Effective Injunctive Relief

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This issue paper looks at the important question of injunctive remedies where either the courts or a competition agency order a firms or firms to cease unlawful conduct and/or undertake additional conduct to restore competition to the market place.² There are many variations on the procedures, standards, methods of enforcement, and penalties for disobedience, but the goals as set forth above are quite similar: stop illegal behavior and restore competition. This brief survey looks at the legal standards for issuing injunctions, the important distinctions between negative and positive injunctions, structural and behavioral injunctions, the increasing complexity of behavioral injunctions in competition cases, and the growing use of third parties and alternative dispute resolution techniques for resolving disputes over compliance.

I. Obtaining Injunctive Relief

In the United States, it is the courts which issue permanent, preliminary, and temporary injunctions and related equitable orders.³ In competition case, both the government and private parties in civil cases can seek injunctive relief along with other remedies.⁴

In order to obtain a temporary restraining order (TRO) a party must demonstrate to the court that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition.⁵

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² See e.g., Zenith Radio Corp. v. Hazeltine Research 395 U.S. 100, 132-33 (1969); Ford Motor Company v. United States, 405 U.S. 562 (1972); California v. Am. Stores Co., 495 U.S. 271, 281 (1990). There are important relationships between injunctive and the other types of remedies discussed elsewhere in the issue papers, but are beyond the scope of this brief survey.

³ In addition, the Federal Trade Commission can issue cease and desist orders which are then appealable to the federal courts of appeals. 15 U.S.C. § 45.


⁵ Federal Rules Civil Procedure 65(B). Because of the federal structure of the U.S. courts, the standards for TROs, preliminary injunctions, and permanent injunctions will vary somewhat in the fifty state courts and the federal system.
TROs are frequently issued ex parte but last only a brief period of time, normally ten days or less.

The standards for preliminary injunctions are more exacting. Preliminary injunctions may not be ordered without notice to the other side and requires proof of the following elements:

(1) a substantial likelihood of success on the merits;

(2) a substantial likelihood (or serious threat) that failure to grant the injunction will result in irreparable injury of a kind for which money damages will not remedy;

(3) that the threatened injury outweighs any damage that the injunction may cause to the opposing party; and

(4) that granting an injunction will serve the public interest.6

If it is the government that seeks the injunction, then the fourth factor involving the public interest is presumed. The preliminary injunction will last until the conclusion of the litigation unless modified by the court. At the end of the litigation, the preliminary injunction will be become permanent if the plaintiff prevails and the other factors remain applicable. The losing party would the right of appellate review of both the merits and the relief granted by the trial judge. Failure to obey a valid injunction would be punishable by contempt of court, which can result in fines, non-monetary penalties, and possible imprisonment until compliance is forthcoming.

In other legal systems, it is the Competition Authority that has the power to issue interim and permanent relief subject to powers conferred by Treaty, statute, or regulation. For example, in the EU, Article 8 of Regulation 1/2203 grants the European Commission these powers. In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, may by decision, on the basis of a prima facie finding of infringement, order interim

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measures. Article 8 further provides that an interim measure shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate. Article 5 of the same Regulation grants this power to National Competition Authorities as well. At the conclusion of the case, both National Competition Authorities and the European Commission must order the undertakings to bring all competition infringements to an end in addition to imposing any applicable fines. The Commission and the NCA decision on interim and permanent relief would be appealable to the appropriate EU or national court.

Articles 23 and 24 of Regulation 1/2003 allow the Commission to impose fines for the failure to abide by interim measures or final decisions, depending on the gravity and the duration of the conduct. Such decisions would also be subject to appeal.

Even in negotiated settlements, consent decrees, and commitments, the parties typically are bargaining in the shadow of the law, taking in account the probability of a violation being found and the scope of the anticipated relief.

II. Types of Injunctive Relief

There are two critical distinctions among types of injunctive relief in competition matters. These are 1) negative versus positive injunctions, and 2) structural versus behavioral injunctions.

A. Negative versus Positive Injunctions

A negative injunction is a legally binding order by a court or authority to cease a particular form of behavior. It normally includes, but can go beyond, ceasing the specific behavior found to be unlawful. Such an injunction could be combined with fines, penalties, criminal sanctions, or other forms of equitable relief such as restitution and disgorgement.

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Frequently, effective negative injunctions are easy to craft. If a cartel, joint venture, exchange information, merger, etc is found to be unlawful, its continued existence and implementation should be enjoined. More commonly, careful drafting is required to describe the scope of the illegal behavior, the permissible limits of further action by the parties, with care not to unnecessarily limit lawful procompetitive behavior.

At the same time, conduct that would otherwise be lawful may need to prohibited or circumscribed in order to restore competition to the affected market. One example in the United States has been provisions in merger consent decrees where the defendant have been prohibited from future acquisitions or required to report all such future acquisitions in advance, even where not otherwise required by statute.

Drafting problems are exacerbated when we begin to discuss so-called positive injunctions which require the defendant to take some set of actions, rather than refrain from taking action. Examples include obligations to divest in merger and unilateral conduct cases, licensing of technology, supply obligations, access requirements, etc. Without careful drafting and monitoring, disputes will inevitably arise as to the timing, scope, compliance, and duration of the obligations.

B. Structural versus Behavioral Injunctions

The second set of issues relate to the distinction between structural and behavioral injunctions. In the U.S. it is often said that there is a preference for structural over behavioral injunctions because of simplicity and the ease in determining whether the defendant has complied with its obligations. In reality, such structural injunctions largely have been limited to divestitures in clearly unlawful horizontal mergers and the sui generis agreed divestiture of the Bell System telephone monopoly in the 1980s. Tellingly, divestiture (either vertically

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or horizontally) was rejected by the U.S. appellate court in the Microsoft litigation, even while affirming most of the violations alleged by the government.9

In the EU, the Commission is bound by Article 7 of Regulation 1/2003 which states that:

It may impose on [respondents in violation of Article 101 or 102 TFEU] any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.10

Thus, as a practical reality in almost all successful competition cases and negotiated settlements and commitments, the issue of carefully crafting an enforceable and effective behavioral injunction will be front and center.

C. Duration of the Relief

An additional, albeit lesser, issue relates to the time limit of injunctions. Older U.S. cases and consent decrees often had injunctive provisions that lasted indefinitely unless the defendant sought modification and termination at a later time. Starting in the 1980s, government practice in the U.S. changed with court injunctions and consent decrees limited to ten years or less absent extraordinary circumstances.11

D. Serving the Public Interest

In any system of private enforcement, there is the final issue of crafting appropriate injunctive relief that serves the public interest. In some cases, private suits will follow public enforcement, in other jurisdictions private cases may be

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11 For example, the consent decree in the U.S. Microsoft litigation expired on May 12, 2011 after two extensions.
proceeding simultaneously to private enforcement, or even in many cases, without any public enforcement at all. In some of those cases, damages are the primary or exclusive remedy being sought. But in others, injunctive relief may be the sole or main form of relief being sought. Mechanisms must be worked out so that the outcomes in public and private cases be coordinated, or at a minimum that they do not conflict. Should certain forms of relief, divestiture for example, going to be limited to public enforcement or also available in private cases? Should this be decided on a case-by-case basis? Should the procedures for judicial review and approval be the same or different for public and private competition claims?

All of these factors serve to mask the real issue, how best to design relief that ends the unlawful behavior, restores market competition to an approximation of the state of the market prior to the violation, does not impose costs in excess of its benefits, ensure compliance by the defendants over time, and verify that the relief is effective and procompetitive?

III. Increased Complexity in Recent Competition Injunctions

Some recent decrees illustrate the increasingly complexity of injunctive relief in competition cases in the US and the EU. In the U.S. Microsoft litigation, the relief included eliminating certain exclusive and restrictive contractual provision in upstream and downstream contracts. The consent decree also included more complicated provisions requiring the licensing of communications protocols, the provision of voluminous technical information to ensure interoperability, as well as non-discrimination and non-retaliation provisions. In the EU, the final settlement included forced unbundling, the creation of a choice menu for internet

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12 See e.g., California v. Am. Stores Co., 495 U.S. 271, 281 (1990) (full equitable remedies including divestiture available to successful private plaintiff in U.S. antitrust litigation). In reality, it would be inconceivable that significant divestiture would be ordered in a private monopolization case outside of the narrowest merger context without robust governmental support for the decree).
browsers, and the disclosure of substantial interface information to provide greater access to competing software developers.\textsuperscript{15}

A number of recent U.S. media and technology mergers have also included complicated access and information provisions to ensure non-discrimination against less integrated rivals.\textsuperscript{16} Perhaps the most complicated decree came in the Google-ITA transaction. In July 2010, Google entered into a merger agreement to acquire ITA, the provider of the QPX software, which was the leading airfare pricing and shopping system providing pricing, schedule, and seat availability information to Internet travel sites such as Expedia and Travelocity. QPX also was the leading software platform for so-called meta-search sites, such as Kayak and TripAdvisor, which allow customers to view results from multiple travel sites. While Google was not in the on-line travel space at the time of the acquisition, it planned to enter the market using the ITA software it was acquiring.

The Justice Department permitted the merger subject to a stringent consent decree.\textsuperscript{17} The consent decree required the defendants to honor all existing QPX licensing agreements, negotiate extensions of such licenses with terms “substantially similar” to the existing terms at the time of the consent decree, and negotiate other terms of the extension that are “fair, reasonable and non-discriminatory.” New licenses also have to contain commercial terms that are “fair, reasonable and nondiscriminatory.” Defendants must provide upgrades on fair, reasonable, and non-discriminatory terms. Defendants must license a new software product called InstaSearch that was in development by ITA at the time of the merger, on fair, reasonable, and non-discriminatory terms to all interested parties. Finally, the defendants agree to devote at least as much annual resources as the average of the past two years for the continued research development and maintenance of both QPX and InstaSearch.


\textsuperscript{17} Final Judgment, United States v. Google Inc., Case No. 1:11-cv-00688 (D.D.C. 2011).
In the most recent FTC Google investigation, the agency entered into a two part settlement with the firm. In a letter agreement with the firm in which Google agreed to end the practice of “scraping” data from rival web sites as it entered those markets and to give advertising greater control and portability of their own data.\textsuperscript{18} In a separate consent decree now pending for judicial approval,\textsuperscript{19} the firm also agreed to license cell phone, laptop, and tablet technology it has acquired from Motorola to all interested parties on a fair reasonable and non-discriminatory basis. As of the time of our conference, we still await the announcement of the commitments offered by Google in the on-going EU investigation which are likely to extend beyond the modest relief obtained by the FTC.

IV. Monitoring and Enforcement of the Decree

As the decrees have become more complex, the need for effective compliance has become more challenging. Courts are poorly equipped to handle that process for many of the types of these long-term access, information, and non-discrimination decrees. Most courts have limited resources and limited expertise in long-term administration of complex regulatory type injunctions. The typical judge in the United States is not a competition specialist. The judge would have a staff of only a law clerk or two plus an administrative assistant, sometimes sharing those with other members of the same court and a docket of hundreds of other cases. In addition, the power to hold parties in contempt of court has proven to be a limited one, best employed only in response to the most deliberate circumventions of the most sharply drawn injunctive obligations.\textsuperscript{20}

A specialized competition tribunal would still only have a limited number of professional staff and a docket of equally complex matters demanding its

\textsuperscript{20} See United States v. Microsoft Corp., 147 F. 3d 935 (D.C. Cir. 1998)(holding Microsoft did not violate prior consent decree prohibiting bundling of new features in future operating systems based on language of the decree rather than scope of the antitrust laws).
attention. Even a large competition agency such as the Antitrust Division of the Justice Department or DG-Comp of European Union still has finite resources and competing needs that limit the ability to assign personnel on a long-term basis to monitoring compliance with existing decrees in addition to current investigations and litigation.

As a result, outside third parties have been increasingly called upon to assist courts, tribunals, and agencies in enforcing long term injunctive relief in complex competition cases. Both the United States and the European Union used technical committees and monitoring trustees respectively to ensure compliance with the highly technical injunctive relief in the Microsoft litigation. Less extensive third monitoring arrangements have been used successfully in ensuring compliance with information firewall provisions in vertical merger cases and to ensure timely divestiture of assets in horizontal merger cases in both the U.S. and the EU.

The other critical issue will be how to resolve the day-to-day disputes that are inevitable to arise in long term behavioral injunctions. Courts and tribunals can resolve the largest big picture controversies, but are ill-equipped and often uninterested in the important, but mundane, issues of whether a vertically integrated firm is providing the specified level of access or is treating an unintegrated rival in a non-discriminatory manner. Such disputes can often be technical in nature and require viewing a sequence of conduct over time in order to determine whether a pattern of non-compliance is present. At the same time, firms will also have individual disputes that require resolution in a timely manner.

In the United States, consent decrees in two recent merger cases have used innovative forms of alternative dispute resolution procedures where the Justice Department and the courts play virtually no role. In both the Comcast/Universal

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21 The need for effective monitors is not limited to competition cases. An outside monitor was a critical component in the negotiation and enforcement of a complex $25-50 billion settlement between 49 states and the federal government and the five largest consumer mortgage servicing companies entered into in 2012. See generally Office of Mortgage Oversight, https://www.mortgageoversight.com/. The monitor has a full-time staff of three and over three hundred contract employees consisting primarily of accountants and auditors.
22 For more details, see Waller, supra note 13, at 588-89.
23 Id. at 383-86.
and the Google/ITA mergers, disputes over access, pricing, retransmission, and other issues are submitted to expedited arbitration through the American Arbitration Association.24 In each case, the parties to the arbitration ultimately present a final offer that the arbitrator must select between without compromise or alteration. Experience with this style of final offer arbitration suggests that such provisions often produce agreed compromises prior to the arbitrator’s decision and more reasonable offers for those disputes going all the way through the process.

V. A Hypothetical Scenario for Discussion

Consider the following hypothetical in light of the many issues already discussed in designing effective injunctive relief and ensuring that the respondent complies with the injunction. In this hypothetical, the super-dominant firm “Froogle” combines the social networking capabilities of Facebook and the internet search capabilities of Google. Froogle has been found liable of having abused its dominant position in a relevant market consisting of internet “social search” through the following practices:

1) Froogle “scrapes” data from rival sites without their permission in order to use the data to start new services like local restaurant and shopping reviews;

2) Froogle preferences its own services over those of rivals in areas like travel and shopping so that rival services never appear in the top 10 positions on the screen, although meeting all the criteria of Froogle’s normal search algorithm;

3) Froogle uses patented software to encrypt all user data posted on its site so that the data is turned unusable and unreadable if the user tries to move that data to a competing social search site or a competing site tries to import that data; and

4) Froogle requires software developers to enter into exclusive contracts preventing the developer from creating competing application programs for any other social search site.

24 For a detailed description of both consent decrees, see Waller, supra note 13, at 591-92.
What terms should be the injunctive relief contain? How should compliance be monitored? How should disputes over compliance be resolved? What are the appropriate penalties for non-compliance? How long should the decree last? How do you know if the decree has been successful?