

Remedies in Exclusive Dealing Cases

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Overview

- Remedies in Unilateral Conduct Cases
 - The Importance of Remedies
 - Possible Remedial Goals
 - Possible Remedial Tools
 - Costs and Benefits of Various Remedies
- Remedies for Abusive Exclusive Dealing
 - Considerations of Efficiency
 - “Fencing in” Relief in Exclusive Dealing Cases

The Importance of Remedies

- Designing remedies in unilateral conduct cases is a difficult but necessary task.
- Unlike mergers, which can be blocked, or price-fixing and other collusion cases, where actions can be simply enjoined, single-firm monopoly cases involve a change in market structure that may require more than an injunction to fix.
- An effective remedy is as important as an effective investigation or prosecution.
- Remedies should be considered at the beginning of an investigation.

Possible Goals of Remedies

- Stopping unlawful conduct and preventing its recurrence
- Restoring competition in the relevant market
- Deterrence
- Compensating victims

Possible Remedial Tools

- Types of remedies in unilateral conduct cases:
 - Prohibitory conduct remedies (cease and desist)
 - Affirmative conduct remedies
 - Structural remedies
 - Penalties
- Different remedies have different administrative costs (remedy design and ongoing administration), and different effects on efficiency and innovation.
- The preferred remedy will be the one that accomplishes the remedial goals of the relevant jurisdiction while minimizing the costs of remedy design and administration and the risks of chilling efficient conduct and incentives to innovate.

Prohibitory Conduct Remedies

- Enjoin the conduct found to be illegal, and conduct having similar effect realized through similar means (“fencing in” relief)
- Low up-front administrative costs, and low risk of chilling efficient conduct. However, incentives to engage in abusive conduct will likely continue (unless dominance is fragile), so ongoing monitoring costs can be high
- A standard remedy in unilateral conduct cases, but not always sufficient to restore competition. Also doesn’t deter future wrongdoing or compensate victims.

Affirmative Conduct Remedies

- Gives the defendant an affirmative obligation to take certain actions to restore competition.
- May be appropriate where prohibitory remedies are inadequate to restore competition.
- Relatively costly to design and administer, and can risk chilling efficient conduct and incentives to innovate.
 - Enforcer must identify the steps necessary to restore competition
 - High oversight costs, especially with access remedies
 - Forced sharing may diminish the incentives of the defendant, its rivals and similarly situated firms in other industries to invest in innovation.
- Avoiding affirmative remedies of long duration, especially in dynamic industries, may mitigate potential costs.
- Usually don't deter wrongdoing or compensate victims

Structural Remedies

- Advantages:
 - Can rapidly eliminate market power and restore competition
 - “Fix it and forget it” Changes the defendant’s incentives, reducing monitoring costs. Remedy is self-enforcing.
- Disadvantages:
 - Significant up-front remedy design costs, especially where the defendant has not grown by acquisition
 - Can involve monitoring costs
 - Can destroy efficiencies
- Types of structural relief
 - Horizontal or vertical divestiture
 - Divestiture of property rights

Monetary Penalties

- Advantages
 - Easy to administer, hard to evade
 - Deters unlawful conduct, can compensate victims
- Disadvantages
 - Can be difficult to set the optimal fine
 - Need to balance under and over-deterrence
 - Monetary penalties don't usually restore competition

A Remedial Taxonomy

	Prohibitory Conduct	Affirmative Conduct	Structural	Monetary Penalty
Stop/Prevent Illegal Conduct	+		+	
Restore Competition		+	++	
Deterrence				+
Compensation				++
Remedy Design Costs	+	-	--	
Remedy Administration Costs		-	+	++
Effect on Innovation and Efficiency	+	-	-	

General Suggestions for Defining Remedies (Kovacic, 1989)

- Promptly define the remedial objectives and develop a plan to achieve them
- Understand the industry
- Make adjustments if there is a history of misconduct
- Anticipate the defendant's likely response
- Identify side effects
- Analyze administrability
- Select a remedy
- Develop a framework for implementation

Suggestions for Drafting Remedies

- Remedies must be clear enough so that the dominant firm, its rivals, and the administering agency all know whether particular conduct complies with the remedy.
- Provisions merely reciting general statutory language are pointless, and vague provisions are unlikely to induce effective compliance without extensive further proceedings
- A remedial decree may have to identify specific conduct in which the dominant firm is permitted to engage.
- The order should be of sufficient duration to encourage entry and expansion of competitors.

Ensuring Compliance with the Remedy

- Regular compliance reports
- Antitrust compliance program
- Document retention obligations
- Access to the defendant's employees and records
- Appointment of a special monitor
- Fines for failure to comply

Remedies for Exclusive Dealing

- Prohibitory conduct remedies an obvious choice, but challenges remain
- Exclusive dealing – even by a dominant firm – can be efficient. Prohibition should be limited to the market in which competition was harmed, and be no broader than necessary to realize the remedial goals.
- An example: U.S. DOJ Microsoft case prohibited exclusive dealing arrangements “that have a significant degree of foreclosure on the market” for a period of 5 years
- Another example: U.S. FTC Intel case allowed exclusive dealing where (i) necessary to recoup investment in specialized products for specific customers; (ii) no longer than 30 months in duration; and (iii) limited to the specific products that were customized for that specific customer.
- Contracts entered into by the defendant on an exclusive basis may need to be renegotiated, especially if exclusivity offered for a discount

“Fencing In” Relief in Exclusive Dealing Cases

- Many types of conduct may replicate effects of exclusive dealing, and exclusive dealing remedies in the U.S. often prohibit some or all forms of the following:
 - Retaliation and termination against disloyal customers
 - Market share rebates
 - Bundled pricing
- As with exclusive dealing generally, these forms of exclusivity can be efficient, and care must be taken to avoid discouraging efficient conduct.