Organisation for Economic Co-operation and Development

DAF/COMP/GF/WD(2022)37

Unclassified

English - Or. English

23 November 2022

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Global Forum on Competition

REMEDIES AND COMMITMENTS IN ABUSE CASES – Contribution from the United States

- Session IV -

1-2 December 2022

This contribution is submitted by the United States under Session IV of the Global Forum on Competition to be held on 1-2 December 2022.

More documentation related to this discussion can be found at: oe.cd/sctr.

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JT03508397

Remedies and Commitments in Abuse Cases

- Contribution from the United States –

1. The Federal Trade Commission (FTC) and the Antitrust Division of the United States Department of Justice (DOJ) (collectively, the Agencies), the two federal agencies charged with enforcing competition law in the United States, face an economy marked by concentration. Dominant firms are controlling key arteries of commerce, which provides them with the ability to pick winners and losers and shape the trajectory of innovation. The Agencies are committed to addressing these concerns at their core by focusing on both structural conditions giving rise to dominance as well as the incentives driving the anticompetitive conduct. Implementing successful remedies to address harms from monopolization offenses and restore competition is central to this effort.

2. Remedies in monopolization cases typically involve either structural relief (*e.g.*, divestitures and breakups) or behavioral relief. This paper focuses on occasions when the Agencies have sought, and courts have ordered, remedies that include divestitures as relief for illegal monopolization. It also addresses situations where, when structural relief is unavailable or would be incomplete, the Agencies have focused their remedies on not only preventing the illegal actions and strategies going forward, but also to denying the wrongdoer the benefits of its illegal actions. Examples of such actions can include, *inter alia*, disgorgement and equitable monetary relief for victims, actions that address executive responsibility, and bans on executive participation in the relevant sector.

1. Background

3. In the United States, monopolization offenses are governed by Section 2 of the Sherman Act (Section 2), which prohibits acquiring or maintaining monopoly power through the use of exclusionary conduct.[1] Monopolization offenses are not limited to discrete acts; a monopolist continues to violate Section 2 as long as the monopolist continues to wield unlawfully acquired or maintained monopoly power.[2] In addition, Section 5 of the Federal Trade Commission Act (FTC Act) prohibits "unfair methods of competition in or affecting commerce."[3] Section 5 reaches more broadly than the main U.S. antitrust laws – the Sherman and Clayton Acts – to capture conduct that goes beyond competition on the merits and tends to negatively affect competitive conditions, even in the absence of a showing of current anticompetitive effect or intent. It focuses on stopping

[1] 15 U.S.C. § 2.

[2] United States v. Grinnell Corp., 384 U.S. 563, 580 (1966); *see also* Ford Motor Co. v. United States, 405 U.S. 562, 574 n.9 (1972) (quoting N. Sec. Co. v. United States, 193 U.S. 197, 357 (1904)) ("It would be a novel, not to say absurd, interpretation of the anti-trust act to hold that after an unlawful combination is formed and has acquired the power which it has no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it."); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 74 (1911) (monopolist's elimination of competition brought about "a perennial violation of [Section 2 of the Sherman Act]").

[3] Pub. L. No. 63-203, 38 Stat. 717; 15 U.S.C. § 45(a)(1).

unfair methods of competition in their incipiency based on their tendency to harm competitive conditions.[4]

4. Section 2 is enforced through both government and private civil litigation.[5] The courts are invested by statute with jurisdiction to prevent violations, and have broad power to craft appropriate remedies.[6] The remedy in a Section 2 case should seek to unfetter a market from anticompetitive conduct, terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and prevent practices likely to result in monopolization in the future."[7] The FTC is empowered to issue administrative cease and desist orders and to seek injunctive relief in federal court to remedy prohibited "unfair methods of competition." There is no private right of action under Section 5 of the FTC Act.[8]

5. If the Agencies demonstrate at trial that the alleged conduct violates antitrust laws, a court will order a remedy necessary and appropriate to restore competition.[9] Injunctive relief for monopolization "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."[10] "Adequate relief in a monopolization case should put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act."[11] Courts and the FTC have broad discretion to order a remedy to stop illegal conduct and reverse the effects of that conduct on competition in the future. Often, cease and desist provisions and conduct prohibitions are imposed to stop the exclusionary conduct and prevent its resurgence.[12] In those cases, the injunctions serve to stop the firm from engaging

[4] *See* Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, FTC File No. P221202 Nov. 10, 2022, https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

[5] Civil actions to enforce Section 2 may seek (treble) damages as 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.

[6] *See* Int'l 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.").

[7] United States v. Microsoft Corp., 253 F.3d 34, 103 (D.C. Cir. 2001) (en banc) (quoting *Ford Motor*, 405 U.S. at 577; United States v. United Shoe Mach. Corp., 391 U.S. 244, 250 (1968) (internal quotations omitted).

[8] 15 U.S.C. § 45. *See also* Policy Statement, *supra* note 4.

[9] *Grinnell*, 384 U.S. at 577 (1966) ("[A]dequate relief in a monopolization case should put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct.") (citing Schine Chain Theaters, Inc. v. United States, 334 U.S. 110, 128–29; *see also Ford Motor*, 405 U.S. at 573 (adequate relief must "restore competition"); United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 334 (1961) ("[I]t is well settled that once the government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.").

[10] United States v. U.S. Gypsum Co., 340 U.S. 76, 88–89 (1950).

[11] *Grinnell*, 384 U.S. at 577. *See also Schine Chain Theaters*, 334 U.S. at 128 ("To require divestiture of theatres unlawfully acquired is not to add to the penalties that Congress has provided in the antitrust laws. Like restitution it merely deprives a defendant of the gains from his wrongful conduct. It is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project.").

[12] *See, e.g.,* McWane, Inc. v. FTC, 783 F.3d 814 (11th Cir. 2015) (McWane barred from requiring

in the illegal conduct as well as similar conduct that could be used to achieve the same ends.

6. When necessary to address the effects of illegal monopolization, courts have required asset divestitures and "break ups" of violators in monopolization cases. "Divestiture has been called the most important of antitrust remedies,"[13] and this type of structural relief may be appropriate to remedy monopolization under U.S. competition law because it provides continuing relief.

2. Divestitures

7. As a general matter, the scope of a divestiture will depend on market conditions as well as the illegal conduct that was used to build or maintain a monopoly:

> *Divestiture or dissolution must take account of the present and future conditions in the particular industry as well as past violations. It serves several functions: (1) It puts an end to the combination or conspiracy when that is itself the violation. (2) It deprives the antitrust defendants of the benefits of their conspiracy. (3) It is designed to break up or render impotent the monopoly power which violates the [Sherman] Act.*[14]

8. However, relief in civil proceedings, unlike criminal cases, must not be punitive and "the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices."[15] When divestiture is warranted, a "public interest served by such

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its customers to purchase exclusively from McWane); Broadcom Inc., F.T.C. Docket No. C-4750, Decision and Order (2021) (Broadcom barred from requiring its customers to source components from Broadcom on an exclusive or near exclusive basis and barred from retaliating against customers for doing business with Broadcom's competitors); Victrex plc, F.T.C. Docket No. C-4586, Decision and Order (2016) (Respondents prohibited from entering into exclusive supply contracts using an alternate source of implant-grade polyetheretherketone (PEEK) in new products. They also must allow current customers meeting certain conditions to modify existing contracts to eliminate the requirement that the customer purchase PEEK for existing products exclusively from Invibio); Transitions Optical Inc., F.T.C. Docket No. C-4289, Decision and Order (2010) (Transitions barred from requiring customers to purchase from Transitions on an exclusive basis);; Intel Corp., F.T.C. Docket No. 9341 (2010) (Intel agreed to a settlement containing provisions that would undo the effects of Intel's past conduct, and prohibiting Intel from suppressing competition in the future); United States v. United Reg'l Health Care Sys., No. 7:11-cv-30, ECF No. 10 (N.D. Tex. Sept. 29, 2011) (final judgment approving consent decree that, to remedy Section 2 violation, prohibited defendant from entering into contracts that inhibit health insurers from contracting with defendant's competitors); United States v. Dentsply Int'l, Inc., No. Civ.A. 99–005(SLR), 2006 WL 2612167 (D. Del. Apr. 26, 2006) (barring company from requiring exclusivity and related conditions to remedy Section 2 violation); United States v. Microsoft Corp., 231 F. Supp. 2d 144 (D.D.C. 2002) (approving consent decree that, among other things, governed the terms of Microsoft's relationship with specified categories of third parties and required Microsoft to provide uniform licenses, to remedy Section 2 violation); United States v. Waste Mgmt. of Ga., Inc., No. CV496-35 (S.D. Ga. May 20, 1996) (final judgment approving consent decree that imposed limitations on contracting provisions to remedy Section 2 violation).

[13] *E.I. du Pont de Nemours & Co.*, 366 U.S. at 330–31 (citation omitted) (directing the District Court to enter a decree requiring du Pont to divest the stock it had acquired in GE, in violation of Section 7 of the Clayton Act))

[14] *Schine Chain Theatres*, 334 U.S. at 128–29 (citations omitted).

[15] Int'l Salt Co. v. United States, 332 U.S. 392, 401 (1947). *See also E.I. du Pont de Nemours & Co.*, 366 U.S. at 326 ("Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive.").

civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints."[16]

9. The use of divestiture as a remedy in Section 2 cases has a long history in the United States, starting with *Standard Oil* in 1911. In many of these cases, the companies attained monopoly power through acquisition and then engaged in improper conduct to maintain that monopoly. In *Standard Oil* the Supreme Court addressed the creation of monopoly power through serial acquisition holding that the creation of monopoly power "destroy[ed] the potentiality of competition which otherwise would have existed . . ."[17] The Court upheld, with minor modifications, the remedy that broke Standard Oil into 34 companies to restore competition.[18] The same year, the Supreme Court determined divestiture was an appropriate remedy for violations orchestrated by American Tobacco.[19] American Tobacco attempted to coordinate with its plug tobacco competitors. When this failed, the company engaged in price wars that ruined some of its competitors and then acquired them at bargain prices. American Tobacco acquired control over inputs, thus creating entry barriers, and entered into long term covenants not to compete. [20] The Supreme Court determined that the relief was needed to cure the complex and nuanced violations that, when taken as a whole, significantly harmed competition.[21] The Court remanded the case back to the lower court with instructions to develop a plan of dissolution.[22]

10. Similarly, courts have ordered divestitures when policing compliance with an injunction would prove challenging. For example, in *Corn Products Refining Company*[23] and *Grinnell*,[24] both companies attempted to drive out weaker competitors through, among other things, price wars to monopolize the market and deter new entry.[25] These practices served to entrench the monopoly. In both cases, courts ordered divestiture after determining that injunctive relief would be insufficient to restore competition, in part because of difficulties policing compliance over time.[26]

11. Courts have determined that divestiture also can be an appropriate remedy in cases in which competitors used their buying power to foreclose competition in violation of

[16] *Int'l Salt*, 332 U.S. at 401.

[17] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 74 (internal citations omitted).

[18] *Id.* at 81–82.

[19] United States v. Am. Tobacco Co., 221 U.S. 106, 187 (1911) (directing the lower court to hear evidence on a plan of dissolution).

[20] *Id.* at 160–84.

[21] *Id.* at 184–87.

[22] *Id.* at 187–88.

[23] United States v. Corn Prods. Refin. Co., 234 F. 964, 1018 (S.D.N.Y. 1916) (requiring the FTC to file a plan of dissolution with the court).

[24] United States v. Grinnell Corp., 384 U.S. 563, 580 (1966) (dissolution "is wholly justified").

[25] *Grinnell*, 384 U.S. at 567–70; *Corn Prods. Refin.*, 234 F. at 1010–11.

[26] *Grinnell*, 384 U.S. at 578 (remanding the case to the district court to develop a plan of dissolution); *Corn Prods. Refin.*, 234 F. at 1018 (ordering a plan of divestiture to be filed with the FTC within 120 days of the judgment).

Section 2.[27] In *United States v. Crescent Amusement,* for example, the court found that theaters entered into agreements with movie distributors illegally restricting distributors from licensing the same films to the theaters' competitors. The Supreme Court sustained the lower court's decision, and expanded upon the lower court's order, requiring divestiture of ownership interests in any other corporate defendant or affiliated cooperation and enjoined future acquisitions in those companies.[28] The Court clarified that Congress has "declared that the rule of trade and commerce should be competition not combination"[29] and the duty of the court is "to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival."[30]

12. Similarly, the Supreme Court has condemned other contractual relationships and acquisitions that created exclusivity and foreclosed competition in the professional world of champion boxing (which addresses agreements between competitors).[31] In *International Boxing Club of NY,* the Court upheld a remedy of equitable and structural relief, reasoning that the anticompetitive conduct gave the defendant "an odorous monopoly background which was known and still feared in the boxing world."[32] The Court determined it was "necessary to include each of these provisions in the decree in order to put an end to the combination, deprive the appellants of the benefit of their conspiracy and break up their monopoly power."[33] The Court also upheld a lower court's finding that a joint operating agreement between two local newspapers violated Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act,[34] and affirmed the lower court's discretion to require the newspapers involved to submit a plan of dissolution in order to re-establish one of the newspapers as an independent competitor.[35]

13. A well-known divestiture in the United States occurred when the United States and American Telephone & Telegraph Co. (AT&T) settled litigation and the court decree divided AT&T into smaller companies. The United States had filed suit in 1974, alleging

[27] *See* Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 114–15 (1948); United States v. Crescent Amusement Co., 323 U.S. 173, 181 (1944).

[28] *Crescent Amusement,* 323 U.S. at 187.

[29] *See id.*

[30] *Id.* at 188 (quoting Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 461 (1940)) (internal quotation marks omitted). *See also* Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 128 (1948).

[31] Int'l Boxing Club of N.Y., Inc. v. United States, 358 U.S. 242, 252 (1959) (upholding judgment of Section 1 and 2 violation that contractual provisions which created exclusive control over certain boxing matches violated Section 2).

[32] *Id.* at 254.

[33] *Id.* at 255.

[34] Citizen Publ'g Co. v. United States, 394 U.S. 131, 134–35 (1969) (joint operating agreement that contained price fixing, profit pooling, and market control provisions violated Sections 1, 2, and 7). With its passage of the Newspaper Preservation Act of 1970, Congress has since determined that joint operating agreements are legal because they preserve editorial competition while allowing newspapers to cut costs, but the holding that courts may impose structural remedies remains untouched by the statute. *See, e.g.,* Hawaii Newspaper Agency v. Bronster, 103 F.3d 742 (9th Cir. 1996).

[35] *Citizen Publ'g*, 394 U.S. at 135 (appellants were required "to submit a plan for divestiture and re-establishment of the Star as an independent competitor and for modification of the joint operating agreement so as to eliminate the price-fixing, market control, and profit-pooling provisions").

monopolization of telecommunications services and equipment in violation of Section 2.[36] In 1982, after a lengthy trial, the parties advised the court of a proposed settlement that included divestiture.[37] The parties agreed to split the company along vertical lines, separating long distance service from local service.[38] The parties also agreed to split the company along horizontal lines and divided local service among regional operating companies.[39] The divestiture was designed to promote innovation and foster competition in long distance service by incentivizing access to local distribution to non-AT&T long-distance carriers by the regional operating companies.[40] The court approved the settlement,[41] determining that the divestiture was in the public interest.[42] In addition to the divestiture, the parties agreed to injunctive relief designed to promote interconnectivity and prevent discrimination among carriers at the local level.[43]

14. As demonstrated in cases described above, a divestiture remedy does not preclude additional injunctive relief. Courts ordered structural relief along with behavioral constraints or other equitable relief designed to restore competition, facilitate entry, or prevent recurrence.[44] Section 2 remedies may include provisions designed to prevent the anticompetitive effects of the unlawful conduct.[45] The Supreme Court acknowledged that if the Agencies are to achieve the objectives Congress envisioned when enacting the Sherman Act, they "cannot be required to confine [their] road block[s] to the narrow lane[s] the transgressor has travelled; [they] must be allowed effectively to close all roads . . ."[46]

[36] United States v. Am. Tel. & Tel. Co. (*AT&T*), 552 F. Supp. 131, 139 (D.D.C. 1982).

[37] *Id.* at 140.

[38] *Id.* at 141.

[39] *Id.* at 141–42.

[40] *Id.* The decree also included several conditions designed to promote interconnectivity and prevent discrimination between carriers connecting to the regional local exchanges.

[41] 15 U.S.C. § 16(e)–(f). The Tunney Act requires the United States in antitrust cases to comply with certain procedures designed to evaluate the competitive impact of the transaction. A court must determine the settlement is in the public interest.

[42] *AT&T*, 552 F. Supp. at 160–71.

[43] *Id.* at 171-208.

[44] *See, e.g.*, United States v. Grinnell Corp., 384 U.S. 563, 578 (1966) (imposing an injunction against future acquisitions); Int'l Boxing Club of N.Y., Inc. v. United States, 358 U.S. 242, 261–63 (1959) (granting injunctive relief including compulsory leasing provisions and prohibitions on contractual provisions with contestants designed to open up the market in the business of promoting professional world championship boxing matches); United States v. Crescent Amusement Co., 323 U.S. 173, 188 (1944) ("Civil suits under the Sherman Act would indeed be idle gestures if the injunction did not run against the continuance or resumption of the unlawful practice."); *AT&T*, 522 F. Supp. at 141–42 (including provisions designed to promote interconnectivity and prevent discrimination between carriers); United States v. Corn Prods. Refin. Co., 234 F. 964, 1015 (S.D.N.Y. 1916) (injunctive relief should include profit sharing, price agreements, and other mechanisms to restrict entry).

[45] United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) (injunction must be warranted by "some cognizable danger of recurrent violation"); United States v. Or. State Med. Soc'y, 343 U.S. 326, 333 (1952) ("The sole function of an action for injunction is to forestall future violations.").

[46] FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952).

Those found liable for violating the Sherman Act "must expect some fencing in."[47] For these reasons, courts routinely impose compliance and reporting obligations on violators.[48]

15. When appropriate, the remedy should also compensate victims of a monopolist's behavior through either disgorgement or equitable monetary relief. Unlike private plaintiffs, the Agencies typically cannot collect monetary damages to remediate harm.[49] However, public disgorgement of profits obtained from illegal conduct has been used as a remedy and mirrors private damages.[50] The FTC has sought monetary disgorgement in past cases.[51] Although a recent ruling has limited disgorgement as a remedy available to the FTC,[52] many state attorneys general may seek disgorgement in cases filed under state antitrust laws, which frequently mirror the federal laws.[53]

3. Additional Remedies

16. The Agencies will exercise the full scope of available remedies to obtain comprehensive relief, both to fully restore competition and to include relief that deprives the defendants of the benefits of the illegal conduct. For example, the Agencies continue to bear in mind that courts have recognized that a compulsory license may be an appropriate remedy for monopolization offenses.[54] In cases involving standard essential patents, the FTC has used compulsory licenses to require the patent holder to comply with its commitments to license its standard-essential patents on fair, reasonable, and nondiscriminatory (FRAND) terms. In these cases, the FTC has the compulsory licensing remedy that is akin to "'structural' relief where the licensing at issue enables the licensee to compete against the defendant in the relevant product market."[55]

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[47] FTC v. Nat'l Lead Co., 352 U.S. 419, 431 (1957) (citing *Crescent Amusement*, 323 U.S. at 187).

[48] *See, e.g.*, *AT&T*, F. Supp. 552 at 230 (discussing compliance terms in the consent decree).

[49] There is an exception when the United States is injured in its business or property by anticompetitive conduct. Then the United States may recover treble damages. 15 U.S.C § 15a.

[50] *See* Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J. 79, 81–83 (2009).

[51] *See, e.g.*, FTC v. Mylan Lab'ys, 62 F. Supp. 2d 25, 36–37 (D.D.C. 1999) (citing FTC v. Febre, 128 F.3d 530, 534 (7th Cir. 1997); FTC v. Gem Merch., 87 F.3d 466, 470 (11th Cir. 1996); FTC v. Pantron, 33 F.3d 1088, 1102 (9th Cir. 1994); FTC v. Sec. Rare Coin & Bullion Corp, 931 F.2d 1312 (8th Cir. 1991); FTC v. Sw. Sunsites, Inc., 665 F.2d 711 (5th Cir. 1982); FTC v. R.A. Walker & Assocs., No. 83–2138, 1991 U.S. Dist. LEXIS 14114 (D.D.C. July 26, 1991) (denying defendant's motion to dismiss on grounds that the FTC could not seek disgorgement). The cases cited by the court are all consumer protection cases that do not trigger Section 2 of the Sherman Act.

[52] *See* AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1352 (2021).

[53] *See* FTC v. Vyera Pharms., LLC, 2021 U.S. Dist. LEXIS 183303 at *7 (S.D.N.Y. Sep. 24, 2021) (holding that *AMG* did not truncate the rights of state attorneys general to obtain disgorgement in their *parens patriae* capacity).

[54] United States v. Glaxo Grp. Ltd., 410 U.S. 52, 64 (1973) (citing Besser Mfg. Co. v. United States, 343 U.S. 444 (1952); Int'l Salt Co. v. United States, 332 U.S. 392 (1947); Hartford-Empire Co. v. United States, 323 U.S. 386 (1945)) ("Mandatory selling on specified terms and compulsory patent licensing at reasonable charges are recognized antitrust remedies."). MSC Software Corp. F.T.C. Docket No. 9299 Decision and Order (2002). See also Union Oil of California, F.T.C. Docket No. 9305, Decision and Order (2005)(royalty-free licenses).

[55] Motorola Mobility LLC, F.T.C. Docket No. C-4410 Decision and Order (2013); Robert Bosch GmbH, F.T.C. Docket No. C-4377 Decision and Order (2013).

17. The FTC has applied these principles in fashioning compulsory licenses as remedies. When N-Data breached a licensing commitment made to a standard setting organization by its predecessor in interest, the FTC issued a complaint alleging a violation of Section 5 of the FTC Act and entered into a consent decree that limited N-Data's rights to enforce the relevant patents.[56] The FTC included similar provisions in consent decrees settling litigation against Dell and Union Oil Company of California. In both complaints, the FTC alleged the parties harmed competition and undermined standard-setting or rule-making processes by failing to disclose their patents during the standards development process and then threatening to exercise their patents after the respective bodies had adopted the standard covered by the undisclosed patents.[57] Outside of the SEP context, Microsoft entered into a consent decree requiring Microsoft to, among other things, license its Windows Operating System to OEMs using uniform licensing agreements with uniform royalty terms; and make communications protocols available to third parties with certain limitations on reasonable and non-discriminatory terms.[58]

18. Finally, the agencies may seek to impose personal responsibility on individuals who controlled, directed, or participated in the illegal conduct. In a recent case alleging monopolization of the market for an essential pharmaceutical, for example, the FTC and a coalition of state attorneys general named in the complaint two individuals—Martin Shkreli and Kevin Mulleady—in addition to the pharmaceutical company Vyera. The government plaintiffs alleged that Shkreli and Mulleady founded Vyera with the plan to acquire a single-source, off-patent drug like Daraprim, significantly raising the price (by over 4,000%), and preventing generic competition through a web of restrictive agreements limiting access to necessary brand samples, active ingredients, and sales data. Mulleady settled on the eve of trial: the stipulated order prohibits him both from engaging in conduct similar to that alleged in the case and from participating in the pharmaceutical industry (with very limited exceptions).[59]

19. After a full trial, the court found Shkreli individually liable for violations of Sections 1 and 2 of the Sherman Act and parallel violations of state law.[60] "Shkreli conceived of, implemented, maintained, and controlled Vyera's anticompetitive and monopolistic scheme."[61] Pursuant to Section 13(b) of the FTC Act and Section 63(12) of New York's Executive Law and under its equitable powers, the court banned Shkreli for

[56] Negotiated Data Sols. LLC, F.T.C. Docket No. C-4234, Decision and Order at 5–7 (2008).

[57] Dell Comput. Corp., 121 F.T.C. 616, 620–21 (1996); Union Oil Co. of Cal., F.T.C. Docket No. 9305, Decision and Order at 3 (2005). In *Rambus*, the FTC imposed a compulsory license after concluding that Rambus violated Section 2 by failing to disclose its patents to a SSO and then seeking to enforce them after the SSO agreed on a standard covered by those patents. *See Rambus*, *supra* note 56 at 6. An appellate court overturned the decision on the merits, concluding that the FTC had not proven that Rambus would have adopted a different standard but for the deception. Rambus Inc. v. FTC, 522 F.3d 456, 466–67 (D.C. Cir. 2008). The appellate court decision did not speak to the appropriateness of a compulsory license as a remedy.

[58] Second Modified Final Judgment | ATR | Department of Justice; *See also* United States v. Microsoft, 231 F.Supp. 2d 144 (D.C.C. 2002), aff'd 373 F.3d 1199 (D.C. Cir. 2004).

[59] FTC v. Vyera Pharms., LLC, No. 20-cv-00706 (S.D.N.Y. filed Jan. 27, 2020).

[60] FTC v. Shkreli, 581 F. Supp. 3d 579, 637 (S.D.N.Y. 2022).

[61] *Id.*

life from participating in the pharmaceutical industry.[62] The court determined that "Shkreli's egregious, deliberate, repetitive, long-running, and ultimately dangerous illegal conduct" warranted the lifetime ban.[63] Furthermore, given the serious risk of recurrence and the inadequacy of a more narrowly-tailored injunction, the ban was necessary to protect the public from being subjected to further anticompetitive schemes in the pharmaceutical industry at the hands of Shkreli.[64] The court also ordered him to pay over $64 million in disgorgement under the laws of the state plaintiffs.[65]

[62] *Id.* at 638–39.

[63] *Id.* at 639.

[64] *Id.* at 639–40.

[65] *Id.* at 642–43.