associated differential pricing and critical loss analyses will ultimately prevail should be known fairly soon. The court held evidentiary hearings and oral argument in early August and is expected to rule in autumn 2007.

### Tunney Act review largely unchanged

In the summer of 2006 it appeared that a district court reviewing DoJ settlements of challenges against two mega-mergers in the telecommunications industry, SBC's acquisition of AT&T and Verizon's acquisition of MCI, might significantly increase judicial oversight of such consent judgments under the Tunney Act.<sup>23</sup> This closely watched case raised the question whether Congress's 2004 amendment of the Tunney Act<sup>24</sup> required stricter judicial review of such DoJ consent judgments.

During early hearings in the case, US District Judge Sullivan suggested that he would consider arguments that the 2004 amendment permitted courts to consider not just the narrow terms of the settlement, but also the overall competitive impact of the mergers. Judge Sullivan then requested the DoJ to submit additional materials to support its allegations and the rationale for the proposed settlement. Critics of the two mergers and of traditional standards of court review quickly offered briefs as friends of the court arguing that the amendment had, indeed, overthrown the traditionally limited judicial review of consent decrees in favour of broad evidentiary hearings and searching judicial oversight. The DoJ and the merging parties complied with the court's requests for additional materials at a subsequent hearing in November 2006 and waited with bated breaths to see whether the court would hold a full evidentiary hearing.

In the end, however, the court was satisfied without calling for more hearings. In March 2007, the court issued its decision approving the proposed judgment.<sup>25</sup> The opinion discussed the Tunney Act and its recent amendment, along with the relevant legislative history and their implications for the separation of judicial and executive powers mandated by the US Constitution, but finally followed appellate court precedent pre-dating the 2004 amendment to focus solely on whether the proposed settlement addressed the government's complaint as pled. Explaining that a court must defer to the government's decision about what to challenge, the judge looked only for some factual foundation for the decision, not for a perfect remedy of all possible anti-competitive effects. Finding such a basis and finding that the DoJ had considered and excluded alternative forms of relief, it concluded that the proposed decree was in the public interest, as required by the Tunney Act.

Although critics of limited judicial review have contended that

the case missed an opportunity to correct a process gone awry since the Tunney Act was originally passed, other commentators have welcomed Judge Sullivan's careful review of the relevant statutory text and legislative history and agreed with his general approach. Two DoJ consent judgments since the decision in this case have proceeded with no more searching reviews than that by Judge Sullivan, suggesting that little has indeed changed, which will be a relief to parties eager to close transactions and expecting to do so with reasonable confidence once an agreement has been reached with the DoJ.

### Conclusion

Merger filings and investigations continue their upswing. The DoJ's procedures for second request have now largely caught up to those of the FTC and offer much reduced document retrieval and review costs, but in exchange for even more onerous discovery and other

timing commitments than those imposed by the FTC, albeit in the relatively few cases that actually end up in court rather than being settled amicably by the parties. For its part, the FTC spent more time in court challenging mergers during the summer of 2007 than it has in recent years, and with decidedly mixed results – one outright loss, one initial loss now on appeal, and one still too early in the process to call. The third case, however, promises to continue to entertain even those far removed from the antitrust practice, for reasons that may even sway the result. Finally, turning to back to the DoJ, the result is in from a closely watched pair of cases that some thought threatened to overturn the longstanding court practice of giving the DoJ significant leeway when settling complaints in merger and other antitrust cases under the Tunney Act. Notwithstanding initial indications to the contrary, the court in those cases ultimately concluded that the 2004 amendments to the Tunney Act did not, in fact, change the deferential review standard.

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Steptoe & Johnson has a diversified antitrust and competition law practice based in both Washington and Brussels, with four major areas of focus.

First, Steptoe has long represented clients in merger and non-merger investigations before the Antitrust Division of the Justice Department and the Federal Trade Commission. A majority of the partners in the antitrust practice group have worked for these agencies. In addition, as competition law enforcement has spread around the globe, so has Steptoe's experience in defending merger and non-merger investigations in the European Union and elsewhere.

Second, owing to its Washington roots, Steptoe has represented clients in many regulated industries. As these industries have been deregulated in recent decades, many have lost their antitrust exemptions and Steptoe lawyers have become highly knowledgeable about the application of antitrust law to the electric utility and power generation, telecommunications, airline, railroad, trucking, pipeline, maritime, insurance and financial services industries.

A third branch of Steptoe's antitrust practice has been representation of clients as defendants in private class actions, other complex treble damage litigation, and parens patriae cases brought by state attorneys general. Over the past decade, Steptoe has also increasingly represented clients in state court class actions based on unfair trade practice and consumer protection theories.

Finally, Steptoe's white-collar criminal practice has grown to be one of the most significant in Washington. Steptoe's lead lawyers in this area have had extensive experience in the Justice Department before entering private practice. They have defended corporations and top management in several recent high profile criminal antitrust investigations and prosecutions.

In spring 2004, Steptoe enlarged its Brussels office to serve its clients' ever-growing EU regulatory needs, thus broadening and deepening its EU practice. The Brussels legal team has a long and distinguished history of working with the EU institutions. The team's regulatory competence is diverse, including EU/international trade, biotechnology and chemicals regulation, financial services and insurance, environment, technology and communications, competition, and litigation. Supplementing the EU regulatory practice, the Brussels office also offers well-qualified counsel on Belgian corporate, financial and commercial issues, and on international tax and structuring.

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## Notes

- 1 15 USC section 18.
- 2 Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), 15 USC section 18a, as amended, Pub L No. 106-553, 114 Stat 2762 (21 December 2000).
- 3 FTC Bureau of Competition and DoJ Antitrust Division, 'Hart-Scott-Rodino Act Report, Fiscal Year 2006', available at <http://www.ftc.gov/os/2007/07/P110014hsrreport.pdf>.
- 4 FTC, 'The FTC in 2007: A Champion for Consumers and Competition at 5' (April 2007), available at <http://www.ftc.gov/os/2007/04/ChairmansReport2007.pdf>.
- 5 Government investigations into transactions that do not require a pre-merger filing under the HSR Act can often be similar in scope and content to second requests.
- 6 15 USC sections 18a and 19(a)(5).
- 7 See FTC, Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 72 Fed Reg 2,692 (22 January 2007).
- 8 See 15 USC section 18a(a)(2)(A), as revised annually by the FTC.
- 9 See 15 USC section 18a(a)(2)(B), as revised annually by the FTC.
- 10 See 15 USC section 18a, note entitled 'Assessment and Collection of Filing Fees.'
- 11 'DoJ Merger Review Process Initiative' (revised 16 December 2006), available at <http://www.usdoj.gov/atr/public/220237.htm>.
- 12 'FTC Reforms to the Merger Review Process at 18' (16 February 2006), available at <http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf>.
- 13 FTC press release (12 April 2007), available at [http://www.ftc.gov/opa/2007/04/westerngiant\\_tro.shtm](http://www.ftc.gov/opa/2007/04/westerngiant_tro.shtm).
- 14 *FTC v Foster*, No. CIV 07-352 (D.N.M. 12 April 2007) (complaint), available at <http://www.ftc.gov/os/caselist/0610259/index.shtm>.
- 15 See, eg, *FTC v Staples, Inc*, 970 F Supp 1066, 1092 (DDC 1997) ("[T]he fact that prices might be lower than current prices after the merger does not mean that the merger will not have an anti-competitive effect. Consumers would still be hurt if prices after the merger did not fall as far as they would have absent the merger.").
- 16 *FTC v Foster*, No. CIV 07-352 (DNM 29 May 2007) (denying preliminary injunction), available at <http://www.nmcourt.fed.us/Drs-Web/view-file?full-path-file-name=%2Fdata%2Fdrs%2Fdm%2Fdocuments%2Fcadd%2F2007%2F05%2F29%2F0000968549-0000000000-07cv00352.pdf>, at 51.
- 17 *Idem* at 51.
- 18 *FTC v Equitable Resources, Inc*, No. 07-cv-0490 (WD Pa 13 April 2007) (complaint), available at <http://www.ftc.gov/os/caselist/0610140/0610140.shtm>.
- 19 *FTC v Equitable Resources, Inc*, No. 07-cv-0490 (WD Pa 14 May 2007) (opinion and order granting motion to dismiss).
- 20 *Idem*, slip op at 13.
- 21 *FTC v. Whole Foods Market, Inc.* (D.D.C. 5 June 2007) (complaint), available at <http://www.ftc.gov/os/caselist/0710114/070605complaint.pdf>.
- 22 See, eg, Joshua Lipton, 'Whole Foods Faces SEC Probe' (Forbes.com 16 July 2007), available at [http://www.forbes.com/markets/2007/07/16/whole-foods-sec-markets-equity-cx\\_jl\\_0716markets30.html](http://www.forbes.com/markets/2007/07/16/whole-foods-sec-markets-equity-cx_jl_0716markets30.html).
- 23 See 15 USC section 16(e). The Act also requires the DoJ to publish the proposed consent judgment and a statement of the competitive impact of the merger and proposed remedy; to collect and reply to comments from the public during a specified waiting period; and to file in court any communications between the DoJ and the merging parties, with certain exceptions. See *idem* at section 16(b) through (h). The FTC's consent decrees are not subject to similar judicial review, but its own procedures require publication of a complaint and an explanation of the reasons for the proposed decree, in a form roughly comparable to what the DoJ must publish.
- 24 See Pub L 108-237 section 221(b)(1) (2004).
- 25 *United States v SBC Communs, Inc*, No. 2005-2102 (DDC 29 March 2007), available at [https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2005cv2102-234](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv2102-234).