DOJ's remedy framework in *U.S. v. Google* overreaches: Mere exclusionary acts do not support structural relief

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I. DOJ's remedy framework

1. In *U.S. v. Google*, Judge Amit Mehta, following the burden-shifting "balancing" approach of *U.S. v. Microsoft*,[1] found that "*exclusive distribution agreements* (. . .) *contributed to Google's maintenance of its monopoly power in* [the markets for] *general search services and general search text advertising*"[2] and thereby violated Section 2 of the Sherman Act.[3]

2. Notably, the court did not find that Google had obtained its monopoly power illegally. It is black-letter law that "*merely possessing monopoly power is not itself an antitrust violation.*"[4] A plaintiff "*must prove a second element, which is the willful acquisition or maintenance of monopoly power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident*."[5] Here, according to Judge Mehta, the Department of Justice (DOJ) had proven that important second element.

3. Having prevailed on liability, the DOJ offered a proposed remedy framework that identifies four areas they believe need remediation: (i) search distribution and revenue sharing; (ii) generation and display of search results; (iii) advertising scale and monetization; and (iv) accumulation and use of data.[6]

4. With respect to "*search distribution and revenue sharing*," the DOJ is "*evaluating remedies that would, among other things, limit or prohibit default agreements, preinstallation agreements, and other revenue-sharing arrangements related to search and search-related products, potentially with or without the use of a choice screen*" and also "*considering behavioral and structural remedies that would prevent Google from using products such as Chrome, Play, and Android to advantage Google search and Google search-related products and features*."[7] Because "[v]*irtually every component and process of a general search engine benefits from data*," the DOJ is "*considering remedies that will* (. . .) *requir*[e] (. . .) *Google to make available* (. . .) *(1) the indexes, data, feeds, and models used for Google search* (. . .) *(2) Google search results, features, and ads*."[8]

5. Also under consideration by the DOJ are "*remedies that would prohibit Google from using or retaining data that cannot be effectively shared with others on the basis of privacy concerns*" and "*remedies that would reduce the cost and complexity of indexing or retaining data for rival*

1 *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).

2 *United States v. Google, LLC*, 2024 WL 3647498, at *66 (D.D.C. Aug. 5, 2024) (hereinafter "*Google*"). Google disputed the characterization of its revenue-sharing agreements (as consideration for default treatment for Google's search engine) as exclusive agreements, but for the purposes of this article, I accept the court's characterization of the agreements.

3 Judge Mehta's reliance on the Microsoft framework can be criticized for relying on the "edentulous" causation standard of *Microsoft* rather than the "but-for" causation standard of *Rambus v. FTC*, 522 F.3d 456 (D.C. Cir. 2008). *Google* at *104–105. DOJ's economic expert suggested that the "but-for" approach was preferable for determining the foreclosure effect of Google's agreements. Ibid. at *105. The court also noted wide agreement that "*Google's distribution agreements did not cause Microsoft's* past *underinvestment in search*," which it recognized had an effect on Bing's attractiveness to mobile phone manufacturers and search-engine users. Ibid. at *115. Conversely, the court seemed to hold Google to a but-for standard when evaluating its articulation of the procompetitive benefits of the agreements. Ibid. at *120–124. The court's rejection of Google's arguments in its defense—because they did not take account of market realities—elides the core requirement in a monopolization case: the necessity of determining whether those market realities were caused by or a function of the defendant's lawful or unlawful actions. Absent this analysis, the court may be considered to have adopted a standard of no-fault monopolization. This choice of liability standard may be significant on any appeal of the district court decision.

4 *Google* at *74.

5 *Google* at *95.

6 Plaintiff's Proposed Remedy Framework, *U.S. v. Google*, case No. 1:20-cv-03010-APM (D.D.C. Oct. 8, 2024) at 4 (hereinafter "Framework"). Judge Mehta appeared to reject harms of the type identified in some of the categories.

7 Ibid. at 5–6.

8 Ibid. at 6–7.

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general search engines."[9] Believing that the "*harms of Google's conduct also extend to the generation and display of new and developing features of general search*" and that "*Google's ability to leverage its monopoly power to feed artificial intelligence* (. . .) *is an emerging barrier to competition*," the DOJ is "*considering remedies that would* (. . .) *prohibit Google from using contracts or other practices to undermine rivals' access to web content*."[10] Other restrictions might require "*Google to allow websites crawled for Google search to opt out of training or appearing in any Google-owned artificial-intelligence product or feature on Google search such as retrieval-augmented-generation-sourced summaries*."[11]

6. The DOJ is considering other remedies, including those that "*may address Google's use of scale, including new advertising technologies such as artificial intelligence* (. . .) *in enhancing and protecting its general search text ad monopoly*" and "*that would involve licensing or syndication of Google's ad feed independent of its search results*."[12] The DOJ is further "*considering remedies that would allow Google search advertisers to receive transparent and detailed information* (. . .) [such as] *Search Query Reports and other information related to its search text ads auction and ad monetization* [,] *consistent with user privacy and to opt out of Google search features (e.g., keyword-expansion, broad match)*."[13]

7. The DOJ suggests that Judge Mehta "consider" "*remedies and laws related to similar conduct in other jurisdictions* (. . .) *to determine what measures* [he] *should impose to prevent Google from maintaining its monopolies in the future*."[14]

8. No such wide-ranging survey of international practices is necessary; nor is it consistent with the law. Judge Mehta should look to the remedy framework set forth by the D.C. Circuit in *United States v. Microsoft*. Both the DOJ and Federal Trade Commission (FTC or the "Commission") have, in their post-*Microsoft* exclusive-dealing monopolization cases, aligned the remedy with the conduct alleged to be unlawful, as *Microsoft* instructs. Judge Mehta should do the same in his remedy determination. If he does so, he may find it difficult to justify an order requiring structural relief.

9 Ibid. at 7.

10 Ibid. at 7–8.

11 Ibid. at 8.

12 Ibid.

13 Ibid.

14 Ibid. at 4.

II. *U.S. v. Microsoft's* guidance on structural relief in monopolization cases

9. Structural relief is rarely obtained in monopolization claims predicated on exclusive dealing claims or other exclusionary or discriminatory agreements (*de jure* or de facto) (including tying and refusal to deal claims).[15] Prohibitions on contractual agreements that disfavor or discriminate against competitors, and a requirement that a firm meet certain affirmative obligations, are not unusual in monopolization cases predicated on illegal exclusive agreements or refusals to deal.

10. The DOJ last obtained structural relief in a monopolization case that was not substantially predicated on illegal acquisitions in *U.S. v. AT&T*, forty years ago. Neither the DOJ nor the FTC sought structural relief in a similar monopolization case until the DOJ sought such relief in *Microsoft*, nearly a quarter-century ago.

11. In *U.S. v. Microsoft*, the district court found Microsoft had monopoly power in the market for Intel-compatible PC operating systems. It also found that Microsoft had maintained its monopoly in violation of Section 2 with a series of predatory and exclusionary acts that significantly limited the distribution of "middleware"—Netscape's internet browser Navigator—that, if distributed widely, "*could enable rival operating systems to enter the market* (. . .) *threat*[ening] *to demolish Microsoft's* (. . .) *monopoly power*."[16] Microsoft's exclusionary acts included "*contractual and* (. . .) *technological shackles*" to limit distribution of Netscape Navigator and payments "*in exchange for* (. . .) *commitment to promote and distribute*" Microsoft's internet browser Internet Explorer and "*exile Navigator from the desktop*."[17] Microsoft's actions "*successfully ostracized Navigator as a practical matter from the two channels that* [led] *most efficiently to browser usage*."[18] The

15 Robert Crandall identifies four such instances occurring prior to 2001: (i) *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982) (break-up of AT&T in response to a complaint filed in 1974 with regard to exclusionary conduct); (ii) Supplemental Judgment, *United States v. United Shoe Machinery*, Civ. Action No. 7198 (D. Mass. Feb. 24, 1969) (modification of previous consent decree to require divestiture of shoe machine assets) and *United States v. United Shoe Machinery*, 391 U.S. 244 (1968) (requiring the district court to reconsider whether the non-structural relief required in a decree entered in *United States v. United Shoe Machinery*, 110 F. Supp. 295 (D. Mass. 1953) was successful); (iii) Consent Decree, *U.S. v. International Business Machines*, 1956 Trade Cas. ¶ 68,245 (S.D.N.Y. Jan. 25, 1956) (divestiture of manufacturing capacity, if within seven years of the decree, the market share of tabulating card business had not fallen below 50%); and (iv) Consent Decree, *U.S. v. Kansas City Star Company*, 1957 Trade Cas. ¶ 68,857 (W.D. Mo. Nov. 15, 1957) (requiring sale of television and radio properties, acquired through license grant). *See* R. W. Crandall, The Failure of Structural Remedies in Sherman Act Monopolization Cases, *AEI-Brookings Joint Center for Regulatory Studies Working Paper* 01-05 (Mar. 2001). This work appears to be related to Mr. Crandall's potential testimony at the *Microsoft* trial.

16 *United States v. Microsoft*, 87 F. Supp. 2d. 30, 38 (D.D.C. 2000).

17 Ibid. at 39, 41.

18 Ibid. at 42.

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district court also found that Microsoft had attempted to monopolize "*the browser market*."[19]

12. The DOJ proposed that Microsoft's operating systems business be separated from Microsoft's applications business. The district court adopted this proposal in the final judgment.[20] The final judgment also imposed conduct restrictions on Microsoft, including a "*ban on exclusive dealing*," "*contractual tying*" and the "*binding*" of middleware products to operating system products.[21] Microsoft was also prohibited from taking any action that "*it* [knew would] *interfere with or degrade the performance of any* [competing] *middleware*."[22]

13. The appellate court affirmed the district court in part but reversed a few of its conclusions of liability. It narrowed the conduct that supported the monopolization finding, reversed the finding of attempted monopoly and reversed the finding of a Section 1 violation based on what the district court found to be an illegal tie between the operating system and Internet Explorer.[23] It vacated the district court's final judgment, in part because it "*rest*[ed] *on a number of liability determinations that* [did] *not survive appellate review*" and because the court "*failed to provide an adequate explanation for the* [remedy]."[24]

14. The appellate court, while noting that "*divestiture is a common form of relief in successful antitrust prosecutions*," recognized that "*by and large, cases upon which plaintiffs rel*[ied] *in arguing for the split of Microsoft* (. . .) *involved the dissolution of entities formed by mergers and acquisitions*."[25] On remand, it instructed the district court that it "*should consider whether plaintiffs have established a sufficient causal connection between Microsoft's anti-competitive conduct and its dominant position in the* [operating system] *market*" because "[m]*ere existence of an exclusionary act does not itself justify full feasible relief against the monopolist to create maximum competition*."[26]

15. Unlike the "edentulous" standard it applied to its finding of liability (perhaps limited to the narrow case of exclusion of a nascent competitor), the appellate court indicated that "*structural relief* (. . .) *requires a clearer indication of a* significant causal connection *between the conduct and creation or maintenance of the market power. Absent such causation, the antitrust defendant's unlawful behavior should be remedied by an injunction against continuation of that conduct*."[27] Liability was found only through "inference," and the district court "*expressly did not adopt the position that Microsoft would have lost its position in the* [operating system] *market but for its anticompetitive behavior*."[28] Importantly, "*if the court on remand is unconvinced of the causal connection between Microsoft's exclusionary conduct and the company's position in the* [operating system] *market, it may well conclude that divestiture is not an appropriate remedy.* (. . .) [The remedy] *should be tailored to fit the wrong creating the occasion for the remedy*."[29]

16. In addition, the appellate court suggested it might be relevant that Microsoft was a "unitary company" "*designed to operate effectively as a single entity*."[30] The appellate court "*identified a proportionality between the severity of the remedy and the strength of the evidence of the causal connection*."[31]

17. After remand, the Department of Justice no longer sought to split Microsoft's applications business from its operating systems business. With some effort, and some differences between the DOJ and many (but not all) of the states that were a party to the litigation, a final settlement was reached with the DOJ and certain plaintiff states.[32] The settlement included various conduct provisions, including but not limited to a non-retaliation clause (for, e.g., distributing, or contemplating distributing, any non-Microsoft middleware or non-Microsoft operating system), adoption of a uniform license agreement, prohibitions on exclusive deals with providers of complementary products, and certain conduct requirements. A similar but slightly different settlement was entered into with other states, after the court rejected their attempt to obtain additional (but non-structural) relief.[33]

III. Antitrust agency remedies in post-*Microsoft* exclusive dealing & refusal to deal matters

18. Neither the Commission nor the Department of Justice has pursued structural relief in matters finding monopolization through exclusive dealing or discriminatory

19 Ibid. at 45.

20 *United States v. Microsoft*, 97 F. Supp. 2d. 59, 64 (D.D.C. 2000) (Final Judgment).

21 Ibid. at 68.

22 Ibid. at 67. The district court included additional conduct and behavioral conditions. *See* ibid. at 64–74.

23 *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).

24 Ibid. at 46, 103. The appellate court also vacated the remedy because of the district court's failure to hold an evidentiary hearing on remedy issues.

25 Ibid. at 105.

26 Ibid. at 106.

27 Ibid. at 106 (internal quotations and citations omitted).

28 Ibid. at 107.

29 Ibid.

30 Ibid. at 106.

31 *United States v. Microsoft*, 231 F. Supp. 2d 144, 164 (D.D.C. 2002).

32 Final Judgment, *United States v. Microsoft*, Civ. Action No. 98-1232 (D.D.C. Nov. 12, 2002), approved, *United States v. Microsoft*, 231 F. Supp. 2d 144 (D.D.C. 2002).

33 *New York v. Microsoft*, 224 F. Supp. 2d 76 (D.D.C. 2002) (proposed remedy in areas unrelated to monopolization of the operating systems market was unwarranted).

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practices after the decision in *Microsoft*.[34] In practice, the agencies' remedies have aligned with the requirement of *Microsoft* that the remedy address the conduct or agreements that allegedly maintained or enhanced the defendant's or respondent's monopoly power. They did not require relief that attempted to undo monopoly power not found to have been obtained unlawfully.

19. In *Broadcom* (2021),[35] the Commission alleged that Broadcom "*hinder*[ed] *its competitors*," "*enhance*[d] *or maintain*[ed] *its monopoly power in the market*[s] *for* [several semiconductor components]" by "*requir*[ing] *customers to purchase, use, or bid*" these components from Broadcom on an exclusive or near-exclusive basis, and "*retaliate*[d] *against 'disloyal' customers*." Through its actions, "*Broadcom foreclosed rivals from a substantial share of the* [relevant semiconductor component markets] *and the* [sale of other semiconductor products]."[36] In settlement of its charges, the Commission prohibited Broadcom from engaging in conduct that had the effect of requiring its customers to source certain semiconductor components on an exclusive or near-exclusive basis.[37]

20. In *Vyera* (2020), the Commission alleged that the defendants, among other actions, entered into multiple exclusive agreements to prevent competitors from obtaining an active pharmaceutical ingredient necessary to offer a competing generic version of the branded drug Daraprim.[38] The complaint asked the court to grant injunctive relief, equitable relief, and to "*permanently enjoin*" certain shareholders of the company from "*owning in part or whole or working for a company engaged in the pharmaceutical industry*."[39] The FTC (and plaintiff states) obtained the requested relief, including the lifetime ban.[40]

21. In 2019, the Commission alleged that *Surescripts, LLC* responded to the threat of new competition in the markets for electronic prescription routing ("routing") and electronic prescription eligibility ("eligibility") services by taking "*a series of anticompetitive actions to protect and maintain its monopolies*." Surescripts changed its pricing policies to distinguish "loyal" and "non-loyal" customers, with the effect that it was able to obtain near "*long-term exclusivity from nearly all of its routing and eligibility*" customers. Surescripts' 95% market share and its loyalty pricing programs made it difficult for its smaller customers to replace the pricing discounts Surescripts customers would lose if they switched to those other, smaller, nascent competitors; in certain instances, any loyalty discounts previously received would be "clawed back" if a counterparty routed prescriptions through another platform. Surescripts also paid significant incentive fees to its loyal customers, incentivizing those customers to be exclusive to the Surescripts platform. Decisions to "multi-home" would lead to a termination of the incentive fees (and a clawback of incentive fees already paid). Surescripts' exclusionary conduct prevented new competitors from achieving any significant scale.[41] The Commission requested that Surescripts be enjoined, and that the court grant equitable monetary relief. After the district court "*reserve*[d]" a decision on Surescripts' request for summary judgment, the Commission and the company entered into an order prohibiting Surescripts from entering into contracts that impose upon a customer a "majority share" requirement, a requirement that the customer promote or market Surescripts' e-prescribing services and preventing customers from promoting or marketing such services by a competitor to Surescripts.[42]

22. In an unsuccessful case against *Qualcomm* (2017), the Commission challenged, as an unlawful maintenance of monopoly, Qualcomm's policies with respect to its supply of baseband processors and licensing of patents that Qualcomm declared essential to "*widely adopted cellular standards*." (As alleged in the complaint, Qualcomm's market share in the relevant markets exceeded 80%.) The Commission alleged that Qualcomm's "no license, no chips" policy acted as a tax on original equipment manufacturers (OEMs), discouraging them from purchasing baseband processors from competitors; the Commission also alleged that an exclusive relationship with Apple excluded competition from other baseband processor suppliers, especially for "*nascent baseband processor supplier*[s]" for whom Apple is a "*particularly important OEM*." The Commission requested the court "*permanently enjoin*[] [Qualcomm] *from engaging in its unlawful conduct*" and "*in similar and related conduct in the future*." The Commission did not seek structural relief, such as the splitting of the baseboard processor chip business from its licensing division.[43] The district court enjoined Qualcomm from engaging in the exclusionary conduct, ruling in support of the FTC, but the

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34 Post-*Microsoft*, the FTC has brought substantially more cases that have alleged monopolization claims than the DOJ. Many of the matters in which the FTC or DOJ has pursued a monopolization claim involve mergers; this paper does not discuss those matters, as they are inconsistent with the relevant facts of the *Google* matter. In most of the consummated merger matters pled as monopolization or maintenance of monopoly, the agencies sought divestiture of the assets acquired (or, sometimes, licensing of the relevant assets). In mergers challenged under a monopolization theory prior to the transaction being consummated, the agencies sought to prevent the acquisition of the assets. The FTC has alleged monopolization claims in many of the enforcement actions they have brought in the pharmaceutical industry, including reverse-payment cases and authorized generic cases; this paper does not discuss those matters, as they are also generally inconsistent with the relevant facts and findings of the *Google* matter. However, in none of those matters did the agency seek structural relief. For a list of many FTC and DOJ monopolization cases filed subsequent to the filing of the 1998 Microsoft complaint, *see* D. Francis, Making Sense of Monopolization, *Antitrust L.J.*, Vol. 84, 2022, pp. 779–840, Appendix.

35 Dates reflect the date of the initial complaint, not settlement; except where noted, the settlements were effectuated after the appellate court opinion in *Microsoft*.

36 Complaint, *Broadcom*, FTC Docket No. 4750 (June 29, 2021).

37 Decision and Order, *Broadcom*, FTC Docket No. 4750 (Nov. 4, 2021).

38 Amended Complaint, *FTC v. Vyera Pharmaceuticals, LLC*, case No. 1:20-cv-00706-DLC (S.D.N.Y. Apr. 16, 2020).

39 Ibid (Prayer for Relief).

40 *See* Joint Motion for Entry of Stipulated Order for Permanent Injunction, *FTC v. Vyera Pharmaceuticals*, LLC, case No. 1:20-cv-00706-DLC (S.D.N.Y. Dec. 7, 2021); *FTC v. Shkreli*, 581 F. Supp. 3d 579 (S.D.N.Y. 2022).

41 Complaint, *FTC v. Surescripts*, case No. 1:19-cv-01080 (D.D.C. Apr. 17, 2019).

42 Stipulated Order for Permanent Injunction and Equitable Relief, *FTC v. Surescripts*, case No. 1:19-cv-01080 (D.D.C. Aug. 9, 2023).

43 Complaint, *FTC v. Qualcomm Inc*., case No. 5:17-cv-00220 (N.D. Cal. Jan. 17, 2017).

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Ninth Circuit reversed (in part) and vacated (in part) the district court's decision.[44]

23. In 2016, the Commission alleged that *Victrex*, through its wholly owned subsidiary Invibio (2016), maintained its greater than 90% market share in the market for implant-grade polyetheretherketone ("PEEK") through various exclusivity terms in long-term supply contracts with medical device makers.[45] The Commission prohibited Victrex/Invibio from "*inviting, entering into, implementing, continuing, enforcing, or attempting thereto, any condition, policy, practice, agreement, contract, contract term, or understanding or any other requirement that has the effect of achieving exclusivity with a customer*." Victrix/Invibio was also prohibited from "*discriminating against, penalizing, or otherwise retaliating against any customer for the reason, in whole or in part, that the customer engages in, or intends to engage in, the research, development, testing, manufacture, production, distribution, purchase, marketing, promotion, or sale of any customer product using a competing PEEK, or otherwise refuses to enter into or continue any condition, agreement, contract, understanding, or other requirement that imposes exclusivity*."[46]

24. In *Cardinal Health* (2015), the Commission challenged Cardinal's "*illegal monopolization of the market for the sale and distribution of radiopharmaceuticals to hospitals and clinics in 25 geographic markets throughout the United States*." According to the Commission, Bristol-Myers Squibb (BMS) and Amersham plc (GE-Amersham) were the only manufacturers of heart perfusion agents (HPAs), an essential input for radiopharmaceuticals. Cardinal "*excluded potential entrants and maintained monopoly power* (. . .) *by obtaining the* de facto *exclusive right to distribute BMS's and* [GE-Amersham's] *HPAs*." This exclusive right "*blocked or significantly delayed potential entrants from gaining access to HPAs*," "*deny*[ing] *customers of radiopharmaceuticals*" and "*enabled Cardinal to amass substantial ill-gotten gains by charging* supra-*competitive prices*." Cardinal threatened both BMS and GE-Amersham with retaliation if they licensed HPAs to potential entrants into the market for the sale and distribution of radiopharmaceuticals.[47] The Commission sought, and Cardinal eventually agreed to: (i) equitable relief (disgorgement of $26.8 million); (ii) limits on Cardinal's ability to enter into multiple exclusive agreements for (certain) radiopharmaceuticals, or inputs to (certain) radiopharmaceuticals, (iii) prohibitions on coercive and retaliatory actions against firms that sell radiopharmaceuticals or their inputs to distributors other than Cardinal, and (iv) release its customers from their contractual obligations with respect to radiopharmaceuticals, within the relevant geographic market.[48]

25. In 2013, the Commission alleged that IDEXX "*maintained a monopoly in the market for point-of-care* (. . .) *diagnostic products used by veterinarians who treat companion animals* (. . .) *through the use of exclusive contracts with distributors*."[49] The Commission required IDEXX to "*cease and desist from* (. . .) *concurrent exclusive distribution agreements with all* (. . .) *national distributors*" and, with respect to any non-exclusive distribution agreement, not include any term or understanding that the counterparty "*refuse or limit the purchase or sale of* [relevant products] *of any person other than IDEXX*." Additionally, and with respect to non-exclusive agreements, the Commission prohibited IDEXX from "*withhold*[ing] *the sale of* [relevant products] *to national distributors*" because the distributor was selling, or intended to sell, relevant products of any other person; nor was it allowed to "*urge,* (. . .) *coerce, threaten, or pressure, or attempt thereto,* [a] *national distributor to refuse to sell* [relevant products]" of any other person.[50]

26. In 2012, the Commission alleged that *McWane*, the only manufacturer of a full line of ductile iron pipe fittings (DIPF) and with 90% of the domestic market, maintained its monopoly by "*excluding actual and potential competitors* (. . .) *through the adoption and enforcement of exclusive dealing policies*." Through its conduct, McWane "*eliminated or delayed competition from the only firms with the ability and incentive to enter the relevant domestic DIPF market in a timely fashion*." It threatened distributors with "*the loss of accrued rebates*" in multiple product lines, if they purchased domestic manufactured DIPF from a newly entering firm, Star Pipe Products ("Star"). It also changed its rebate structure to require distributors to make a minimum but high-share percentage of their purchasers from McWane. Through its actions, McWane "*foreclosed Star from a substantial volume of sales opportunities*" and "*raised barriers to entry*" into the market for domestic DIPF.[51] The Commission, in its notice of contemplated relief, indicated it might seek an order prohibiting McWane (i) from conditioning the sale, or any term of sale, of any product on a customer's dealing, refusing to deal, or any terms of dealing, with any other supplier; (ii) from providing any discounts or other incentives that retroactively reduce the price of previously purchased units of McWane's domestically produced DIPF because of the sale or purchase of an additional unit of product; and (iii) from offering bundled rebates involving domestically produced DIPF.[52] The Commission found liability and imposed a final order largely consistent with its request

44 *FTC v. Qualcomm*, 411 F. Supp. 3d 658 (N.D. Cal. 2019), *rev'd FTC v. Qualcomm*, 969 F.3d 974 (9th Cir. 2020).

45 Complaint, *Victrex plc*, FTC Docket No. 4586 (July 13, 2016).

46 Decision and Order, *Victrex plc*, FTC Docket No. 4586 (July 13, 2016).

47 Complaint for Injunctive and Other Equitable Relief, *FTC v. Cardinal Health, Inc*., case No. 15-CV-3031 (S.D.N.Y. Apr. 20, 2015).

48 Final Order and Stipulated Permanent Injunction, *FTC v. Cardinal Health, Inc*., case No. 15-CV-3031 (S.D.N.Y. Apr. 20, 2015).

49 Complaint, *IDEXX Labs*., FTC Docket No. 4383 (Feb. 11, 2013).

50 Decision and Order, *IDEXX Labs*., FTC Docket. No. 4383 (Feb. 11, 2013).

51 Administrative Complaint, *McWane, Inc*., FTC Docket No. 9351 (Jan. 4, 2012).

52 Ibid., Notice of Contemplated Relief.

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for contemplated relief;[53] its liability and final order were affirmed by the Eleventh Circuit.[54]

27. Also in 2012, the Commission alleged that *PoolCorp*, which had a market share of approximately 80% or more, maintained its monopoly power "*by threatening to refuse to deal with any manufacturer that* [sold] *its pool products to a new distributor entering the market, thereby foreclosing potential rivals from an input necessary to compete*."[55] In settlement, the Commission required PoolCorp to refrain (i) from conditioning the sale, purchase or distribution of pool products to any distributor, (ii) from urging, inducing, coercing, threatening or pressuring manufacturers from selling to any distributor, and (iii) from discriminating against, penalizing, or otherwise retaliating against any manufacturer that sells, or intends to sell, pool products to any distributor.[56]

28. In 2011, the DOJ alleged that *United Regional Healthcare* "*unlawfully maintained its monopoly* [in the markets for general acute-care inpatient hospital services and outpatient surgical services in Wichita Falls, Texas] *by entering into exclusionary agreements with commercial insurers*." United Regional's agreements required insurers that contracted with additional hospitals and healthcare facilities to pay substantially more for services than if they used United Regional exclusively. The DOJ alleged that this "*pricing penalty*" made the cost of including competing hospitals or other healthcare facilities in an insurer network "*prohibitively expensive and not commercially viable*" and excluded "*equally efficient*" rivals.[57] In settlement, United Regional was prohibited from entering into any agreements that prohibited an insurer from contracting with another hospital-services provider, conditioning any price or discount on an exclusive relationship, retaliating or punishing an insurer from contracting with another hospital-services provider, and offering or agreeing to sell hospital services at a "*conditional volume discount*."[58]

29. In *Transitions Optical* (2010), the Commission alleged that the company, which possessed monopoly power in the market for the "*development, manufacture and sale of photochromic treatments for corrective ophthalmic lenses*," "*improperly maintained its monopoly power* [over a ten-year period] *by* (. . .) *entering into exclusive dealing* [agreements] *that foreclose*[d] *its rivals from key distribution channels*."[59] In settlement of the Commission's complaint, Transitions agreed to cease and desist from entering into exclusive agreements, and from policies and practices that had the effect of achieving exclusivity.[60]

30. In *Intel* (2009), the Commission alleged that Intel, among other things, "*threatened to and did increase prices, terminate product and technology collaborations, shut off supply, and reduce marketing support to OEMs that purchased too many products from Intel's competitors*." According to the Commission's complaint, "*OEMs that purchased 100 percent or nearly 100 percent of their requirements from Intel were favored with guarantees of supply during shortages, indemnification from intellectual property litigation, or extra monies to be used in bidding situations against OEMs offering a non-Intel product*." Intel (allegedly) also "*offered market share or volume discounts selectively to OEMs to foreclose competition in the relevant CPU markets*," "*paid or otherwise induced suppliers of complementary software and hardware products to eliminate or limit their support of non-Intel CPU products*," and "*redesigned its* [products] *to reduce the performance of competing CPUs*." Intel engaged in this conduct over the ten years prior to the complaint, and, over that period, maintained a 75% to 85% market share in the markets for personal computer and server central processing units. The Commission also alleged that Intel engaged in conduct intended to eliminate potential competition to central processing units from graphics processing units (and in support of Intel obtaining a monopoly in the market for graphics processing units).[61] The FTC and Intel eventually settled their litigation, with Intel prohibited from conditioning benefits to computer makers in exchange for their promise to buy chips from Intel exclusively, or to refuse to buy chips from others, and from retaliating against computer makers if they do business with non-Intel suppliers. Intel also agreed to modify certain intellectual property agreements with third parties and to disclose that certain of its component products discriminated between Intel and non-Intel chips.[62]

31. In *Dentsply* (1999), the DOJ alleged that the company, over at least a ten-year period, "*unlawfully maintain*[ed] *its monopoly power*" by denying competing manufacturers of artificial teeth access to independent distributors. It did this by "*enter*[ing] *into agreements* (. . .) *to induce dealers not to carry certain competing lines of teeth*" and "*explicitly agreed with some dealers that the dealers* [would] *not carry certain competing lines of teeth*." Dentsply "*threatened to refuse to sell teeth and other merchandise to dealers if they add*[ed] *certain lines of competing teeth, and* (. . .) *when a dealer* (. . .) *dared to offer the lines in question* (. . .) *carried out its threat and terminated the dealer*."[63] The DOJ sought to enjoin any agreement that had the same effect as the restrictive dealing agreements. The appellate court, after reversing the district court's grant of summary judgment in favor of Dentsply, directed the court to grant the injunctive relief the DOJ sought.[64]

53 Final Order, *McWane, Inc.*, FTC Docket No. 9351 (Jan. 30, 2014).

54 *McWane v. FTC*, 783 F.3d 814 (11th Cir. 2015).

55 Complaint, *Pool Corporation*, FTC Docket No. 4345 (Jan. 10, 2012).

56 Decision and Order, *Pool Corporation*, FTC Docket No. 4345 (Jan. 10, 2012).

57 Complaint, *United States v. United Regional Health Care*, case No. 7:11-cv-00030 (N.D. Tx. (Wichita Falls) Feb. 25, 2011).

58 Final Judgment, *United States v. United Regional Health Care*, case No. 7:11-cv-00030 (N.D. Tx. (Wichita Falls) Sep. 29, 2011).

59 Complaint, *Transitions Optical*, FTC Docket No. 4289 (Apr. 22, 2010).

60 Decision and Order, *Transitions Optical*, FTC Docket No. 4289 (Apr. 22, 2010).

61 Administrative Complaint, *Intel Corp.*, FTC Docket No. 9341 (Dec. 16, 2009), ¶¶ 3, 5–9, 11, 14, 18.

62 Decision and Order, *Intel Corp.*, FTC Docket No. 9341 (Oct. 29, 2010).

63 Complaint, *United States v. Dentsply*, Civ. Action No. 99-005 (D. Del. Jan. 5, 1999).

64 *United States v. Dentsply*, 399 F.3d. 181 (3rd Cir. 2005); Final Judgment, *United States v. Dentsply*, Civ. Action No. 99-005 (D. Del. Apr. 26, 2006).

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IV. Conclusion

32. Judge Mehta did not find that Google's exclusive distribution agreements allowed it to obtain monopoly power, but that they "*contributed to Google's maintenance of its monopoly power*" in the relevant markets.

33. Two FTC matters may be instructive in illustrating the difference. In both matters, the defendant/respondent to an FTC action was precluded by the FTC from benefitting from those actions that allowed it to obtain monopoly power. In *Rambus* (2002), the FTC alleged that Rambus had wrongfully obtained monopoly power for certain technology through misrepresentations to a standard-setting body where that standard-setting body adopted Rambus's technology.[65] The Commission, finding liability, prohibited Rambus from making misrepresentations or omissions to standard-setting organizations and set a maximum allowable royalty rate for its technology; through the maximum royalty rate, it did not allow Rambus to retain the monopoly power gained from its misrepresentations.[66] The D.C. Circuit subsequently set aside the Commission's order on liability and remanded the case back to the Commission, which dismissed the matter.[67]

34. *Unocal* (2002) is similar. There, the Commission alleged that Unocal wrongfully obtained monopoly power in certain technology markets, and certain downstream goods markets, due to misrepresentations to a standard-setting body.[68] The Commission sought an order requiring Unocal to cease and desist and to not undertake any new efforts to assert infringement claims for use of the relevant technology. Unocal eventually agreed, as a condition to its acquisition by Chevron.[69]

35. While Judge Mehta did not take notice of DOJ's pleading in its complaint against Apple that the "payment" from Google to Apple—which was the alleged consideration for default status of Google's search engine—was a function of Apple's power (lawfully exercised) in the market for performance smartphones, not Google exercising its monopoly power to pay its distribution parties to exclude its competitors,[70] he recognized that other factors were relevant to assessing the source of Google's monopoly power.

36. For example, he noted that Google "*has long been the best search engine*" and that its partners—such as Apple and Mozilla—"*continue to select Google as the default* [search engine] *because its search engine provides the best bet for monetizing* [search] *queries*," and is "*superior* [to competing search engines]."[71] He rejected the DOJ's claim that Google was no longer a force for innovation, recognizing that "[s]*earch has changed dramatically over the last 15 years, largely because* (. . .) *Google* (. . .) *has not sat still despite its dominant market share*."[72]

37. Under *Microsoft*, the remedy must address only that conduct that contributed to the illegal maintenance of that power. Although some fencing in relief may be appropriate in a monopolization case, the court is likely to conclude that structural relief cannot credibly be described as fencing-in and would also significantly disrupt the normal competitive process.

38. The factual findings or judicial observations of Google's general superiority over other search engines and the remedy principles articulated in *Microsoft* should constrain the DOJ from seeking structural relief. They will undoubtedly constrain the court from ordering structural relief, because such relief would be inconsistent with the remedy framework of *Microsoft* and the district court's factual findings. ■

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65 Complaint, *Rambus Inc.*, FTC Docket No. 9302 (June 18, 2002), ¶¶ 122–23.

66 Final Order, *Rambus Inc.*, FTC Docket No. 9302 (Feb. 2, 2007), ¶¶ II.A., IV.A.

67 *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008); Order Returning Matter to Adjudication and Dismissing Complaint, *Rambus Inc.*, FTC Docket No. 9302 (May 12, 2009).

68 Complaint, *Union Oil Company of Cal.*, FTC Docket No. 9305 (Mar. 4, 2003), ¶¶ 99–103.

69 Decision and Order, *Union Oil Company of Cal.*, FTC Docket No. 9305 (July 27, 2005).

70 In its recent complaint against Apple, the DOJ implicitly attributes the terms of the Google/Apple revenue-sharing agreement to Apple's market or monopoly power: "*Over more than 15 years, Apple has built and sustained the most dominant smartphone platform and ecosystem in the United States by attracting third-party developers of all kinds to create apps that users could download on their smartphones through a digital storefront called the App Store.* (. . .) *As Apple's power grew, its leverage over third parties reinforced its tight control over how third parties innovate and monetize on and off the smartphone in ways that were anticompetitive and exclusionary.* (. . .) *When developers imagine a new product or service for iPhone consumers, Apple demands up to 30 percent of the price of an app whose content, product, or service it did not create.* (. . .) *When users run an internet search, Google gives Apple a significant cut of the advertising revenue that an iPhone user's searches generate.*" First Amended Complaint, *United States v. Apple*, case No. 2:24-cv-04055 (JXN-LDW) (D. N.J. June 24, 2024) at 7.

71 *Google*, at *96.

72 Ibid. at *119.

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