U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION

ROUNDTABLE SERIES ON COMPETITION AND DEREGULATION

ROUNDTABLE ON CONSENT DECREES

Prepared Statement of Jeffrey A. Eisenach, Ph.D.
Visiting Scholar, American Enterprise Institute

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Thank you for the opportunity to appear at this important roundtable on the use of consent decrees in antitrust enforcement. Before getting to the substance of my remarks, let me emphasize that I am appearing solely on by own behalf and that the views I express do not necessarily represent those of the American Enterprise Institute or of any other entity with which I am affiliated.[1]

Consent decrees are the primary means by which the antitrust enforcement agencies seek to remedy harms to competition caused by mergers and by anticompetitive conduct. Such remedies may take a variety of forms, but generally are classified into two main categories, structural and behavioral. Structural remedies operate by seeking to permanently separate the ownership of assets which, if owned by a single firm, would likely to be used to harm competition and consumers. Behavioral (or "conduct") remedies, by contrast, allow the potentially anticompetitive assets to remain together under a single owner, but restrict or place conditions on the manner in which the assets can be deployed.

The appropriate design of antitrust remedies raises a multitude of issues – including but not limited to the need for administrability, the goal of efficient deterrence, the danger of multi-jurisdictional redundancies or inconsistencies,[2] and the appropriate balance between protecting competition and harming incentives for innovation. In these remarks, I focus on two primary themes. *First*, in thinking about remedies from a policy perspective, it is useful to distinguish between remedies that address horizontal concerns and remedies that address vertical concerns, and between remedies involving mergers and remedies involving anticompetitive conduct.

[1] In addition to my role at AEI, I am a Managing Director at NERA Economic Consulting, where I regularly consult on antitrust and related matters. The opinions expressed herein relate to policy issues and should not be interpreted as reflecting my opinions on any specific matter.

[2] See generally Jeffrey A. Eisenach and Robert Kulick, "Do State Reviews of Communications Mergers Serve the Public Interest?" *Federal Communications Law Journal* (forthcoming 2018).

Second, in all of these contexts, remedies policy should be guided by the principle of regulatory humility.

First, while the issues associated with proper remedy design are generic, the circumstances in which they are applied are not. At the most fundamental level, remedies policies should distinguish between the nature of the underlying competitive concerns (that is, whether the issues are horizontal or vertical) and between situations involving illegal conduct and situations involving mergers. That is, remedies policy should distinguish clearly between the four sets of circumstances depicted in Table 1 below.

TABLE 1:
REMEDY GOALS, OBJECTIVES AND CONCERNS

	Horizontal	**Vertical**
Conduct	• Standard: *Per se* (Sherman §1) • Competitive Concerns: Higher prices/lower quality; supracompetitive profits • Primary Remedy Goals: Deter or enjoin future conduct; remediate damages to consumers • Primary Remedy Concerns: Efficient mix/level of penalties relative to enforcement/detection; incentivizing over-compliance	• Standard: Rule of reason (Sherman §2) • Competitive Concerns: Raising rivals costs/foreclosure of actual or potential competition • Primary Remedy Goals: Deter or enjoin future harmful conduct; remediate competitive harm; restore competition • Primary Remedy Concerns: Creating dyssynergies; discouraging efficient conduct; harming innovation
Mergers	• Standard: Reasonable likelihood of substantial harm to competition (Clayton §7) • Competitive Concerns: Unilateral or coordinated effects; supracompetitive profits • Primary Remedy Goals: Preserve competitive conditions in the relevant market/preserve static competition and consumer choice/prevent higher prices • Primary Remedy Concerns: Preventing realization of static efficiencies; creating dyssynergies; divestiture viability	• Standard: Reasonable likelihood of substantial harm to competition (Clayton §7) • Competitive Concerns: Creating "incentive and ability" to foreclose/raise rivals' costs • Primary Remedy Goals: Preserve competitive conditions in the relevant market; prevent foreclosure of actual or potential competition • Primary Remedy Concerns: Preventing realization of dynamic efficiencies; discouraging efficient conduct; harming innovation

While these distinctions have multiple implications for remedies policy, I will highlight just two. First, the issues in horizontal cases are often relatively clear cut compared with vertical matters; and, the stakes in vertical matters are arguably higher, as may be more likely than horizontal matters to implicate dynamic competition and innovation, and thus have larger implications for economic welfare.[3] As a result, the risks of "getting remedies wrong" (that is, the combined costs associated with Type I *and* Type II error)[4] are likely higher in vertical cases than in horizontal ones. Thus, in my view, the current focus in academic and policymaking circles on vertical issues is, in my opinion, well placed.

A second take-away from Table 1 relates to the distinction between conduct cases and mergers. Specifically, in conduct cases the anticompetitive effect is presumed, and the likelihood of harm to economic efficiency from potential remedies is at most prospective; in mergers the situation is reversed – anticompetitive effects are prospective, and potential for remedies to limit the realization of synergies is front and center. Thus, while both types of cases implicate similar issues of effective remedy design, the goals and objectives, and the benefits and costs, of potential remedies are inherently different. For example, in a vertical monopolization case, the objective is to restore competition to its pre-conduct state, which may (if the effect of the conduct was to create a monopoly where none existed before) include "dismantling the monopoly to restore the competitive environment that would have existed without the violation."[5]

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[3] See e.g., Michael L. Katz and Howard A. Shelanski, "Merger Policy and Innovation: Must Enforcement Change to Account for Technological Change?" in Adam B. Jaffe, Josh Lerner and Scott Stern, eds., *Innovation Policy and the Economy*, Vol. 5 (MIT Press, 2005) 109-165. Of course, horizontal conduct and transactions can also have significant effects on innovation. See e.g., *F.T.C. v. PPG Indus., Inc*., 628 F. Supp. 881 (D.D.C. 1986), aff'd 798 F.2d 1500 (D.C. Cir. 1986).

[4] See e.g., Frank H. Easterbrook, "The Limits of Antitrust," *Texas Law Review* 63;1 (August 1984) 1-40.

[5] U.S. Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (2008) at 144 (*citations omitted*) (hereafter *Section 2 Report*).

Putting these two concepts – the relative importance of vertical issues and the need to distinguish between conduct cases and mergers – leads me to offer two suggestions: (a) The agencies should give serious consideration to proposals to update the 1984 Vertical Merger Guidelines;[6] and, (b) the agencies should also consider providing policy guidance on the design of remedies in vertical conduct cases, picking up where the Antitrust Division's 2008 report on single firm conduct under the Sherman Act left off.[7]

My second overall theme relates to regulatory humility and the purposes of antitrust. As FTC Chair Maureen Ohlhausen has eloquently explained, regulatory humility means always keeping in mind the limits of government's ability to improve market outcomes through regulatory interventions.[8]

Happily for antitrust enforcers, the antitrust laws are broadly consistent with the principle of regulatory humility. As the Antitrust Modernization Commission explained in 2007:

> Antitrust law in the United States is not industrial policy; the law does not authorize the government (or any private party) to seek to "improve" competition. Instead, antitrust enforcement seeks to deter or eliminate anticompetitive restraints. Rather than create a regulatory scheme, antitrust laws establish a law enforcement framework that prohibits private (and, sometimes, governmental) restraints that frustrate the operation of free-market competition.[9]

To be sure, there is some unavoidable tension between these broad principles and the use of remedies, since every remedy is at least in some sense a "regulatory scheme" designed to "improve competition" compared with some but-for world. The goal of remedies policy should

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[6] For a review of recent merger cases in the information technology sector, see Jeffrey A. Eisenach, "US Merger Enforcement in the Information Technology Sector," in *Handbook of Antitrust, Intellectual Property and High Tech* (Roger Blair and Daniel Sokol, eds.) (Cambridge University Press, 2017).

[7] See *Section 2 Report* at 143-163.

[8] See e.g., Maureen K. Ohlhausen, "The Procrustean Problem with Prescriptive Regulation," Sixth Annual Telecom Policy Conference, Free State Foundation (Washington, D.C. Mar. 18, 2014) (available at http://www.ftc.gov/system/files/documents/public_statements/291361/140318fsf.pdf).

[9] Antitrust Modernization Commission, *Report and Recommendations* (April 2007) at 3.

be to reduce these tensions to the extent possible. In my opinion, three guiding principles can help to do so.

First, as the 2004 *Remedies Guidelines* explained, "structural remedies are preferred to conduct remedies … because they are relatively clean and certain, and generally avoid costly government entanglement in the market."[10] At that time, the Division concluded – correctly I believe – that conduct remedies are inferior to structural remedies in at least four ways, including the need for direct monitoring, indirect costs associated with firms' efforts to evade conduct restrictions, the risk of discouraging efficient conduct, and the prospect of preventing subject firms from responding efficiently to change.

To these reasons for favoring conduct over structural remedies, I would add a fifth: The potential for conduct remedies to spawn *de facto* regulatory agencies with lives of their own, complete with budgets, staffs and "constituencies." As Peter Huber put it in his assessment of the 1982 AT&T Modified Final Judgment, in such cases "the best of antitrust degrades into the worst of commission," producing what he called "degenerate antitrust bureaucracies" that develop their "own lore, unique traditions, precedents, procedures, formalities and technical vocabulary."[11]

To be clear, the 2004 *Remedies Guidelines* did not reject the use of conduct remedies outright, nor am I.[12] Rather, I am suggesting they be applied with more care and greater caution than the revised 2011 *Remedies Guidelines* seem to suggest.[13]

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[10] U.S. Department of Justice, *Antitrust Division Policy Guide to Merger Remedies* (October 2004) at 7.

[11] See Peter Huber, *Law and Disorder in Cyberspace: Abolish the FCC and Let Common Law Rule the Telecosm* (Oxford University Press, 1977) at 98-99.

[12] See e.g., Jeffrey A. Eisenach and Ilene K. Gotts, "In Search of a Competition Doctrine for Information Technology Markets: Recent Antitrust Developments in the Online Sector," *in Competition and Communications Law: Key Issues in the Telecoms, Media and Technology Sectors* (Kluwer Law International, 2014) 69-90.

[13] U.S. Department of Justice, *Antitrust Division Policy Guide to Merger Remedies* (June 2011) at 12 ("There is a panoply of conduct remedies that may be effective in preserving competition.").

This brings me to my second guiding principle, which is that conduct remedies, when applied, should be of limited duration. Sunset provisions both limit the potential damage associated with imposing inflexible conditions on a changing market and also serve as a prophylactic against institution building. Time limits are especially important in dynamic markets, where "decrees of long duration can soon become obsolete."[14]

My third proposed guiding principle applies to both structural and conduct remedies, and consists of a simple admonishment to heed one of the most fundamental and enduring laws of economics: the Law of Unintended Consequences.[15] Applied to remedies policy, the Law of Unintended Consequences reminds us that – despite the wealth of data and sophisticated analytical tools we bring to the task – our ability accurately to predict the effects of regulatory interventions in the economy is limited. As a practical matter, it suggests the burden of proof in designing remedies of all kinds should be on the government, to demonstrate that the benefits of any remedy are reasonably likely to exceed the costs.[16]

Thank you again for the opportunity to present these remarks. I look forward to participating in the discussion.

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[14] See *Section 2 Report* at 148 ("In fast-changing markets, however, absent sufficient adaptability, decrees of long duration can soon become obsolete, with unintended effects that potentially can stifle a defendant's ability to compete, thereby harming consumers.") (*citations omitted*).

[15] See Rob Norton, "Unintended Consequences," *The Concise Encyclopedia of Economics* (2008) (available at http://www.econlib.org/library/Enc/UnintendedConsequences.html),

[16] For example, the Antitrust Procedures and Penalty Act (the "Tunney Act") requires the Justice Department to prepare a Competitive Impact Statement when it enters a consent decree. See 15 U.S.C. § 16.