

ICN Teleseminar on Remedies in Unilateral Conduct Cases Opening Remarks by Howard Shelanski and Chris Renner

1. Remedies in unilateral conduct cases are an important, even integral, part of an enforcement action, and it is advisable to consider available remedies at an early stage in the case selection process. At one extreme, conduct for which there is no satisfactory remedy may be an unlikely candidate for an enforcement action.
2. The remedial goals of an agency enforcement action in a unilateral conduct case include terminating the unlawful conduct, preventing its recurrence, and restoring the possibility of competition in the relevant market.
3. Different remedial approaches have different administrative costs, and different effects on efficiency and innovation. The preferred remedy will be the one that accomplishes the goals of stopping illegal conduct and restoring competitive conditions while minimizing the costs of remedy design and administration and the risks of chilling efficient conduct and incentives to innovate.
4. There are four types of remedies in unilateral conduct cases:
 - a. Prohibitory conduct remedies
 - b. Affirmative conduct remedies
 - c. Structural remedies
 - d. Penalties
5. Some types of remedies may be employed for more than one remedial purpose. For example, an affirmative conduct remedy (*e.g.*, a compulsory license) may be used either to terminate unlawful conduct (*e.g.*, a refusal to deal) or to restore the possibility of competition going forward.
6. Prohibitory conduct remedies typically enjoin either the continuance or repetition of conduct found to be illegal, or conduct having similar effect realized through similar means (“fencing in” relief).
 - a. An important advantage of prohibitory remedies is that they typically enjoin specific conduct already found likely to be inefficient, or conduct reasonably related to that conduct. By enjoining the continuance or repetition of conduct found to have been inefficient, enforcers reduce the costs of identifying and formulating a remedy and the risks of formulating an overbroad one.

- b. If the defendant's conduct has irretrievably altered the market structure, a merely prohibitory conduct remedy may be inadequate to restore the possibility of competition.
7. Affirmative conduct remedies may be indicated where prohibitory remedies are inadequate to restore the possibility of competition. These types of remedies can be relatively costlier to design and administer than prohibitory remedies, and can risk chilling efficient conduct and incentives to innovate. These costs can be mitigated by insisting on a close organic connection between the conduct mandated by the remedy and the proven violation of competition law. Avoiding affirmative remedies of long duration, especially in dynamic industries, may also mitigate potential costs.
 - a. Affirmative conduct remedies can be difficult to design. These remedies are of necessity somewhat divorced from the actual conduct engaged in by the defendant, and require competition authorities or courts to themselves identify the conduct necessary to restore the possibility of competition. Care must be taken not to formulate a decree that chills efficient conduct, and this can take time and money to accomplish.
 - b. Affirmative conduct remedies can be difficult to administer. Courts and enforcers may face difficulties in supervising an ongoing commercial relationship mandated by such a remedy. Price and service terms must often be set, although at times the dominant firm's prior or contemporaneous terms of dealing may provide a guide.
 - c. Affirmative conduct remedies may chill incentives to innovate. Forced sharing may diminish the incentives of the defendant, its rivals and similarly situated firms in other industries to invest in innovation.
8. While historically an important tool in governmental unilateral conduct remedies, structural relief can involve significant up-front administrative costs and the risk of impairing the efficiency of the divested firm's operations. Nevertheless, such a remedy may be appropriate, particularly when there is a clear causal link between the challenged conduct and the acquisition of monopoly power, and where affirmative conduct remedies are too costly to design and administer.
9. Civil penalties as a remedy may have attractive features, particularly in jurisdictions without a private damages action. Civil penalties avoid much, although not all, of the costs of designing and administering a remedy (particularly an affirmative conduct or structural remedy), and, if tied to the actual harm inflicted by the defendant, may avoid significant risks of chilling incentives to innovate or engage in efficient conduct. Excessive civil penalties, on the other hand, may chill efficient conduct *ex ante*.