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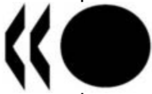

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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS**
**COMPETITION COMMITTEE**

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# ROUNDTABLE ON REMEDIES AND SANCTIONS IN ABUSE OF DOMINANCE CASES

**-- Note by the United States --**

*This note is submitted by the Delegation of the United States to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 8-9 June 2006. This roundtable will take place on Thursday 8 June, afternoon.*

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1. In the United States, single-firm conduct is governed by section 2 of the Sherman Act ("Section 2"), which prohibits the acquisition or maintenance of monopoly power through the use of exclusionary conduct.[1] Section 2 is enforced through civil litigation, both public and private.[2] The courts are invested by statute "with jurisdiction to prevent and restrain violations," and they have broad power to craft appropriate remedies.[3] "Courts are not authorised in civil proceedings to punish antitrust violators, and relief must not be punitive."[4] In addition, the Federal Trade Commission ("FTC") is empowered to issue administrative cease and desist orders to prohibit "unfair methods of competition," under section 5 of the FTC Act. Single-firm exclusionary conduct in violation of Section 2 necessarily constitutes unfair methods of competition in violation of section 5 of the FTC Act.[5]

## 1. Remedy Principles and Practices Applied by the Courts

2. The remedy in a Section 2 case should "seek to 'unfetter a market from anticompetitive conduct,' to 'terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolisation in the future.'"[6] Crafting an appropriate remedy, therefore, requires careful consideration of both the nature and scope of anticompetitive effects from the unlawful conduct and, most importantly, the mechanism through which they are achieved.

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1 *See* Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 (1985).

2 Civil actions to enforce Section 2 may seek (treble) damages and well as injunctive relief. In addition, the laws of most states have provisions comparable to Section 2 under which damages and injunctive relief may be sought.

3 *See* International Salt Co. v. United States, 332 U.S. 392, 400–01 (1947) (Courts "are invested with large discretion to model their judgments to fit the exigencies of the particular case."). *See also* FTC v. Hearst Trust, et al., Civ. No.1:01CV00734 (D.D.C. 2001), in which the FTC challenged Hearst's acquisition of MediSpan as violating the U.S. premerger reporting act (HSR), the FTC Act and Clayton Act (unlawful merger), and the FTC Act as monopolisation. The FTC obtained, via settlement, structural relief (divestiture) for the unlawful acquisition, and monetary relief (disgorgement) for the HSR and monopolisation violations. Certain private plaintiffs joined action and obtained damages as well.

4 United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961). *See also International Salt*, 332 U.S. at 401 ("the end to be served is not punishment of past transgressions"); Hartford-Empire Co. v. United States, 323 U.S. 386, 409 (1945) (a court "may not impose penalties in the guise of preventing future violations"). Although fines are not possible in civil actions to enforce the Sherman Act, the Act authorised the criminal prosecution of all violations, and since 1974 all could have been prosecuted as felonies. Nevertheless, criminal antitrust enforcement in the United States is confined to hard-core cartel activity, and single-firm conduct has never been prosecuted as a felony under the Sherman Act. In the United States, the most recent successful criminal prosecution of single-firm exclusionary conduct appears to have occurred in 1973.

5 *See* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 609 (1953); FTC v. Motion Picture Advertising Service Co., 344 U.S. 392, 395 (1953). For an example of an FTC cease and desist order involving single-firm conduct, see *Intel Corp.*, 128 F.T.C. 213 (1999).

6 United States v. Microsoft Corp., 253 F.3d 34, 103 (D.C. Cir. 2001) (en banc) (citations omitted) (quoting Ford Motor Co. v. United States, 405 U.S. 562, 577 (1972) and United States v. United Shoe Machinery Corp., 391 U.S. 244, 250 (1968)). *See also* Charles A. James, *The Real* Microsoft *Case and Settlement*, ANTITRUST, Fall 2001, 58, 60 ("An antitrust remedy for a Section 2 violation must stop offending conduct, prevent its recurrence, and restore competition.").

3. The typical Section 2 remedy is an injunction consisting of one or more prohibitory provisions framed to prevent the anticompetitive effects of the unlawful conduct.[7] Such provisions generally prohibit the specific conduct found unlawful as well as like conduct with similar anticompetitive effects.[8] As explained by the Supreme Court of the United States:

> A trial court . . . has the duty to compel action . . . that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance. Such action is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal. Acts entirely proper when viewed alone may be prohibited.[9]

4. A purely prohibitory injunction is not always sufficient to accomplish these goals and may be supplemented by mandatory remedial provisions (provisions imposing affirmative duties).[10] Efforts to

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7 In an appropriate case, monetary relief may be obtained under the FTC Act. *See* note 2, *supra*. The FTC may not impose fines pursuant to the FTC Act. It may, however, seek civil penalties (and further injunctive relief) for violations of its administrative orders. There is, however, "no absolute right to an injunction upon a showing of past violation of the antitrust laws." United States v. Borden Co., 347 U.S. 514, 519 (1954). "The sole function of an action for injunction is to forestall future violations." United States v. Oregon State Medical Society, 343 U.S. 326, 333 (1952). An injunction must be warranted by "some cognizable danger of recurrent violation." United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953).

8 *See* National Society of Professional Engineers v. United States, 435 U.S. 679, 697 (1978) (An antitrust remedy should restrain the defendant's "future activities both to avoid a recurrence of the violation and to eliminate its consequences."). There is, however, "no absolute right to an injunction upon a showing of past violation of the antitrust laws." United States v. Borden Co., 347 U.S. 514, 519 (1954). "The sole function of an action for injunction is to forestall future violations." United States v. Oregon State Medical Society, 343 U.S. 326, 333 (1952). An injunction must be warranted by "some cognizable danger of recurrent violation." United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953).

9 United States v. United States Gypsum Co., 340 U.S. 76, 88–89 (1950) (footnote omitted). *See also Professional Engineers*, 435 U.S. at 697 (an antitrust remedy "may curtail the exercise of liberties that the [defendant] might otherwise enjoy"); *International Salt*, 332 U.S. at 400 ("it is not necessary that all of the untraveled roads to [an] end be left open and that only the worn one be closed"). There are limits to a court's authority. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 133 (1969) (a "court may not enjoin all future illegal conduct of the defendant, or even all future violations of the antitrust laws, however unrelated to the violations found by the court").

10 *International Salt*, 332 U.S. at 401 (A remedy should "pry open to competition a market that has been closed by defendants' illegal restraints."). Under sections 5 and 13(b) of the FTC Act, the FTC has obtained monetary equitable remedies, such as disgorgement and restitution, in monopolisation cases. *See, e.g*, FTC v. Mylan Laboratories, Inc., 62 F. Supp. 2d 25, 36–37 (D.D.C. 1999) (monopolisation case holding that the FTC has the power to seek disgorgement), revised and reaffirmed in pertinent part, 99 F. Supp. 2d 1, 4–5 (D.D.C. 1999). Recognising the need to exercise this authority carefully and sparingly, the FTC has used it only in exceptional circumstances. *See* Federal Trade Commission, Policy Statement on Monetary Equitable Remedies, 68 Federal Register 45,820, 45,821 (Aug. 4, 2003). In determining whether to use these remedies, the FTC has considered whether, based on existing precedent, a reasonable party should have expected that its conduct would likely be found to be illegal under the FTC Act. Thus, the FTC has stated that monetary relief under sections 5 and 13(b) of the FTC Act was not appropriate in a case involving the first government action in a complex regulatory context but warned that future cases involving the same conduct could merit disgorgement. *See id.* at 45,822 (citing Abbott Laboratories and Geneva Pharmaceutical, Inc. (March 16, 2000)). Further, the FTC has taken into account the effects and availability of other remedies, including those available to private parties. *See id.* When other remedies

impose affirmative duties are apt to present serious difficulties (as discussed below). In addition, the affirmative duties imposed must be reasonably necessary to prevent or cure the particular anticompetitive effects the unlawful conduct was found to produce.[11]

5. All prohibitory and mandatory remedy provisions must be clear enough so that the dominant firm, its rivals, and the administering agency all know whether particular conduct complies with the provisions.[12] Provisions merely reciting general statutory language are pointless,[13] and vague provisions are unlikely to induce effective compliance without extensive further proceedings.

6. For the last several decades, conduct remedies in Section 2 cases have been of strictly limited duration. By their own explicit terms, remedial decrees generally last for five to ten years.[14] Remedies intended to be in place as long as ten years may make some provision for modification in response to changed circumstances.

7. Structural remedies generally are considered to be more drastic than prohibitory injunctions.[15] Structural remedies present a number of difficulties and normally are reserved for cases in which a conduct remedy is insufficient.[16] Nonetheless, structural remedies can eliminate the opportunity or the incentive to engage in the exclusionary conduct that would be barred by prohibitory remedy provisions. Structural remedies also might be designed to create new competition and eliminate the defendant's dominant position.

8. Structural remedies can take many forms and can vary greatly in complexity. Such a remedy could include divestiture of intangible property rights, which commonly takes the form of licensing

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are likely to result in complete relief, for prudential reasons, the FTC is likely not to pursue an action for monetary equitable relief under sections 5 and 13(b) of the FTC Act.

11 *See* James, *supra* note 6, at 61 ("The relief, however, must have its foundation in the offending conduct.").

12 *See* United States v. Grinnell Corp., 384 U.S. 563, 579–80 (1966) (The "precise practices found to have violated the Act should be specifically enjoined."); *International Salt*, 332 U.S. at 400–01 ("it is desirable, in the interests of the court and of both litigants, that the decree be as specific as possible, not only in the core of its relief, but in its outward limits").

13 *See* Hartford-Empire Co. v. United States, 323 U.S. 386, 410 (1945) (a remedy "must not be 'so vague as to put the whole conduct of the defendant at the peril of a summons for contempt'" or "enjoin 'all possible breaches of the law'") (quoting Swift & Co. v. United States, 196 U.S. 375, 396 (1905)); City of Mishawaka, Indiana v. American Electric Power Co., 616 F.2d 976, 991 (7th Cir. 1980) (a remedy provision merely reciting "the broad language of Section 2" is "too vague").

14 Judge Posner recommends that "all antitrust injunctions expire after a fixed period specified in the decree. Injunctions of indefinite length cast the enforcement agency . . . and the court in the role of a regulatory agency." RICHARD A. POSNER, ANTITRUST LAW 273 (2d ed. 2001). The decree in the *Microsoft* case terminates after five years. United States v. Microsoft Corp., 231 F. Supp. 2d 144, 195 (D.D.C. 2002). The decree in the *Dentsply* case (entered April 26, 2006) terminates after seven and one-half years.

15 *See* United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961).

16 *See, e.g,* 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 653c, at 101 (2d ed. 2002) ("If monopoly power is substantial and likely to be durable, if the possible forms of anticompetitive conduct are varied and difficult to predict, then drafting an effective remedy regulating conduct alone is likely to fail."); E. Thomas Sullivan, *The Jurisprudence of Antitrust Divestiture: The Path Less Traveled*, 86 MINNESOTA LAW REVIEW 565, 609 (2002) ("where the firm proves reticent and unwilling to change its behaviour, divestiture should be the reluctant remedy").

intellectual property.[17] Far more complex is the vertical separation of a dominant firm into component parts (e.g., separating operations at different levels of the distribution chain). In the United States, vertical separation was imposed as a structural remedy for Section 2 violations in the film industry, separating film exhibition from film production and distribution,[18] and most notably was applied in the *AT&T* case, separating local and long distance telecommunications services.[19] The least common and most complex form of structural remedy is breaking the dominant firm into competing entities.[20] This sort of remedy has not been used in the United States in recent decades but was applied in the landmark *American Tobacco* and *Standard Oil* cases nearly a century ago.[21]

**2. Challenges in Crafting Remedies in Section 2 Cases**

9. Crafting any form of remedy poses challenges. Drafting prohibitory remedy provisions can be more challenging than determining whether a violation has been committed. Finding that a dominant firm violated Section 2 requires a careful after-the-fact evaluation of its actual conduct in the particular factual setting presented, but crafting a proper remedy requires a far more complex, forward-looking assessment of all similar conduct under plausible future circumstances. For example, if a dominant firm cuts prices below any reasonable cost benchmark in excluding competition, there is no need to adopt a specific price-cost test before finding the conduct unlawful, but a remedy must set out a specific rule governing future pricing, and that rule must be flexible enough to accommodate a variety of competitive conditions.

10. Drafting prohibitory remedy provisions also can be challenging because of the difficulty in fashioning "an effective deterrent to a repetition of the unlawful conduct" that does "not stand as a barrier to healthy growth on a competitive basis."[22] Although conduct not itself unlawful may appropriately be

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17 Such a remedy was imposed, for example, in *Hartford-Empire Co.* and *United States v. National Lead Co.*, 332 U.S. 319 (1947). Compulsory licensing may raise the thorny problem of determining reasonable compensation.

18 *See* United States v. Griffith, 334 U.S. 100 (1948); Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); United States v. Crescent Amusement Co., 323 U.S. 173 (1948); *see generally* MICHAEL CONANT, ANTITRUST IN THE MOTION PICTURE INDUSTRY 100–53 (1960).

19 *See* United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). The court found that "it is unlikely that, realistically, an injunction could be drafted that would be both sufficiently detailed to bar specific anticompetitive conduct yet sufficiently broad to prevent the various conceivable kinds of behaviour that AT & T might employ in the future" and that "a judicially-created bureaucracy" necessary to supervise the company would be incapable of "performing the unending task of vigilance and oversight that would be required to ensure that an integrated Bell System did not engage in anticompetitive conduct." 552 F. Supp. at 168.

20 *See Microsoft*, 253 F.3d at 80 ("Absent some measure of confidence that there has been an actual loss to competition that needs to be restored, wisdom counsels against adopting radical structural relief.")

21 United States v. American Tobacco Co. 221 U.S. 106 (1911); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911). The success of the remedies in these cases has been questioned many times, notably by Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, 80 OREGON LAW REVIEW 109, 123–41 (2001). Although these remedies did not immediately give rise to intense competition, some believe that they did contribute to the emergence of competition. *See* 1 SIMON N. WHITNEY, ANTITRUST POLICIES: AMERICAN EXPERIENCE IN TWENTY INDUSTRIES 103–10 (1958); 2 SIMON N. WHITNEY, ANTITRUST POLICIES: AMERICAN EXPERIENCE IN TWENTY INDUSTRIES 16–20, 27–28 (1958).

22 United States v. Crescent Amusement Co., 323 U.S. 173, 186 (1948). For a pessimistic view, see POSNER, *supra* note 14, at 273 ("The problem with the antitrust injunction is that if narrowly drawn to

prohibited as part of a remedial decree, great care must be taken to avoid overly broad prohibitory provisions that stifle competition by preventing the dominant competitor from innovating, enhancing efficiency, or offering better value to customers.[23] The prohibitions should therefore be limited to conduct closely related to the anticompetitive conduct at issue.[24] To avoid doing more harm than good by preventing the firm from engaging in legitimate competition, a remedial decree may have to identify specific conduct in which the dominant firm is permitted to engage. For example, in a predatory pricing case, it may be desirable, even if quite difficult, to specify permissible responses to entry or to price cuts by rivals. Finally, a remedy must be designed to provide both the dominant firm and its rivals with incentives to compete aggressively for the benefit of consumers.

11. Mandatory remedy provisions present the same difficulties as prohibitory provisions but to a greater degree. The one-time difficulty of line drawing can be insignificant in comparison with the ongoing difficulty associated with administering mandatory remedy provisions. For example, imposing a duty to aid competitors often "requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited."[25]

12. Mandatory remedy provisions may also have negative effects on market competition that must be balanced against positive effects. For instance, compelling a dominant firm to supply rivals an input may have the short-run effect of making the rivals more effective competitors, but it may also have the long-run effect of undermining rivals' incentives to self-provide or design around the need for the input. In some situations, it may be more beneficial to consumers over the long run for rivals to develop competing standards or networks than to have additional competitors for a given standard or network, and providing competitors with access to existing standards and networks may lessen competition among standards and networks.[26]

13. Compelling cooperation between rivals also "may facilitate the supreme evil of antitrust: collusion."[27] Collusion may be an unintended spillover from legitimate cooperation, or it may be the inescapable result of forced cooperation. The remedy in the *Aspen Skiing* case was a return to the prior

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avoid preventing legitimate competition by the defendant, it is likely to be porous and ineffectual, while if it is broadly drawn to close up all possible loopholes it is likely to handicap the firm in competing lawfully.").

23 *See, e.g.,* New York v. Microsoft Corp., 224 F. Supp. 2d 76, 108–10 (D.D.C. 2002) (stating that conduct restrictions must not deny the firm "the ability to continue to do business and to compete with other participants in the market"); LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 147–48 (1977) ("There are numerous practices which might be desirable to inhibit in particular settings, but which can only be described in general language," and remedies incorporating "judgmental concepts" present "severe" problems.).

24 *See, e.g., Microsoft*, 224 F. Supp. 2d at 110 (conduct restrictions must be "closely related to the anticompetitive conduct").

25 Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407–08 (2004)

26 The potential for mandatory remedy provisions to affect ex ante investment incentives depends on the nature of the conduct involved and the consistency of the remedy used. For example, condemning unconditional refusals to deal as abusive inevitably leads to compelled access, which "may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." *Trinko*, 540 U.S. at 407–08. But if mandatory remedy provisions are not automatic and are only used in specific cases, the effect on investment incentives is more limited.

27 *Id.* at 408.

practice of offering a joint lift ticket on which the price was set through an agreement between the only two competitors in the market.[28]

14. Injunctive remedies should prohibit (or require) conduct that is easily observed. Provisions that, e.g., require certain specified affirmative disclosures or prohibit certain exclusive arrangements can be monitored fairly easily. Provisions that prohibit certain conduct depending upon the intent of the party would be much more difficult to enforce, and should be avoided. Both U.S. agencies actively monitor the compliance of firms subject to remedial decrees to assure that they meet their obligations, and vigorously challenge conduct that violates those orders. Accordingly, the agencies need to be sure those obligations are straightforward and clear.

15. Structural remedies also present challenges. Divestiture, for example, is the preferred remedy in cases involving acquisitions, which by nature change the structure of the acquiring firm.[29] In a Section 2 case, where single-firm conduct is at issue, structural remedies can avoid problems in monitoring compliance with multi-year conduct remedies but also can create inefficiencies. Firms are not always neatly amenable to being dissected, and divestiture might destroy efficiencies that were achieved by the integrated company.[30] As the court of appeals explained in *Microsoft*, structural remedies in Section 2 cases are generally limited to those cases in which there is a close causal connection between the anticompetitive conduct and the firm's dominant position in the market (e.g., the conduct created the firm's market power).[31]

### 3. Remedy Considerations in Liability Determinations

16. "The ideal presentation in a monopoly case would be one in which remedial proposal arose organically out of the theory of the case. . . . The remedy would be . . . a public policy goal integral to the entire proceeding."[32] Two principles follow from this ideal case presentation: First, single-firm conduct should be challenged by an enforcement agency only after careful thought as to the appropriate remedy. Second, a court or administrative agency should not deem single-firm conduct unlawful if a workable and practical remedy is unavailable.

17. The latter principle is particularly important when an agency or court contemplates imposing a duty to assist rivals. In that context, the Supreme Court of the United States recently adopted the views of a leading scholar: "No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency."[33] The

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28 Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 598 n.23 (1985).

29 *See* United States v. Microsoft Corp., 253 F.3d 34, 105–06 (D.C. Cir. 2001) (en banc).

30 *See, e.g.*, *id.* at 106; William E. Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 CONNECTICUT LAW REVIEW 1285, 1293 (1999) ("Courts in abuse of dominance cases have tended to regard divestiture as a riskier form of intervention than conduct controls. Perceptions of the greater risk are most acute where the defendant has a record of superior performance and a restructuring might destroy valuable efficiencies or diminish incentives to innovate.").

31 *See* United States v. Microsoft Corp., 253 F.3d 34, 106–07 (D.C. Cir. 2001) (en banc) (holding that absent such a "causal connection," the firm's unlawful behaviour should be remedied by conduct prohibitions).

32 SULLIVAN, *supra* note 23, at 146.

33 Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415 (2004) (quoting Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST LAW JOURNAL 841, 853 (1989)).

same reasoning applies when the agency, rather than a court, would be placed in such an uncomfortable role and when the required "day-to-day controls" do not relate to the conditions of access. Attempts to regulate aggressive price cutting can be just as problematic as attempts to regulate the terms of access.

## 4. Illustrative Cases

18. On April 26 of this year, the trial court issued its final judgment on remand in the *Dentsply* case.[34] Dentsply is the dominant seller of artificial teeth in the United States, with about 80% of the market, and it was found to have unlawfully maintained its monopoly through restrictive distribution practices for more than ten years. Dentsply distributed its teeth through dealers and strictly enforced a policy of not using any dealers that distributed rivals' teeth. After a trial, the district court found that Dentsply had adopted the policy solely to exclude competitors and that the policy had no procompetitive benefits in this particular setting. The result was to maintain Dentsply's dominance by preventing rival manufacturers from competing effectively to sell their products.

19. The final judgment prohibited Dentsply from entering into an exclusive distribution arrangement with any dealer and from taking any of six specific "retaliatory or deterrent actions against a dealer based on that dealer's sale of non-Dentsply teeth." At the same time, the final judgment also expressly permits Dentsply to adopt certain measures designed to encourage distributors to promote Dentsply's products. To assure compliance, the final judgment required Dentsply to adopt procedures to implement the terms of the judgment, to certify annually that it has complied, and to provide the Justice Department with access to its business records and employees.

20. The FTC issued an administrative complaint in 2003, against The Union Oil Company of California ("Unocal"), alleging that in the 1990s Unocal unlawfully acquired monopoly power in the technology market for producing reformulated gasoline required by the California Air Resources Board (CARB), by misrepresenting, among other things, that Unocal's research was non-proprietary and in the public domain, although it was at the same time pursuing a patent that would enable it to collect over $500 million dollars per year in royalties once the research was incorporated by CARB in its RFG regulations.[35] The complaint alleged that, in the absence of Unocal's deceptive conduct, CARB would not have adopted RFG regulations that substantially overlapped with Unocal's patent claims.

21. Under the terms of a consent order executed in 2005, reached in connection with the Chevron Corporation's acquisition of Unocal,[36] Unocal agreed to an order prohibiting it from enforcing the relevant patents.[37] The order also required Unocal to disclaim or dedicate to the public the remaining term of the relevant U.S. patents. Finally, the order contains standard record-keeping and reporting requirements to ensure the companies' compliance with their terms. The order expires in twenty years. Because the order requires a virtually complete abandonment of the patents (by dedication to the public), there was no need for additional provisions, which might otherwise have been necessary had Unocal retained certain enforcement rights. In line with the prior discussion of remedial principles, the order requires little on-going involvement by the agency and is carefully tailored to the harm. The prohibitions do not impact any efficiency-enhancing conduct.

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[34] United States v. Dentsply International, Inc., 277 F. Supp. 2d 387 (D. Del. 2003), *rev'd*, 399 F.3d 181 (3d Cir. 2005).

[35] *See* http://www.ftc.gov/os/2003/03/unocalcmp.htm. *See generally* http://www.ftc.gov/os/caselist/d9305.htm.

[36] *See* In the Matter of Union Oil Co. of California, Docket No. 9305, Agreement Containing Consent Order (June 10, 2005), *available at* http://www.ftc.gov/os/adjpro/d9305/050610agreement9305.pdf.

[37] *See* http://www.ftc.gov/os/adjpro/d9305/050610do9305.pdf.