Remedies For Plaintiffs In U.S. Competition Cases

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Competition Laws Authorize Different Remedies for Different Offenses

- Structural – mergers; abuse of dominance; anticompetitive agreements
- Behavioral – mergers; abuse of dominance; anticompetitive agreements
- Jail – cartels (DOJ)
- Monetary –
  - Disgorgement/Restitution – abuse of dominance; anticompetitive agreements (private or gov't suit)
  - Civil Penalties – rule or order violation (gov't suit)
  - Criminal Penalties – cartels (DOJ)
  - Damages – mergers; abuse of dominance; anticompetitive agreements – treble – (private)

Types of Structural Remedies

- Full stop or complete divestiture
  - Most likely to maintain existing competition
  - When product market is most of assets acquired
  - Simple, easy to administer, no policing required, and its sure
- Partial divestitures
  - Eliminating the anticompetitive effects
  - Must identify a viable business entity
    - Not necessarily limited to product market
    - Much depends upon identity and needs of acquirer
- Licensing agreements
  - May be best in drug patent or software cases
  - Allows acquirer to maintain efficiencies and on-going research and for new entrant effectively to compete

Consent Order Provisions For Structural Remedies In Merger Cases

- Sell the defined assets
  - Acquirer must have everything it needs to compete effectively
- To an approved acquirer
  - Sometimes to an identified "buyer-up-front"
- At no minimum price
- In a defined time
  - Six months or less
- Clean divestiture with no continuing (long term) entanglements
  - Short term relationship for transition may be necessary
- Parties allowed to merge under a provisional divestiture order
  - With order to hold separate or maintain assets
  - Monitor trustee pending divestiture
  - Divestiture trustee appointed if no divestiture on time
    - Sometimes with a "crown jewel" provision
- All subject to 30-day comment period
  - Material placed on public record

Price and Time Requirements

- No minimum price because goal is to maintain competition as soon as practical, not to protect the interests of the acquirer
- Parties often prefer long divestiture period to avoid "firesale" price. The shorter the better: 6 months or less. Danger to assets during search for buyer:
    - Supermarket stores
    - Customer uncertainty
    - Employee defections
    - Inability to make capital investments

Hold Separate Agreements and Orders to Maintain Assets

- Provides that assets to be divested be operated separately from parties business
- Purpose is to ensure that assets will remain competitive
- Also preserves Commission's options after comment period
- Easiest to employ when a separate business is to be divested
- Not necessary when there is an up-front buyer and divestiture is completed at time of acquisition
- Useful when there is a long divestiture period

Trustee Provisions

- Monitor trustee (or operating trustee)
  - Independent assurance that assets will be maintained
  - And no interim competitive harm
- Divestiture trustee
  - Trustee appointed if parties do not sell assets in defined time
  - Crown jewel provisions
    - Expands the assets to be divested if parties fail to divest the original package in the time allotted
    - Ensures that attractive package of assets will appeal to a suitable buyer
    - Intervenientes lo odian porque pone a riesco partes de la empresa mas provechosas.

Crown Jewel Provision

- If parties are unable to sell the assets in specified time the trustee will automatically be appointed with full authority to sell the assets or such additional or other assets as necessary to accomplish the purposes of the order
  - Helps assure that the defined assets will be sold
  - Parties don't want to risk losing their most profitable business

Types of Behavioral Remedies (undesirable in mergers)

- Firewalls
- Agreement not to raise prices, or to sell at cost
- Supply contracts
  - For input ingredients and non-branded products
  - At what price? (We don't want to be a regulator)
  - Non-discriminatory provisions

- Requires constant monitoring, are impossible to control, and may be competitively harmful
- Comes up most often as compromise settlement in difficult case

Types of Monetary Remedies

- DISGORGEMENT – defendant surrenders all ill-gotten gain.
- RESTITUTION – amount necessary to make injured party whole.
- TREBLE DAMAGES – amount necessary to make the injured party whole x 3
- SINGLE DAMAGES & NO JOINT & SEVERAL LIABILITY -- if leniency granted and defendant cooperates (Private Actions)
- CIVIL FINES -- up to $16,000 per violation or day for continuing violation. for cease-and-desist orders issued under FTC Act or Pre-merger notification *rule violation,* 15 U.S.C.§ 5(l) and (m)
- CIVIL FINES -- up to $7,500 per violation or day for continuing violation for violation of cease-and-desist orders issued under Clayton Act, § 11(l)
- CRIMINAL FINES -- for violations of Sherman Act – up to $100,000,000 for corporations and up to $1,000,000 for individuals. Sherman Act § 4 (Sought only by U.S. Dept. of Justice)

Factors Governing Amount of Civil Penalty

- Good or bad faith of defendant
- Injury to the public
- Defendant's ability to pay
- Eliminating benefits of violation
- Need to vindicate the authority of the FTC
- Duration of the violation
- Existence of criminal or treble damages as alternative penalty
- Past violations

Example of Monetary Penalty: Schnuck's Case

- Schnuck's supermarket acquired National, its chief competitor in St. Louis in 1995, and agreed to divest 24 stores.
- Despite order to maintain assets, Schnuck's failed to maintain assets. Stores became unattractive and sales declined 35%. Departments closed, phone numbers cancelled. Stores not adequately stocked or staffed.
- Civil penalty of $ 3 million plus 2 additional stores were ordered divested to make up the difference.

Factors Governing Decision to Seek Disgorgement or Restitution

- Was the underlying violation clear?
- Is there a reasonable basis for calculating the amount of unjust enrichment?
- Would an FTC action add value in light of other remedies available, including private actions or criminal actions?
  - Are there statute of limitations or standing problems in the private or criminal actions?
  - Are the direct purchasers unwilling to jeopardize supply relationships?

Example of Monetary Disgorgement

- FTC received a complaint that Mylan had raised the price of generic lorazepam, a drug used to treat anxiety, by more than 2000% in 1998
- Mylan manufactures generic drugs:
  - Generic has the same active pharmaceutical ingredient, dosage form, and strength as brand.
  - U.S. Food & Drug Administration must determine that the generic is safe and effective like the brand.

Mylan Case (2)

- Mylan entered 10 year exclusive contract with Profarmaco
- Under the contract Mylan paid Profarmaco a percentage of its lorazepam profits, and Profarmaco agreed not to sell lorazepam API to generic drug companies
- Profarmaco manufactures lorazepam active pharmaceutical ingredient (API) for Mylan
  - API is the chemical that gives a drug its therapeutic effect

Mylan Case (3)

- FTC & states sued Mylan in Federal Court
- Mylan settled case with FTC & states before trial. Mylan paid $100 million in disgorgement that was paid out to individual consumers
- In private litigation by insurance companies, jury found Mylan guilty and awarded insurance companies $12,046,298 (before trebling)

Example of Multiple Remedies: FTC v. Hearst Corporation

- Hearst subsidiary, FDB, notified FTC that it was acquiring Medi-Span
- Hearst did not file critical documents about the competition with Medi-Span with its notification;
- FDB and MS were the only competitors;
- Product Market: Integrated drug information databases, used to determine drug-drug interactions.
- Geographic Market: US, because unique drugs approved.
- Each company had a database, editorial group to gather drug information, sales, marketing, technology staff, customer base.
- Customers are pharmacies, hospitals, doctor offices.
- After acquisition, FDB raised prices 50% to 1000%.
- No new entry after acquisition.

FTC and HEARST AGREE TO A CONSENT ORDER WITH THE FOLLOWING REMEDIES:

- Civil Penalty: $4 Million
- Divestiture:
  - Sold Medi-Span to a Buyer, chosen by Hearst but approved by FTC, including:
    - Customer contracts;
    - Sales and marketing group;
    - FDB employees hired by Buyer of MS; FDB cannot impede Buyer from hiring some important employees.
  - Transition Period: FDB forced to share important information with Buyer for period of time until Buyer of MS can create its own information and compete (Similar to a License).

Hearst Remedies Continued:

- Disgorgement of Profits: $19 million paid to disgorge illegally gained profits during violation;
- Restitution: In conjunction with private court suit by harmed customers, the disgorged money PLUS additional money paid to compensate customers;
- Conduct Restraints: Hearst prohibited from using or enforcing licensing agreements that impair Buyer's ability to compete;
- Future Competition Remedy: Opened contracts for all customers to renegotiate with FDB and Buyer of MS.

Hearst Remedies Continued:

- Disclosure Requirements:
  - Hearst required to send a letter to all customers telling them that MS sold; FTC drafted letter;
  - Hearst required to put notice on its website that MS sold; FTC drafted notice;
  - Hearst required to put advertisement/notice in professional magazines, journals and websites noting that MS sold; FTC drafted notice.
- Monitor Requirements: Hearst required to hire and pay a Monitor to assist FTC in monitoring Hearst compliance with the final order.

Lessons Regarding Monetary Relief

- Various forms of monetary relief are needed to accomplish goals of maintaining same level of competition, deterrence, making injured whole, and punishment
- Profits are so great and chances of being caught so small that consequences when caught should be very serious
- Returning money to consumers increases their recognition that they are stakeholders and enlists their personal commitment to enforcement