FTC Policy Reversal Signals an Intention to Make Increased Use of Monetary Equitable Remedies for Violations of U.S. Antitrust Laws

Key Points

- The FTC will no longer limit disgorgement and restitution to “exceptional” cases, signaling an intention to make increased use of monetary equitable remedies.
- Separate pending or potential actions, whether civil or criminal, will not dissuade the FTC from pursuing monetary remedies.
- The downside risk to being found in violation of U.S. competition laws just got higher.

Introduction

Last week the U.S. Federal Trade Commission (FTC or Commission) abruptly rescinded its 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases (Policy Statement), which had served for nearly a decade as a statement of the FTC’s enforcement philosophy with respect to monetary remedies. Specifically, the Policy Statement provided analytical guidelines for determining whether to seek monetary equitable remedies — i.e., disgorgement and restitution. In a 4-1 decision, the Commission abandoned this framework, choosing instead to rely only on existing case law for guidance. The stated rationale for this policy shift is the Commission’s view that “the Policy Statement has chilled the pursuit of monetary remedies in the years since the statement’s issuance.”

What this change practically means is that the FTC is positioning itself to make increased use of monetary equitable remedies.

The FTC’s 2003 Policy Statement

After promulgating proposed considerations and allowing for a period of public comment, the Commission in 2003 unanimously issued its Policy Statement to outline “the appropriate circumstances in which to seek, as a matter of prosecutorial discretion, monetary equitable remedies.” The Policy Statement recognized that disgorgement and restitution were not “routine” remedies and should be pursued only in “exceptional” cases. To identify those cases, the Commission provided a three-factor analytical framework:

- The FTC limited pursuit of monetary relief to “clear” violations — i.e., in connection with conduct that a reasonable party should expect to be illegal. By way of example, the Commission

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1 See FTC Press Release, FTC Withdraws Agency’s Policy Statement on Monetary Remedies in Competition Cases; Will Rely on Existing Law (July 31, 2012).
4 See supra n. 2.
identified naked restraints, such as price-fixing or horizontal market division, as “clear” violations; it also referenced examples that were not *per se* violations but nonetheless included egregious conduct such as withholding key documents.

- The Commission restricted demands for a monetary equitable remedy to instances where there was a reasonable basis for calculating the amount of the remedial payment.
- The Commission stated that it would consider disgorgement or restitution when it anticipated that other available civil or criminal remedies would fail to fulfill the goals of the competition laws.

The FTC’s Withdrawal

The FTC has abandoned these guidelines because it considered two of the three factors “overly restrictive” and to have “chilled the pursuit of monetary remedies.” First, the FTC will no longer limit the pursuit of monetary equitable relief to “clear” violations of the competition laws. The Commission noted that “whether conduct is common or novel, clearly a violation or never before considered, has little to do with whether the conduct is anticompetitive.” This policy shift is a clear signal that the Commission will consider monetary equitable remedies in more cases and in varied circumstances, including cases of first impression. This stands in stark contrast not only to the 2003 Policy Statement but also to prior Commission policy.

Second, the FTC concluded that the third factor — whether pending or potential civil or criminal actions could adequately remedy antitrust violations — creates an undue burden on the Commission in making its case. The Commission argued that it should not be required to establish the insufficiency of other actions in order to obtain a monetary remedy, but it did not cite any examples where such a showing was required. Moreo-

ver, the Commission specifically expressed its view that “Supreme Court jurisprudence has increased burdens on plaintiffs,” implying that the remedies available in civil cases have become more uncertain.

The Dissent

Dissenting Commissioner Maureen K. Ohlhausen expressed several reservations with the decision — the most notable being the move “from clear guidance on disgorgement to virtually no guidance on this important policy issue.” The rescission of agency guidelines will create uncertainty regarding when and how the FTC will exercise its statutory authority in the future. And according to Commissioner Ohlhausen, a lack of guidance “runs counter to the goal of transparency, which is an important factor in ensuring ongoing support for the agency’s mission and activities.”

Increased Pursuit of Monetary Remedies

The most important aspect of the decision is that the Commission will no longer reserve monetary equitable remedies for “exceptional cases.” This policy shift signals a clear intention on the part of the FTC to make increased use of monetary remedies. It is also evident that separate pending or potential actions, whether civil or criminal, will no longer dissuade the Commission from demanding such remedies from violators of the U.S. competition laws.

The revocation of the Policy Statement, while designed to increase prosecutorial flexibility for the FTC, has the practical effect of changing the cost-benefit analysis for firms considering courses of conduct. Under the old policy, businesses did not have the downside risk of disgorgement or restitution, absent exceptional circumstances. Now that downside risk has increased significantly.

This new calculus is especially significant for businesses considering conduct that may raise novel or unsettled legal questions, and it may well cause wary parties to forgo commercial arrangements that could otherwise be procompetitive. For example, the FTC has aggressively challenged certain types of settlements between

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5 See supra n. 3.
6 Id.
7 See, e.g., FTC *v.* Mylan Pharm., Inc., *et al*., File No. X990015 (Nov. 29, 2000) (Stmt. of Chairman Pitofsky and Commissioners Anthony and Thompson).
8 Id. at 4.
9 See supra n. 3.
10 Statement of Commissioner Maureen K. Ohlhausen Dissenting from the Commission’s Decision to Withdraw its Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2012).
11 Id.
branded and generic drug makers that the FTC likes to call “pay-for-delay” arrangements. These types of settlements continue to be a top enforcement priority for the FTC, yet the courts of appeals are split over the standard that governs their legality. While the legality of these arrangements remains uncertain, it is clear that the Commission has positioned itself to pursue monetary remedies if it determines that such arrangements violate the U.S. antitrust laws.

Businesses should also consider the following potential effects on future FTC enforcement policy:


Interestingly, while European competition authorities do not impose equitable monetary remedies for violations of the European competition laws, they can (and increasingly do) impose monetary fines that are determined pursuant to published, albeit quite flexible, enforcement guidelines. See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02), available at Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02). The FTC policy shift may be viewed as moving the FTC in the direction of the European competition authorities, in terms of the increased emphasis on monetary remedies and greater enforcement flexibility.

The Commission’s failure to seek public comment before making this reversal signifies that the Commission will most likely seek disgorgement or restitution very soon. Otherwise, consistent with past practice, the Commission would have conducted a more thorough deliberation.

The Commission’s decision to abandon the Policy Statement in its entirety rather than to modify or amend it tends to bolster the hypothesis that the FTC intends to prosecute disgorgement or restitution actions in the very near future.

From the perspective of practical enforcement policy, standards for identifying those circumstances that justify the pursuit of monetary equitable remedies are important. But the paucity of existing case law provides little or no guidance on how or when the FTC will seek a monetary equitable remedy, and the Commission did not cite any authority to the contrary.

The Commission’s warning that novel violations are now ripe for financial remedies likely signifies that the FTC has already identified cases or ongoing investigations where it intends to seek disgorgement or restitution.

Conclusion

In sum, businesses should take notice that the downside risk to being in violation of the U.S. competition laws just got higher. The FTC has positioned itself to start demanding significant cash payments. And it is likely that it will do so quickly, with greater frequency, and in more varied circumstances.

Practice group contacts

If you have questions regarding the information in this legal update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at www.dechert.com/antitrust.