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Interim Measures in Antitrust Investigations – Note by the United States

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1. Introduction

1. In the United States, the preliminary injunction is the primary interim measure that plaintiffs, including federal antitrust enforcement agencies (the "agencies"), utilize pending trial.[1] Preliminary injunctions are an embedded feature of the U.S. judicial system,[2] and can serve a critical role in providing a temporary injunctive remedy that "preserve[s] the relative positions of the parties until a trial on the merits can be held."[3]

2. Federal statutes specifically provide for preliminary injunctions when necessary for the enforcement of the antitrust laws.[4] This tool can prevent antitrust defendants from causing irreparable harm to competition during the course of litigation. In doing so, preliminary injunctions play a valuable role in ensuring that litigation remains a viable tool for preserving competition.

3. Historically, preliminary injunctions in competition matters have been utilized most often in the context of mergers, but their availability and use are broader. This submission provides an overview of preliminary injunctions in the United States in the specific context of supporting federal enforcement of the competition laws. Most of the agencies' experience in seeking preliminary injunctions to enforce the antitrust laws is with merger review, but a few cases involving conduct are summarized below.

2. Discussion

4. In the United States, the process for requesting a preliminary injunction can vary in length and complexity. Courts often decide a preliminary injunction request in an antitrust case after a hearing.[5] There is also a process by which a preliminary injunction hearing can sometimes be consolidated with the trial.[6]

5. Federal courts generally apply a four-factor test to motions for preliminary injunctive relief, under which "[a] plaintiff seeking a preliminary injunction must establish

[1] Other interim measures in the U.S. system, such as motions for stays pending appeal and temporary restraining orders (stop-gap pre-trial temporary injunctions issued by a judge, without prior notice to the defendant, to prevent immediate irreparable harm prior to a preliminary injunction hearing), are available to the agencies when necessary and appropriate but are not examined in this submission.

[2] Fed. R. Civ. P. 65(a)(1) (federal courts may issue preliminary injunctions).

[3] *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

[4] 15 U.S.C. §§ 4, 25, 26, 53(b)(2) (authorizing the enforcement agencies and private antitrust plaintiffs to seek preliminary injunctions).

[5] *E.g.*, FTC v. Peabody Energy Corp., 492 F. Supp. 3d 865 (E.D. Mo. 2020) (granting preliminary injunction after hearing); *United States v. v. Upm-Kymmene, Oyj*, No. 03-2528, 2003 WL 21781902, at *10, 12-13 (N.D. Ill. July 25, 2003) (granting preliminary injunction after hearing). Alternatively, sometimes preliminary injunctions are decided on the papers. *E.g.*, *United States v. Tribune Publ'g Co.*, No. 16-01822, 2016 WL 2989488, at *1 (C.D. Cal. Mar. 18, 2016).

[6] F.R.C.P. 65(a)(2).

[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest."[7] Many courts apply a sliding scale whereby the strength of one factor may compensate for a weakness in another factor.[8]

6. This test can apply differently when the antitrust agencies are seeking preliminary injunctions, as opposed to a private plaintiff. The FTC can get a preliminary injunction "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."[9] In general, if a court finds that an agency is likely to succeed on the merits then courts will often "presume[]" there is irreparable harm and that the public interests favor the preliminary injunction given the agency's role enforcing the antitrust laws in the public interest.[10] Courts have held that in enacting the FTC statutory provision, "Congress 'intended to codify the decisional law'" holding that government agencies enforcing federal statutes need not make a separate showing of irreparable harm.[11] Likewise, the balance of the equities "will usually" tip in the government's favor because "private interests must be subordinated to public ones."[12] This distinction follows from general legal principles and

[7] *Winter* v. *Nat. Res. Def.*, 555 U.S. 7, 20 (2008). A similar four-factor test applies to other interim measures in the U.S. system that are not addressed in this submission, such as motions for stays pending appeal, *see Nken v. Holder*, 556 U.S. 418, 434 (2009), and temporary restraining orders, *see* 11A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2951 (3d ed. 2008).

[8] *See, e.g., Adventist Health Sys./SunBelt, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 17 F.4th 793, 800–01 (8th Cir. 2021) ("The district court flexibly balances [the four factors given] the particular circumstances in each case to determine whether the movant is entitled to injunctive relief.") (internal quotation marks omitted); *Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010) ("These considerations are interdependent").

[9] 15 U.S.C. § 53(b)(2). The U.S. Department of Justice may seek preliminary injunctions "as shall be deemed just in the premises." 15 U.S.C. §§ 4, 25. *See also United States v. Atl. Richfield Co.*, 297 F. Supp. 1061, 1074 n.21 (S.D.N.Y. 1969) (citation omitted) (Congress's "failure . . . to require that the Government show irreparable loss on the application for a preliminary injunction . . . as is the case with a private plaintiff, indicates [a] Congressional desire to lighten the burden generally imposed on an applicant for preliminary injunctive relief."). Although *Atl. Richfield* specifically addresses 15 U.S.C. § 25, the language is the same in *id.* § 4. By contrast, private antitrust plaintiffs are to obtain a preliminary injunction only under "the same conditions and principles" as generally provided by federal courts, including a showing that "the danger of irreparable loss or damage is immediate." 15 U.S.C. § 26.

[10] *E.g., United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980); *United States v. Kasz Enterprises, Inc.*, 855 F. Supp. 534, 543 (D.R.I. 1994) ("when seeking a preliminary injunction, the government need not show that irreparable injury will result in the absence of injunctive relief; such injury is to be presumed.").

[11] *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1082 (D.C. Cir. 1981) ("eliminating the need [for government agencies] to show irreparable harm"); *see also FTC v. Consumer Def., LLC*, 926 F.3d 1208, 1214 (9th Cir. 2019) ("precedent eliminating the traditional showing of irreparable harm in cases of statutory enforcement, where the applicable statute authorizes injunctive relief, remains intact").

[12] *United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980); *see also FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 352 (3d Cir. 2016) ("private equities are afforded little weight" and "cannot outweigh effective enforcement of the antitrust laws"); *Weyerhaeuser Co.*, 665 F.2d at 1083 (holding that after "demonstrate[ing] a likelihood of ultimate success, a counter-showing of private equities alone would not suffice to justify denial of a preliminary injunction barring the merger.").

from the text of the federal antitrust statutes and so applies with force in the antitrust context.

7. The Sherman Act "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[13] It inexorably follows that harm to competition or the competitive process harms our society in numerous—often immeasurable—ways. Indeed, as the Supreme Court has explained, competition (or the lack thereof) affects "all elements of a bargain"—including not only price and output but also "quality, service, safety, and durability."[14] And the antitrust laws recognize that harms may need to be addressed in their "incipiency," which is why Section 7 of the Clayton Act, for example, is designed to prevent harm to competition before the merger or acquisition results in tangible harm to businesses and consumers.[15] There may be considerable permanent damage to a market even while the litigation is pending.

8. Courts also evaluate the specific relief requested. In contrast to preliminary injunctions that preserve the status quo (sometimes termed "prohibitory"), many courts hold that "mandatory" preliminary injunctions—*i.e.*, those that "alter the status quo" or "affirmatively require[] the nonmovant to act in a particular way"—"must be more closely scrutinized" than "prohibitory" injunctions.[16] Nevertheless, necessary mandatory relief can be granted. [17] Although courts have said that they are hesitant to issue injunctions disturbing the status quo, the ultimate purpose of preliminary relief is to "prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits."[18] In addition, the distinction between mandatory and prohibitory relief can at

[13] *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

[14] *Nat'l Soc. of Pro. Eng'rs v. United States*, 435 U.S. 679, 695 (1978).

[15] *See Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962). *See also United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 505 (1974) ("for once the two companies are united no one knows what the fate of the acquired company and its competitors would have been but for the merger").

[16] *E.g., Schrier v. Univ. Of Colo.*, 427 F.3d 1253, 1259, 1261 (10th Cir. 2005) (internal quotation marks omitted).

[17] For example, the FTC's Bureau of Consumer Protection frequently obtains preliminary injunctions that include asset freezes (prohibitory and designed to prevent the dissipation of assets) and receivers (which can serve both a prohibitory function of preservation of assets and documents and a mandatory function (ensuring that the illegal conduct is stopped during the pendency of the proceeding)), as well as other necessary conduct. *See e.g.*, Stipulated Preliminary Injunction, FTC v. AH Media Group, LLC, et al., No. 1:05-cv-02179 (N.D. Cal. 2019); Press Release, Fed. Trade Comm'n, FTC Obtains Preliminary Injunction Against Investor Training Scheme Online Trading Academy (Apr. 7, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/04/ftc-obtains-preliminary-injunction-against-investor-training-scheme-online-trading-academy.

[18] *United Food & Com. Workers Union, Loc. 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998) (internal quotation marks omitted); *see also, e.g., WarnerVision Ent. Inc. v. Empire of Carolina, Inc.*, 101 F.3d 259, 261 (2d Cir. 1996).

times be "more semantic than substantive,"[19] as "injunctive provisions containing essentially the same command can be phrased either in mandatory or prohibitory terms."[20]

9. To illustrate in the merger context, an injunction ordering divestiture after an already-consummated merger would be considered "mandatory" because it would change an existing status quo. By contrast, an injunction preventing consummation of a merger would be "prohibitory," (as would an injunction against enforcement of soon-to-be-implemented anticompetitive agreements); these sorts of injunctions merely preserve the pre-dispute status quo.

10. Preliminary injunctions also can be essential in conduct cases, for example to prevent permanent changes to the structure of the marketplace.[21] This may occur if a monopolist is about to: eliminate important competition that cannot be easily revived, tip a market with network effects, or enhance barriers at critical junctures for market entry. It can be difficult for a court to restore competition once such monopolization occurs.[22] For example, courts cannot restore the businesses of failed competitors or nascent competitors blocked from getting off the ground.[23] Irreparable harm can still occur even if an important competitor remains in the market but suffers permanent damage to its customer relationships, goodwill, or market position, making it unable to compete effectively.[24]Restraints that cause nonmonetary injury to consumer welfare are also arguably irreparable because they are unquantifiable and thus unsuited for remediation

[19] *Tom Doherty Assocs., Inc. v. Saban Ent., Inc.*, 60 F.3d 27, 34 (2d Cir. 1995) (internal quotation marks and brackets omitted).

[20] *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 835 (1994).

[21] *See, e.g., United States v. Columbia Pictures Indus., Inc.*, 507 F. Supp. 412, 434 (S.D.N.Y. 1980) (potential "irreparable alteration of the marketplace" warranted preliminary relief).

[22] *See United States v. Microsoft Corp.*, 980 F. Supp. 537, 544 (D.D.C. 1997) (enjoining Microsoft from requiring OEMs to license and preinstall Internet Explorer browser as a precondition of licensing Windows 95, because "the cost of a compulsory unbundling of Windows 95 and IE in the future could be prohibitive" and Microsoft's conduct might "overwhelm the developing competition in the browser market . . . before it becomes established"), *rev'd on other grounds*, 147 F.3d 935 (D.C. Cir. 1998).

[23] *See, e.g., New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 660 (2d Cir. 2015) (defendants' product-hopping strategy threatened "permanent damage to competition") (internal quotation marks and brackets omitted); *Columbia Pictures Indus., Inc.*, 507 F. Supp. at 434 (threatening "irreparable alteration of the marketplace . . . likely [] long before a trial on the merits could be completed."); *Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462, 514 (E.D. Pa. 1972) (granting preliminary injunction against enforcement of NHL's "reserve clause" because the clause would deny a new competitor league "an[y] effective source of major league professional hockey players" and thus "any place" in the market); *Greenspun v. McCarran*, 105 F. Supp. 662, 666-67 (D. Nev. 1952) (finding irreparable harm based on likelihood that advertisers' boycott would "endanger the existence" of one of two daily newspapers in Las Vegas and thereby "tend to give to the owners and proprietors of the [remaining paper] a monopoly").

[24] *See, e.g., Atl. Coast Airlines Holdings, Inc. v. Mesa Air Grp., Inc.*, 295 F. Supp. 2d 75, 96 (D.D.C. 2003) (consent solicitation aimed at replacing the board of a "potential low-fare competitor" for air service at Washington Dulles threatened irreparable harm to competition, because "no retrospective relief . . . would be able to cure the harm to the external business relationships, financial position, and reputation . . . that will be necessary for [the potential competitor] to compete in the business market").

through damages. For example, degradations of product quality,[25] losses of innovation,[26] or restrictions on consumer choice,[27] may be irreparable because it is difficult to quantify the harm they cause to consumers. This difficulty may be especially pronounced in zero-price markets, where products' lack of any nominal price may make it even more difficult to quantify the harm caused by an effect on product quality or innovation.

11. Some examples illustrate how the government can obtain preliminary injunctions to protect competition from conduct violations. In *Columbia Pictures Industries*, the Department of Justice successfully obtained a preliminary injunction against movie studios to prevent a joint venture ("JV") that would have "substituted a profit sharing formula for the competitive negotiations over the value of individual films in the pay television market" in an exclusive arrangement accounting for about half of industry revenue.[28] Following a hearing, the preliminary injunction was issued days before the JV would have gone into effect. The court found the government was likely to succeed on the merits of its Sherman Act Section 1 claim by showing that the JV would raise prices, restrain competition in licensing films, and deny the JV's pay network rivals access to films. The court also found the balance of equities favored the preliminary injunction. In general, "private interests must be subordinated to public ones," and in this case the JV would cause "irreparable alteration of the marketplace . . . likely [] long before a trial on the merits could be completed."[29]

12. In *New York ex rel. Schneiderman v. Actavis PLC*, the State of New York claimed that drug manufacturer Actavis engaged in an exclusionary product-hopping scheme.[30] When Actavis introduced a new once-daily Alzheimer's drug, the company endeavored to withdraw its older twice-daily version. This would force patients to switch to the new drug in the months before the exclusivity period on the older drug expired and before generics could offer twice-daily alternatives. After a hearing, the State of New York successfully obtained a preliminary injunction that prevented Actavis from withdrawing the twice-daily version pending trial. The Court of Appeals for the Second Circuit affirmed that the State demonstrated a substantial likelihood of success on the merits of its Sherman Act Section 2 claim. Without a preliminary injunction, generic entry for the twice-daily drug might have been thwarted. The State showed that Actavis knew that by imposing a "forced switch" that "deprive[d] consumers of th[e] choice" of its own twice-daily version before generic entry,[31] "patients would be very unlikely to switch back to twice-daily [] therapy even after less-expensive generic[s] becomes available, due to the high transaction costs," especially for Alzheimer's patients.[32] This could result in "[p]ermanent damage to

[25] *E.g., FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (dentists' refusal to provide X-rays to insurers along with claim forms)

[26] *E.g., FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1509 (D.C. Cir. 1986) (merger subject to hold-separate order might reduce "innovation in development of new materials")

[27] *E.g., Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217, 224 (2d Cir. 2008) (alleged conspiracy to require arbitration clauses in credit card agreements)

[28] *Columbia Pictures Indus., Inc.*, 507 F. Supp. at 431.

[29] *Id.* at 434.

[30] *Actavis PLC*, 787 F.3d at 643.

[31] *Id.* at 655.

[32] *Id.* at 649.

competition in the [relevant drug] market."[33] The district court also found that the preliminary injunction was in the public interest because "the government represents the public's interest in a competitive marketplace."[34]

13. In *FTC v. Warner Chilcott Holdings Co. III*, the FTC filed a complaint seeking an injunction against a March 2004 agreement entered into by pharmaceutical companies Warner Chilcott and Barr to prevent entry of Barr's generic version of Warner Chilcott's Ovcon oral contraceptive.[35] While the case was pending trial, the FTC learned that Warner Chilcott intended to execute a switch strategy related to Ovcon. 36 The plan, according to the complaint, was to launch a new, chewable version of Ovcon, and then to stop selling the traditional oral version, in order to convert consumers to the new product. Such a strategy was expected to destroy the market for generic Ovcon before the resolution of the trial, because generic substitution could not occur if traditional Ovcon was unavailable. To prevent this development, on September 25, 2006, the FTC filed for a preliminary injunction that, if granted, would have required Warner Chilcott to continue to make traditional Ovcon available, until the case could be resolved on the merits. The day that the FTC filed the papers, Warner Chilcott waived the exclusionary provision in its agreement with Barr that prevented Barr from entering with its generic version of Ovcon. The next day, Barr announced its intention to start selling a generic version of the product. The parties subsequently agreed to terms for a permanent injunction, that was finalized by the court in 2006[37] and 2007.[38]

[33] *Id.* at 660.

[34] *Id.* at 662.

[35] Complaint for Injunctive and Other Equitable Relief, FTC v. Warner Chilcott, No. 1:05-cv-02179 (D.D.C. Nov. 7, 2005).

[36] *See* case summary and related materials at https://www.ftc.gov/legal-library/browse/cases-proceedings/0410034-warner-chilcott-holdings-company-iii-ltd-warner-chilcott-corporation-warner-chilcott-us-inc-galen. (In April 2004, Barr received approval from the FDA to make and sell its generic version of Ovcon. Several weeks later, Warner Chilcott paid Barr the $20 million required under the agreement, preventing Barr from selling a generic version of Ovcon until May 2009.)

[37] Final Order and Stipulated Permanent Injunction, FTC v. Warner Chilcott, No. 1:05-cv-02179 (D.D.C. Oct 23, 2006).

[38] Final Order and Stipulated Permanent Injunction, FTC v. Barr Pharmaceuticals, Inc., No. 1:05-cv-02179 (D.D.C. Nov. 27, 2007).