

NELCO
NELCO Legal Scholarship Repository

New York University Law and Economics Working
Papers

New York University School of Law

8-1-2008

The Case for Antitrust Civil Penalties

Harry First

NYU School of Law, FIRSTH@juris.law.nyu.edu

Follow this and additional works at: http://lsr.nellco.org/nyu_lewp



Part of the [Antitrust and Trade Regulation Commons](#), and the [Law and Economics Commons](#)

Recommended Citation

First, Harry, "The Case for Antitrust Civil Penalties" (2008). *New York University Law and Economics Working Papers*. Paper 148.
http://lsr.nellco.org/nyu_lewp/148

This Article is brought to you for free and open access by the New York University School of Law at NELCO Legal Scholarship Repository. It has been accepted for inclusion in New York University Law and Economics Working Papers by an authorized administrator of NELCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.

THE CASE FOR ANTITRUST CIVIL PENALTIES

HARRY FIRST*

When it comes to remedying illegal monopolization, U.S. antitrust law would seem to provide every remedy in the book. Conduct that maintains a monopoly can be enjoined. The monopolist's pricing practices can be controlled. The way the monopolist deals with its suppliers or competitors can be regulated. The monopolist can be subject to continuing obligations to disclose sensitive information. It can be required to grant compulsory patent licenses. Shareholders can be required to divest their ownership in affiliated firms. A monopoly firm can be split apart and restrictions placed on the post-break up businesses in which it can engage. Excluded competitors or injured purchasers can sue the monopolist for three-times the damages they have sustained, plus attorneys' fees. And if that were not enough, the monopoly firm can be criminally fined and placed under continuing court supervision, and its executives can be fined and sent off to jail.

There is one remedy that is lacking in this scheme, however. Federal antitrust laws do not now provide for a "civil penalty" for monopolization. In one sense, this is curious. Other sections of the federal antitrust laws include civil penalties: The Justice Department can seek civil penalties for violations of the pre-merger notification provisions of Hart-Scott-Rodino or for violations of an FTC order.¹ On the consumer protection side, the FTC can seek civil penalties for violations of its rules or its cease and desist orders.² Many state antitrust laws provide for civil penalties. Many jurisdictions outside the United States have civil penalties for competition law violations, most notably the European Union and Japan. Many other U.S. regulatory schemes provide for civil penalties, including the securities laws and tax laws.

* Charles L. Denison Professor of Law, New York University School of Law. The author thanks Mette Diget and Maria Joao Melicias for their excellent research assistance. The Filomen D'Agostino and Max E. Greenberg Research Fund at New York University School of Law provided financial assistance for this article.

¹ See 15 U.S.C. §§ 18a(g), 45(l). See also 15 U.S.C. § 15e (parents patriae recovery can be deemed a "civil penalty" and given to the states as general revenue).

² See 15 U.S.C. § 45 (m) (applying to unfair or deceptive acts or practices). For discussion of this provision, see David O. Bickhart, *Civil Penalties Under Section 5(m) of the Federal Trade Commission Act*, 44 U.CHL.L.REV. 761 (1977). The FTC's assertion of the power to seek equitable monetary remedies is discussed *infra* notes 61-75 and accompanying text.

The lack of civil penalties for violations of the Sherman Act or Federal Trade Commission Act has not gone unnoticed, of course. The question whether to recommend this addition to federal antitrust law was one of the topics on the Antitrust Modernization Commission's agenda. After hearings on the matter, however, the Commission ultimately determined that there is "no need" to give the federal agencies this authority.³

In my view, there is a good case to be made for adding such a remedy to federal antitrust law. The good case, however, is a modest one. Although an argument can be made for adding civil penalties for all antitrust offenses, I would at this point confine civil penalties to the imposition of civil fines in monopolization cases, and to only those monopolization cases that fit into two specific categories—"systemic conduct" cases and "no efficiency justification" (NEJ) cases. Even as limited, the case for adding this penalty is modest. I do not claim that imposing a civil penalty in such cases will be the silver bullet cure for the remedy problems that these kinds of monopolization cases raise. My claim, instead, is that a civil penalty has certain advantages that the rest of our remedies in this area lack. These benefits may make a civil penalty an attractive addition to current remedial options in this limited, but very important, range of cases.

I. WHAT ARE CIVIL PENALTIES?

Civil penalties occupy ambiguous ground between traditional civil monetary damages awards and traditional criminal penalties of fines and imprisonment. Civil penalties most often resemble criminal fines (hence, they are often called "civil fines"), but they need not be so confined. Civil penalties could be imposed to disgorge illegally obtained profits, to provide restitution to victims, or as a forfeiture of property used to facilitate a crime, all of which are remedial aspects of today's criminal justice system.⁴

Civil penalties are usually associated with the rise of the administrative state in which Congress has conferred on administrative agencies the power to impose monetary penalties

³ See ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 287-88 (2007) (Recommendation 48), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

⁴ See Criminal Fine Improvements Act, 18 U.S.C. § 3571(d) (providing for alternative fine of twice the gross gain from the offense); U.S. SENTENCING GUIDELINES MANUAL §§5E1.1, 1.4 (orders of restitution and forfeiture for individuals), 8B1.1, 1-2 (orders of restitution and forfeiture for organizations).

for violations of the agency's statute or orders. As one commentator wrote nearly thirty years ago, "it is today almost inconceivable that Congress would authorize a major administrative regulatory program without empowering the enforcing agency to impose civil monetary penalties as a sanction."⁵ In some cases the agency imposes these civil penalties directly, acting under its own internal procedures and subject to judicial review.⁶ In other cases Congress has required the Department of Justice to bring suit for their imposition.⁷ But civil penalties are not limited to administrative agencies. The federal government has long made use of civil process to obtain forfeitures and fines in the enforcement of immigration and revenue laws.⁸ Indeed, there are even statutes permitting private citizens to obtain civil penalties, with the resulting penalty paid to the U.S. Treasury.⁹

If Congress has been fond of calling some penalties "civil," Congress has been less clear on what makes them so. Civil penalty statutes generally resemble their criminal siblings in terms of setting out maximum dollar penalties, to be imposed per violation, but Congress has generally not provided statutory guidance on the method for determining when the maximum penalty should be imposed or, indeed, how penalties should be set in particular cases.¹⁰ The Sentencing Reform Act of 1984 made an effort to

⁵ Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum. L.Rev. 1435, 1436 (1979).

⁶ See, e.g., *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977) (hearing before OSHA Administrative Law Judge, on charge brought by Secretary of Labor); Diver, *supra* note 5, at 1485-90.

⁷ See *supra* note 1. Civil fines imposed through administrative process, once final, are collected through civil actions in federal court.

⁸ See, e.g., *Hepner v. United States*, 213 U.S. 103 (1909) (civil suit by United States to recover a penalty for violation of immigration statute); *Chafee & Co. v. United States*, 85 U.S. 516 (1874) (suit for statutory penalty for failure to pay tax on whisky imposed in the Revenue Act of 1864); *Stockwell v. United States*, 80 U.S. 531 (1871) (civil suit to recover double the value of goods illegally imported from Canada, based on penalty provisions in statutes enacted in 1823 and 1799).

⁹ See 33 U.S.C. §§ 1319(d), 1365(a) (permitting citizen suits for civil penalties for violations of Clean Water Act).

¹⁰ See Diver, *supra* note 5, at 1440-41, 1458-61. Congress has, on occasion, provided some guidance on penalties, but, even there the guidance is weak. See 33 USCS § 1319(d) (requiring court to consider seriousness of violation, economic benefit to the violator, prior history, good-faith compliance efforts, impact of penalty on violator, and "and such other matters as justice may require").

control discretion in setting criminal penalties. By its terms, though, the Act is applicable only to “offenses,”¹¹ leaving judicial and administrative discretion less constrained when imposing civil fines than when imposing criminal fines.

The lack of clarity as to why some monetary penalties are called “civil” and why some are called “criminal” has exasperated most commentators, for the main difference appears to be consequential.¹² Once labeled civil, many of the protections available for criminal prosecutions arguably vanish. Civil burdens of proof obtain, rather than criminal; intent requirements can be relaxed; double jeopardy does not apply; and trial by jury becomes subject to the lines imposed by the Seventh Amendment (law or equity) rather than the Sixth (“serious” or not).¹³ These issues have often befuddled the courts as well as commentators, but the end result today is that Congress is generally free to alter these protections simply by changing the label it puts on the sanction.¹⁴

¹¹ See 18 U.S.C. § 3551 (a) (statute applies to sentences of defendants “found guilty of an offense”).

¹² For criticism, see, e.g., J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 382 (1976) (“The Court has never developed a principled explanation of why identical sanctions should trigger certain constitutional safeguards but not others.”); Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 5 (2005) (“The legislature is left free to interpret or modify the civil rights guaranteed to certain suspects and defendants by the Constitution so long as the legislature labels the penalties imposed as “civil” and provides at least a fig leaf of apparent consistency with traditional (albeit conflicting) notions of “civil” law.”); Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 84 (2008) (proposing to “do away with the civil-criminal divide in procedure altogether and to replace it with a different scheme”).

¹³ See, e.g., *Hudson v. United States*, 522 U.S. 93 (1997) (Double Jeopardy Clause inapplicable to civil penalty); *Tull v. United States*, 481 U.S. 412 (1987) (applying Seventh Amendment in civil action by United States to impose civil fine; jury trial required for determination of liability but not for assessment of amount of penalty); cf. *Arthur Andersen LLP v. United States*, 544 U.S. 696, _ (2005) (jury charge failed to convey need for consciousness of wrongdoing, a “level of culpability we usually required in order to impose criminal liability”) (internal quotation marks omitted).

¹⁴ See *Hudson*, 522 U.S. at _ (“only the clearest proof will suffice to . . . transform what has been denominated a civil remedy into a criminal penalty”) (overruling *United States v. Halper*, decided eight years before, in which the Court had applied the Double Jeopardy Clause to a civil penalty). Compare *Austin v. United States*, 509 U.S. 602 (1993) (applying Eighth Amendment Excessive Fines clause to civil forfeiture) with *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 263-64 (1989) (Excessive Fines Clause does not apply to punitive damages imposed in private civil suit). Compare *United States v. Newman*, 144 F.3d 531, 538 (7th Cir. 1998) (“Restitution has traditionally been viewed as an equitable device for restoring victims to the position they had

For our purposes, however, we need not plumb the outer limits or incidents of civil penalties. All we need to take away from history and current use is this: Civil penalties are of no fixed form, although they most often are monetary fines paid to the U.S. Treasury. They can be imposed by courts or administrative agencies, in civil proceedings subject to civil procedural rules including the civil burden of proof standard. Whatever constraint there is on the amount of a civil penalty will be found within the statute permitting its imposition. Whatever further constraints the Sentencing Guidelines might impose on federal courts in setting criminal fines will not affect the imposition of civil penalties. The tax status of civil and criminal fines are the same; neither are deductible from income. Other civil penalties, however, have more ambiguous tax consequences.¹⁵

II. THE USE OF CIVIL PENALTIES

A. EUROPE

The European Union is the most important example of a jurisdiction that uses civil penalties in antitrust cases. The Commission's power to impose penalties, granted originally in 1962, is now controlled by Regulation 1/2003 (the "Modernization Regulation").¹⁶ Regulation 1/2003 provides that the Commission

occupied prior to a wrongdoer's actions.") (holding that mandatory restitution is not a criminal penalty for purposes of the Ex Post Facto Clause) *with* United States v. Schulte, 264 F.3d 656, 661 (6th Cir. 2001) (restitution is punishment, subject to Ex Post Facto Clause) (citing cases).

¹⁵ See 26 U.S.C. §162(f) (criminal penalties and fines not deductible); Reg. 1.162-21(b)(1) (civil as well as criminal penalties are subject to 162(f)). Reg. 1.162-21(b)(2) states that compensatory damages paid to the government are not fines or penalties. The courts do not draw very distinct lines. See *Huff v. Commissioner*, 80 T.C. 804 (1983) where the Tax Court distinguished nondeductible civil penalties "imposed for purposes of enforcing the law and as punishment for the violation thereof" from deductible civil penalties "imposed to encourage prompt compliance with a requirement of the law or as a remedial measure to compensate another party for expenses incurred as a result of the violation." The former were considered close to criminal penalties while the later were not. *Colt Industries v United States*, 880 F.2d 1311 (Fed. Cir. 1989) refused to draw a distinction between compensatory and retributive civil penalties and refused to allow a taxpayer to deduct payments made to settle a suit with the EPA. The 10th Circuit in *True v. United States*, 894 F.2d 1197 (1990) found that if there are "deterrent and retributive functions" to a penalty, it cannot be deducted even if it also has "compensatory and remedial aspects."

¹⁶ See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1, p.1.

may impose fines for infringements of both Articles 81 (concerted practices) and 82 (abuse of dominant position). The amount of the fine takes account of the gravity and duration of the infringement; fines are capped at ten percent of the company's turnover for the previous year.¹⁷ Regulation 1/2003 also provides that the fines are not to be considered "of a criminal law nature," in an apparent effort to avoid the possibility that the Commission will be required to provide the procedural protections required in criminal proceedings.¹⁸

The Commission has issued Guidelines for imposing these fines, first adopted in 1998 and then revised in 2006. The Guidelines use a two-step approach.¹⁹ The first step is to calculate the "basic amount" of the fine, which depends on some proportion (up to thirty percent) of the value of sales involved, the proportion varying with a "number of factors" including the nature of the infringement and the market shares involved, multiplied by the number of years of the violation.²⁰ The second step adjusts the fine based on aggravating or mitigating circumstances, such as recidivism or refusals to cooperate (aggravating) and termination, unusual cooperation, or negligent violation (mitigation).²¹ The 1998 Guidelines had ranked offenses as "minor," "serious," and "very serious," calibrating fines accordingly.²² Those Guidelines

¹⁷ See *id.* Art. 23 (2), (3).

¹⁸ See *id.* Art. 23 (5). Despite this provision, the Commission has been required to provide certain fundamental rights, although the extent to which all criminal protections apply remains unclear. See, e.g., *Hüls AG v. Commission*, 1999 ECR I-4287, para. 150 ("given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence [from Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms] applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments") (cartel case).

¹⁹ See "[Guidelines on the method of setting fines](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901%2801%29:EN:NOT)" imposed pursuant to Article 23(2)(a) of Regulation No 1/2003", OJ [2006] C 210, p. 2, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901%2801%29:EN:NOT>. For the 1998 Guidelines, see OJ 98/C 9/03 of 14.01.98.

²⁰ See *id.*, paras. 19-26. Note that the 2006 Guidelines add a new provision for a minimum basic fine of fifteen to twenty-five percent of sales irrespective of the duration of the company's participation in the infringement (the "entry fee"), applied to deter entry into cartel agreements but which can also be applied for "other infringements." See *id.*, para. 25.

²¹ See *id.*, paras. 28-29.

²² See "[Guidelines on the method of setting fines](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901%2801%29:EN:NOT)" imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty", OJ [1998] C 9 p.3, available at [http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901%2801%29:EN:NOT)

considered price cartels and “clear-cut abuse of a dominant position by undertakings holding a virtual monopoly” as “very serious.” Abuses of dominant position such as loyalty discounts and refusals to supply were considered “serious.”²³ The 2006 Guidelines do away with these categories. Instead, the Commission states that it will assess “gravity” (which is then reflected in the varying percentage applied to the value of sales) “on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case.” The only specifically mentioned infringements now are secret horizontal price fixing, market sharing, and output limitations (that is, cartel agreements), which are “among the most harmful restrictions of competition” and will be “heavily fined.”²⁴

In some ways the EC Guidelines resemble the U.S. Sentencing Guidelines. Under the U.S. Sentencing Guidelines, fines for organizations begin with a base fine, which for antitrust is twenty percent of the volume of commerce affected. The fine is then subject to a variety of aggravating and mitigating factors relating to culpability, including the extent of an organization’s cooperation and acceptance of responsibility.²⁵ But there are two critical differences in terms of coverage. On the one hand the EC’s fines and Guidelines apply only to “undertakings,” not individuals; the Commission has no power to order sentences of imprisonment. Whatever deterrent or punitive effect that the Commission seeks with regard to competition law violations must be carried out through its administrative fines. On the other hand, the EC’s fines and Guidelines have a broader substantive law coverage. The U.S. Sentencing Commission has promulgated only one antitrust Guideline, for bid rigging, price fixing, or market allocation agreements among competitors, explaining that “[t]here is no consensus . . . about the harmfulness of other types of antitrust offenses, which furthermore are rarely prosecuted and may involve unsettled issues of law.”²⁶ The European Commission’s Guidelines, however, apply to all violations of Articles 81 and 82,

lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998Y0114%2801%29:EN:NOT.

²³ See *id.*, para. 1 (A).

²⁴ See 2006 Guidelines, *supra* note 19, at paras. 20, 23.

²⁵ See U.S. SENTENCING GUIDELINES MANUAL §§ 8C2.4-2.5, 2R1.1(d).

²⁶ See *id.* § 2R1.1 (Commentary). For other antitrust violations, the general provisions of the Sentencing Reform Act would apply, specifically, 18 U.S.C. § 3553(a).

which include violations that would fall under Section 2 of the Sherman Act in the United States.²⁷

The policy behind the Commission's approach to fines is generally deterrence based, rather than deserts based, with an expressed goal of achieving both specific and general deterrence.²⁸ Indeed, the Commission has emphasized the distinction between the goals of public enforcement—deterrence and overall compliance with EC competition rules—and the goal of private enforcement, which is to secure “full compensation” for victims of competition law violations.²⁹ Thus, the Commission has promoted its increasingly strong fining policy while, at the same time, seeking to encourage the growth of private damages suits in Europe. The Commission recognizes that private litigation would “inherently” produce “beneficial effects in terms of deterrence,” but it does not see an equivalence between the goals of the two types of remedies.³⁰ Nor do the fining Guidelines draw a distinction between the need to deter cartel practices and the need to deter abuses of dominant position. The 2006 fining Guidelines apply to both types of violations (although now modestly more directed toward cartels than the 1998 Guidelines) and offer no different treatment for Article 81 and Article 82 cases.

The Commission's actual practice in assessing fines has emphasized cartels, to the point where the annual amount of civil fines imposed in EC cartel cases recently surpassed the criminal

²⁷ The same breadth of coverage can be found in Member States. *See, e.g.*, Office of Fair Trading, OFT's Guidance as to the appropriate amount of a penalty, paras. 1.4, 2.4 (2004) (intention to impose severe penalties on cartel activities and “serious abuses of a dominant position”; “predatory pricing, is also one of the most serious infringements”), *available at* http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft423.pdf; Bundeskartellamt, Guidelines of the setting of fines, Notice no. 38/2006, para. I.1.1 (2006) (administrative fines apply to “abusive practices”), *available at* <http://www.bundeskartellamt.de/wEnglisch/download/pdf/Bussgeldleitlinien-E.pdf>; Portugal, _

²⁸ *See* 2006 Guidelines, *supra* note 19, at para. 4.

²⁹ *See* Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC(2008) 404, paras. 2, 17 (April 2, 2008), *available at* http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/working_paper.pdf

³⁰ *See* European Commission, White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final (April 2, 2008), *available at* http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf.

finer imposed in U.S. Justice Department cases.³¹ Nevertheless, the Commission has not neglected abuse of dominant position cases. In the ten-year period between 1998 and 2008 the Commission imposed civil fines in fourteen Article 82 cases.³² The largest fine ever imposed by the EC is in an abuse of dominance case—€197.2 million against Microsoft.³³ The largest single cartel fine is slightly smaller, €179.6 million against ThyssenKrupp in the elevators and escalators cartel case.³⁴

The Article 82 cases in which the Commission has imposed a civil fine in the past decade have a number of interesting aspects. First, civil fines have been imposed for a wide range of practices. Six cases involved pricing, including predatory pricing, price squeezes (“margin squeezes” in the Commission’s parlance), and some form of loyalty-inducing pricing. Two involved tying, one involved a refusal to deal (“refusal to supply”), and one involved abuse of the patent system.³⁵ Second, the Commission’s articulated reasons for determining the amount of the fine not only examined the economic impact of the illegal practice, but also considered some fault-based elements. These fault-based elements included the intent with which the company acted and the extent to which the Commission’s decision was either novel or supported by

³¹ For data on EC cartel fines, see <http://ec.europa.eu/comm/competition/cartels/statistics/statistics.pdf>. For U.S. fine data, see Scott D. Hammond, Dep’ty Ass’t Attny Gen’l for Criminal Enforcement, U.S. Dep’t of Justice, Antitrust Div., *Recent Developments, Trends, and Milestones In The Antitrust Division's Criminal Enforcement Program* at 11 (2008) (reporting \$630 million in fines in FY 2007), available at <http://www.usdoj.gov/atr/public/speeches/232716.pdf>. The Commission reports thirty-one cartel cases decided in the five year period between 2003 and 2008. See *id.* The Department of Justice brought far more criminal Section 1 cases during the same five-year period. See Antitrust Div., Workload Statistics, FY 1998-2007 (141 cases), available at <http://www.usdoj.gov/atr/public/workstats.pdf>.

³² Source: Cases from <http://ec.europa.eu/comm/competition/antitrust/cases/> (author’s files). For a thorough review of the Commission’s fining practices in both cartel and abuse cases, as well as court decisions through 2004, see Damien Geradin & David Henry, *The Commission Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts’ Judgments*, 1 EUR. COMP. J. 401 (2005).

³³ See Comm’n of the European Cmtys., Comm’n Decision of 24 Mar. 2004, Case COMP/C-3/37.792 Microsoft para. 1080 (hereinafter EC *Microsoft* Decision). This does not include subsequent civil fines imposed for noncompliance. See *infra* notes 125-126 and accompanying text.

³⁴ See EC Cartel Statistics, *supra* note 31 (Table _).

³⁵ The remaining cases involved more unusual situations that are hard to categorize.

clear past precedent.³⁶ For example, the Commission categorized one price squeeze case as “serious” rather than “very serious” because the method the Commission applied to determining the price squeeze had not been used before (this categorization affected the fine under the 1998 Guidelines).³⁷ Third, in two of the Article 82 cases the Commission increased the fines because of the infringing company’s “significant economic capacity.” Although this factor is not mentioned in the fining Guidelines, the Commission noted the substantial assets of the infringing companies and then applied a multiplier (1.25 in one case and 2.0 in the other) to “ensure a sufficient deterrent effect.”³⁸

The Commission’s approach to fines is consistent with the ambiguous position that civil fines occupy. The Commission may lack for “criminal” penalties, but it does not lack for the power to order the infringer to engage in conduct that would remedy its illegal behavior.³⁹ Nevertheless, the Commission has chosen to remedy infringements by placing great reliance on the deterrent effect of civil fines, in an effort to insure both that the offender will not repeat its violation and that others will not engage in similar behavior. In so doing, the Commission inevitably has slipped over into the assessment of culpability with which the criminal system is concerned. Rather than just aligning the fine with the economic effect of the infringer’s behavior, the Commission adjusts penalties

³⁶ Compare Comm’n of the European Cmtys., Comm’n Decision of 4 July 2007, Case COMP/38.784 – Wanadoo España vs. Telefónica paras. 765-66 (basic penalty amount reduced by 10% because infringement with regard to one of the products was committed negligently) with Comm’n of the European Cmtys., Comm’n Decision of 29 March 2006, Case COMP/E-1/38.113 – Prokent-Tomra paras. 91, 409-12 (infringement committed “intentionally” and exclusionary practices were “purposely employed”; internal documents set out company goal “to maintain market dominance” and to “protect and strengthen market position and dominance across Europe”).

³⁷ See Deutsche Telekom, Case COMP/C-1/37.451, 37.578, 37.579, para. 206 (2003), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003D0707:EN:HTML>. See also Commission Decision of 27 August 2003 relating to a proceeding pursuant to Article 82 of the EC Treaty of (COMP/37.685 GVG/FS), OJ L 11/17, para. 164 (2003) (no fine because case was novel).

³⁸ See Telefónica, *supra* note 36, para. 758 (1.25 multiplier); EC Microsoft, *supra* note 33, para. 1076 (2.0 multiplier).

³⁹ The Commission, of course, can order a company to undertake remedial actions in addition to the imposition of a fine, or prior to reaching a decision the Commission can enter into binding remedial commitments with a company that meet the Commission’s competitive concerns. See Regulation 1/2003, Art. 9(1); Comm’n Decision 22 June 2005, Case COMP/A.39.116/B2 – Coca-Cola (commitment relating to various distribution practices, including target rebates, tying, and exclusivity provisions, that allegedly excluding competitors of dominant firm) (Article 82 investigation).

to account for aggravating and mitigating factors, including intent and cooperation. Indeed, the Commission's desire to impose fines so as to secure "overall compliance" with EC competition rules suggests a bit of the retributive—companies that do not follow the law, particularly when it is clear and they do so intentionally, deserve to be penalized.

B. U.S. STATES

It is common for state antitrust laws to include provisions for civil penalties, whether in the form of civil fines, restitution, disgorgement, or forfeitures.⁴⁰ Civil fine statutes generally take the same form as do federal civil fine statutes, that is, they provide for maximum penalties per violation. For example, California provides a civil penalty of \$2500 for "each violation," part of which is to be placed in an "Unfair Competition Law Fund" to be used to support enforcement of California's consumer protection laws.⁴¹ New York provides for the recovery of a "civil penalty" in lieu of the criminal penalty provided under the state antitrust law and for the same amount, which is \$1 million for corporations and \$100,000 for individuals.⁴²

As a general matter, state enforcers have a broader array of enforcement options than does the European Commission (or than do the U.S. federal enforcement agencies, for that matter), including criminal prosecutions and actions for damages, but they also have more limited enforcement resources.⁴³ The states' actual record likely reflects both characteristics of state antitrust enforcement.

In terms of civil penalties cases brought, state enforcement statistics show that in the ten-year period between 1998 and 2008 nineteen states (of twenty-seven reporting jurisdictions) sought civil penalties in approximately forty cases, most of which were for civil fines.⁴⁴ About two-thirds of the cases involved price

⁴⁰ For a review of such statutes, see AMERICAN BAR ASSOCIATION, STATE ANTITRUST PRACTICE AND STATUTES _ (3d ed. 2004).

⁴¹ See Cal. Bus. & Prof. Code § 17206(a), (d).

⁴² See N.Y. Gen. Bus. Law § 342-a.

⁴³ For a description of state remedies, see Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004 (2001).

⁴⁴ Source: Cases taken from NAAG State Antitrust Litigation Database, available at <http://www.naag.org/antitrust/search/> (author's files). Note that reporting is voluntary by state. There is no assurance that any particular state reports all antitrust cases, or even reports cases consistently.

fixing or bid rigging. Some of these cases involved the type of cartel practices that would appear to have warranted criminal prosecution.⁴⁵ Other price-fixing cases brought for civil penalties, however, likely would not have warranted such prosecution. Three involved a cartel that the Justice Department had already prosecuted criminally;⁴⁶ three involved agreements relating to competitive advertising that affected price;⁴⁷ one involved an attempt to form a price-fixing conspiracy;⁴⁸ and one involved a case that the FTC had previously settled with a cease and desist order.⁴⁹

Particularly noteworthy in the bid-rigging area is a group of cases that involve a somewhat unusual bid-rigging effort and took an approach not usually followed by antitrust enforcers, but which

The database clearly under-reports state enforcement (although by how much is uncertain), there being fifty-five “state” antitrust jurisdictions but only twenty-seven reported cases during this period.

⁴⁵ See, e.g., *California v. Acme Rotary Broom*, No. 05CECL06793 (Cal. Super. Ct. Sept. 2005) (street-sweeping brush cartel); *Utah v. Signing Resource, LLC, et al.* (Civ. No. 050909852) (3rd Dis. Utah, 2005) (rigging state bids for sign language interpreters); *Utah v. Stericycle, Inc.* (Civ. No. 2:03 CV 49) (D.Utah 2003) (division of markets and customer allocation); *Maine v. Coutts Bros.*, No. CV-00-088, Kennebec Superior Court, June 28, 2001 (bid-rigging on power construction project); *Utah v. Nuttall Bernina* (Civ. No. 000903757 (3rd Dist. Utah, 2000) (bid-rigging on school sewing machines)

⁴⁶ [sorbates]

⁴⁷ See *California v. John L. Sullivan Investments*, No. 02AS07559 (Sacramento Superior Court 2003) (agreement among four Toyota dealerships not to advertise price); *Maine v. Bridgton Hospital, MMC*, No. CV-00-87 (Kennebec Super. Ct. 2000) (agreement to end competitive advertising for patients); *Florida v. Hernando County Association of Travel Professionals, Inc.*, Doc. No. 99-1535-CA-0 (Cir. Ct. 1999) (travel agencies’ agreement to limit Yellow Pages advertising, as well as to fix certain customer transaction fees). Compare *Polygram Holding Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005) (agreement by two record companies to suspend advertising and discounting of two classical music CDs) (remedy was cease and desist order).

⁴⁸ See *Utah v. Curb-King, Inc.* (Civ. No. 040100254 MI)(1st Dist. Utah 2004) (manufacturer of curbing equipment attempted to organize installers of curbing to raise prices by, e.g., using its web site to encourage installers to get together and set prices “at a figure you can all make a living with . . .”). Compare *United States v. American Airlines, Inc.*, _ F.2d _ (attempt to fix prices at Dallas hub) (charged as attempt to monopolize).

⁴⁹ See *Wisconsin v. The Wisconsin Chiropractic Ass’n*, Case No. 01CV3568, Circuit Court Dane County (December 2001) (conspiracy to raise prices of chiropractic services and boycott third-party payors as part of effort to raise reimbursement rates); *The Wisconsin Chiropractic Ass’n*, File No. 971-0117, Agreement Containing Consent Order To Cease And Desist (March 7, 2000), available at <http://www.ftc.gov/os/2000/03/wiscaagree.htm>.

has become familiar in federal fraud prosecutions.⁵⁰ These cases dealt with practices in the insurance industry through which various insurance companies and insurance brokers rigged quotes for certain types of insurance coverage so as to steer business to particular insurance companies that appeared to be making the lowest bid. Two of these cases were settled with agreements under which the corporate defendants agreed to various reforms of their business practices, including the institution of compliance programs, agreed to continue cooperating with the state in its further investigations, created a restitutionary fund for policyholders harmed by the illegal conduct, and paid substantial civil fines to the states involved.⁵¹ At the same time, corporate employees were indicted criminally under a variety of state charges.⁵² This approach mirrors the enforcement approach that U.S. Attorneys and federal securities regulators have taken recently in the corporate fraud area, under which federal prosecutors agree not to prosecute the involved corporation in return for changes in corporate conduct, future cooperation, and the payment of restitution and civil fines.⁵³ U.S. cartel prosecutions, however, have not followed this path.

Not all state civil penalty cases have involved horizontal price fixing. One interesting example is the case brought against two department store chains (Federated and May) and two sellers of branded tabletop products (Waterford and Lenox) arising out of the department stores' successful joint efforts to pressure the manufacturers not to deal with a discount department store (Bed, Bath and Beyond) that wanted to carry their products. The parties settled the case not only by agreeing to restrictions on future behavior involving joint refusals to deal. The parties also agreed to pay \$2.9 million in civil fines (the maximum fines for the four

⁵⁰ Nine such cases are listed in the NAAG database, *supra* note 44, some of which involve suits by different states against the same defendant.

⁵¹ See *In the Matter of ACE Ltd. and ACE Group Holdings, Inc., Assurance of Discontinuance and Voluntary Compliance* (April 25, 2006) (\$40 million in civil fines divided among three states), available at http://www.oag.state.ny.us/press/2006/apr/ACE_Final_AOD.pdf; *In the Matter of The Prudential Ins. Co. of Am., Assurance of Discontinuance and Voluntary Compliance* (Dec. 11, 2006) (\$2.5 million civil penalty), available at <http://www.oag.state.ny.us/press/2006/dec/Prudential%20Assurance%20of%20Discontinuance.pdf>. The other cases included similar relief, but not necessarily the payment of a civil fine.

⁵² See *New York v. Doherty*, Sup. Ct. (2006) (indictments of eight executives), available at <http://www.oag.state.ny.us/press/2005/sep/sep15.pdf>.

⁵³ See Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions* (unpublished draft) (author's files).

defendants would have been \$4 million).⁵⁴ The state did not seek damages on behalf of injured consumers, nor did it bring any criminal action. Although the case does involve horizontal agreements, at heart this is a distribution restraint, making the imposition of monetary penalties all the more unusual.⁵⁵

There are also two important monopolization cases in which the states originally sought civil penalties, but subsequently abandoned their requests. One is a case involving Bristol-Myers Squibb's effort to suppress competition with its branded pharmaceutical drug Buspar, efforts which included payments to generic manufacturers to stay out of the market ("reverse payments") and knowingly making false statements to the Patent and Trademark Office.⁵⁶ Although the states' complaint initially sought civil penalties, these claims were abandoned in a settlement that provided \$100 million in damages to injured consumers. In fact, the settlement specifically states that the payment is "not and shall not, be considered, the payment or compromise of a penalty or fine under any state or federal laws."⁵⁷

The other important state case in which civil penalties were originally sought is *Microsoft*. The states' initial complaint included counts under state law and sought the "maximum penalties" under "the laws of each State."⁵⁸ The states never pressed these penalty requests at trial, however. Instead, they presented a proposed remedy decree jointly with the Department of Justice, seeking structural and conduct relief. When the case eventually settled and nine states refused to join their co-plaintiff states Department in the proposed settlement, the nine states put

⁵⁴ See Dep't of Law, Press Release, Department Store Chains And Tableware Makers Settle Major Antitrust Case: State Investigators Uncover Scheme to Control Distribution of Products (Aug. 10, 2004), available at http://www.oag.state.ny.us/press/2004/aug/aug10a_04.html.

⁵⁵ See also *California v. J.A. Momany Services, Inc.*, No. 03426723 (San Francisco Superior Court 2003) (tying of proprietary traffic signal equipment to non-proprietary equipment for purchases by contractors who were making State bids) (\$105,000 civil penalty).

⁵⁶ See *Alabama v. Bristol-Myers Squibb Co.*, No. 01-CV. 11401 (S.D.N.Y. 2001).

⁵⁷ See Settlement Agreement, ¶ 4 (E), available at <http://www.oag.state.ny.us/business/antitrust/pdfs/buspirone.pdf>. The characterization is presumably done, in part, for tax reasons. See *supra* note 15.

⁵⁸ States' First Amended Complaint, Prayer for Relief, ¶ e (filed July 17, 1998) (author's files).

forward their own request for a remedial decree. Their proposed decree, however, made no claim to civil fines.⁵⁹

The states' use of civil penalties is thus a varied lot. The states have not adopted any joint Guidelines for use of these penalties (as they have in some other areas of antitrust enforcement), nor are there clear processes operating in any individual state, whose laws, in any event, can vary a great deal in terms of the penalties that can be imposed. Rather, the use of civil penalties seems to be more situational. One might guess that in some cases civil penalties are chosen because civil litigation presents lower hurdles than criminal litigation (the states report fewer criminal prosecutions than cases seeking civil penalties⁶⁰). The availability of civil penalties may also provide a useful tool for settling cases that might otherwise be prosecuted criminally, an attractive option to a state antitrust enforcement agency with small resources. But civil penalties also are being used in some cases where a criminal prosecution might not just be harder, but inappropriate (such as the New York table top products case or the advertising restriction cases). As such, the imposition of these penalties provides somewhat more of a deterrent bite than a suit that seeks only injunctive relief.

C. U.S. FEDERAL TRADE COMMISSION

The U.S. FTC has statutory power to seek civil fines for violations of its orders.⁶¹ These fines are statutorily capped at \$10,000 "for each violation," subject to an inflation adjustment, but the statute also provides that "each day" of a continuing failure to obey an FTC order counts as a separate violation.⁶²

Given the fact that these civil fines are imposed on those who violate the Commission's orders, courts have approached them as they would a criminal fine.⁶³ For example, in *United*

⁵⁹ See *New York v. Microsoft Corp.*, Civ. Action No. 98-1233 (CKK), Plaintiff Litigating States' First Amended Proposed Remedy (filed March 4, 2002).

⁶⁰ Source: NAAG database, *supra* note 44 (reporting 27 cases between 1993 and 2004).

⁶¹ See *supra* notes 1, 2.

⁶² See 15 U.S.C. § 45(l). For the current adjustment, see 16 C.F.R. § 1.98(c) (\$11,000).

⁶³ See 18 U.S.C. § 3571(a) (listing factors to be considered in imposing a criminal fine, including pecuniary loss, need to deprive the defendant from illegally obtained gains, and, if the defendant is an organization, its size).

States v. Boston Scientific Corp.,⁶⁴ the government sought the maximum civil fine of \$35 million for violation of a merger consent decree which had required the defendant to license its technology in a way that would create an independent competitor in the intravascular ultrasound catheter market. The court applied the six factors that the courts “traditionally have looked at” in assessing civil fines under the FTC Act: “(1) harm to the public; (2) benefit to the violator; (3) good or bad faith of the violator; (4) the violator's ability to pay; (5) deterrence of future violations by this violator and others; (6) vindication of the FTC's authority.”⁶⁵ The court's analysis then stressed the economic harm (driving a competitor out of the catheter market), the defendant's bad faith (particularly in ignoring an FTC compliance opinion relating to aspects of the decree), and the need for deterrence. The court imposed a \$7.04 million fine, part of which was for half the maximum daily fine and part for the full maximum daily fine (for the period during which the defendant ignored the compliance opinion).⁶⁶

The Commission has also asserted the power to seek disgorgement and restitution as “monetary equitable remedies” for antitrust violations, remedies which it believes are currently available under Section 13(b) of the FTC Act.⁶⁷ A Commission policy statement on the matter justifies disgorgement on deterrence and (rough) moral grounds: it is “designed to deprive a wrongdoer of his unjust enrichment and to deter others.”⁶⁸ The policy statement provides a less clear justification for restitution. The Commission states that restitution serves “different but often complementary purposes” to disgorgement, the different presumably being compensating victims and the complementary presumably being deterrence.⁶⁹ The Commission's policy statement also sets out three factors to guide its discretion in seeking these penalties: (1) a clear violation; (2) a “reasonable basis” either for calculating the amount of the defendant's gain or

⁶⁴ 253 F. Supp. 2d 85 (D. Mass. 2003)

⁶⁵ *Id.* at 98.

⁶⁶ *See id.* at 98-102.

⁶⁷ *See* FTC, Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820, 45,821-23 (Aug. 4, 2003), available at <http://www.ftc.gov/os/2003/07/disgorgementfrn.htm>.

⁶⁸ *Id.* at 45,821 (relying on *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989), upholding disgorgement ordered by the SEC for violating Section 13(d) of the Securities and Exchange Act of 1934, which requires owners of more than 5 percent of an issuer's stock to provide certain information to the issuer).

⁶⁹ *See id.*

the amount of injury the violation caused; and (3) “value added,” in the sense that without an additional monetary payment, “other remedies are likely to fail to accomplish fully the purposes of the antitrust laws.”⁷⁰

The Commission’s assertion of authority to seek disgorgement and restitution has been controversial, on legal and policy grounds.⁷¹ Perhaps because of this controversy, the Commission has, in its words, moved “cautiously” and used its authority “sparingly.”⁷² Specifically, in the past decade it has ordered restitution in only three cases: one involving a licensing agreement ending competition between two generic drug manufacturers; a second involving an attempt to monopolize two generic drugs; and a third involving an unlawful merger and violation of the premerger notification requirements.⁷³ The Antitrust Modernization Commission, after reviewing this track record, was content to leave things as they are, stating that there was “no need to clarify, expand, or limit the FTC’s authority” to obtain equitable monetary remedies and noting that there was no indication that the FTC’s exercise of its authority had led to “duplicative or excessive payments.”⁷⁴

The Commission has not sought the power to impose civil fines for anticompetitive conduct, either as a matter of statutory interpretation of its current authority or as a proposal for legislative action. It does not appear, however, that the Commission has actively explored this possibility. In fact, when the then-Chairman of the Commission testified before the Antitrust Modernization Commission and was asked about the use of civil fines, she responded that there were “plenty of instances” in which the public was surprised that antitrust violators were not being penalized and that, given the problems of some conduct remedies, there might be

⁷⁰ *Id.* at 45,821-822.

⁷¹ See Kevin Arquit, Written Testimony Before the Antitrust Modernization Comm’n, Dec. 1, 2005 (criticizing on legal and policy grounds), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement_Arquit.pdf For a thorough discussion of the legal and policy issues, see Stephen Calkins, *Civil Monetary Remedies Available to Federal Antitrust Enforcers*, 40 U.S.F. L. REV. 567 (2006).

⁷² See FTC Policy Statement, *supra* note 67, at 45,821.

⁷³ The cases are discussed in Calkins, *supra* note 71, at 587-88. Note that plaintiffs were also suing in each of the three cases, making it difficult to say exactly what “value” the FTC added. See Arquit, *supra* note 71, at 8-9 (discussing *Mylan* and *Hearst*); FTC Press release for Perrigo, <http://www.ftc.gov/opa/2004/08/perrigoalpharma.shtm>.

⁷⁴ AMC REPORT, *supra* note 3, at 288.

“some circumscribed instances where we could use civil fine authority.” Nevertheless, she indicated that the matter had not been studied closely enough to indicate exactly when civil fines would be appropriate.⁷⁵

III. THE REMEDIAL FUNCTIONS OF CIVIL PENALTIES

A. DETERRENCE

1. *Section 1*

Deterrence is a major goal of antitrust remedies and has been a major focus of much of the recent debate over antitrust remedies. Critical to this debate is the theory of optimal sanctions for antitrust violations.

The theory of optimal sanctions rests on two important propositions relevant to the issue of civil penalties. First is the idea that “the purpose of penalties . . . is to deter inefficient offenses, not efficient ones.”⁷⁶ That is, if illegal antitrust conduct creates social gain that exceeds social cost, the violator should commit the offense and pay the penalty. Thus, more accurately put, the theory is actually one of optimal *occurrence* rather than optimal *deterrence*. Second, optimal deterrence theory is indifferent to the legal format in which the “penalty” is assessed. Money is fungible, so whether the violator pays it to the government in the form of a fine or to private parties in the form of damages matters not. The total is what is important, not just to provide adequate deterrence but also to assure that there is not over-deterrence.

The basic theory of optimal deterrence provides a simple rule for assessing a monetary penalty: the penalty should be set at the net harm to persons other than the offender divided by the probability of apprehension and conviction.⁷⁷ This rule is an

⁷⁵ Testimony of Deborah Platt Majoras, Chairman, Federal Trade Commission, Before the Antitrust Modernization Comm’n, March 21, 2006, at 51-52, *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/060321_FTC_DoJ_Transcript_reform.pdf.

⁷⁶ William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U.CHI.L. REV. 652, 655 (1983). *See also* Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968). The theory is well-accepted, *see* John M. Connor & Robert H. Lande, *The Size of Cartel Overcharges: Implications for U.S. and EU Fining Policies*, 51 ANTITRUST BULL. 983, 984-85 (2006).

⁷⁷ *See* Landes, *supra* note 76, at 656-57.

acceptable and clear starting point in a discussion of remedies, but it is not an acceptable ending point. It works best in that area of antitrust which has constituted the bulk of public and private enforcement in recent years—cartel enforcement—in which the need for deterrence is clearest, because the harm is obvious and well-accepted, and the cases generally do not raise (or the defendants are not permitted to raise) efficiency claims which might lead to a calculation of the social benefits to weigh against the social harm. As Werden and Simon so colorfully put it, “efficient hard-core price-fixing is no more likely than efficient child molestation.”⁷⁸

The debate on cartel penalties has thus shifted from the simple “optimal deterrence” rule to harder institutional and behavioral issues. Even if we could establish the optimal financial penalty, will this penalty actually deter corporate managers from engaging in cartel behavior? Is imprisonment necessary? Enforcers today stress imprisonment as a better deterrent than organizational fines (although they are unwilling to give up fines).⁷⁹ What can we say about the real probability of successful apprehension and conviction? Is it the fifty percent figure apparently reflected in the Sentencing Guidelines?⁸⁰ The ten percent to which Douglas Ginsburg originally testified when the Sentencing Commission was considering the Guideline for antitrust fines?⁸¹ Or is it somewhere in between?

Answers to these critical empirical questions can then affect how one views the assessment of monetary payments outside the criminal justice system, for example, the award of

⁷⁸ Gregory J. Werden & Marilyn J. Simon, *Why Price Fixers should Go to Prison*, 32 ANTITRUST BULL. 917, 932 (1987). Not all agree with this assessment. See Paolo Buccirossi & Giancarlo Spagnolo, *Optimal Fines in the Era of Whistleblowers. Should Price Fixers still Go to Prison?*, in THE POLITICAL ECONOMY OF ANTITRUST _ , n.14 (Vivek Goshal & John Stennek, eds., 2007).

⁷⁹ See, e.g., Scott D. Hammond, Dep’ty Ass’t Attny Gen’l for Criminal Enforcement, U.S. Dep’t of Justice, Antitrust Div., *Charting New Waters in International Cartel Prosecutions* (2006), <http://www.usdoj.gov/atr/public/speeches/214861.pdf>.

⁸⁰ The fine for price fixing and bid rigging is set on the assumption that the average overcharge is ten percent. The fine is then doubled. Although the Sentencing Commission’s explanation indicates that the increase is to take account of the welfare loss from price fixing, there is no indication of how this estimate was obtained. Earlier drafts of the organizational guidelines had paid more explicit attention to the risk multiplier, with which this enhancement seems more consistent.

⁸¹ See Connor & Lande, *supra* note 76, at 987 and nn. 15, 16.

damages in private litigation. If fines (plus imprisonment) can and do optimally deter, then the award of damages could produce over-deterrence, or, at least, inefficient deterrence (that is, it would be more efficient if offenders spent the excess payouts elsewhere). But if fines and imprisonment are not adequate—and casual empiricism reveals the existence of many otherwise undeterred cartels that are currently the targets of prosecution—then additional monetary “penalties” become necessary.

In theory, at least, imposing civil penalties on cartels for deterrence purposes could add to system-wide deterrence by increasing the penalties that cartelists would pay. For those cartels that we prosecute criminally, though, there would be no reason to add a civil penalty on top of a criminal one. Congress can just amend the Sherman Act to increase criminal fines, as it did in 2004, and there is no indication that federal prosecutors feel hindered by today’s current cap on fines. For cartels that we do not prosecute criminally, however, civil penalties, particularly when cast in the form of civil fines, could increase system-wide deterrence. As Stephen Calkins has put it, government remedy choices in price fixing cases are “bi-modal”—there is criminal prosecution, with fine and imprisonment, at one extreme, or a “sin no more” injunction at the other.⁸² Calkins argues that some middle-ground sanction would be useful for deterrence, giving as an example the numerous civil cases that government enforcers have brought against physicians.⁸³ Indeed, review of the states’ use of civil fines indicates that the potential range is much larger, from the unconventional bid rigging in the insurance company cases, to the advertising restriction cases, to the boycott in the tabletop products case.

Whether a civil fine is appropriate for such cases, however, raises two difficult institutional issues. The first relates to the ambiguous nature of a civil fine. Criminal fines, imposed through the criminal justice system, have a moral component, conveying the criminal law’s judgment of opprobrium. Antitrust economics may suppress this judgment, but our system of criminal law is built

⁸² Calkins, *supra* note 71, at 569-70.

⁸³ *See id.* at 571-74; *see also* Jon Leibowitz, *Evolving Remedies from “Time-Outs” to Civil Penalties (Not the Third Rail of Antitrust)*, 80 TUL. L. REV. 595, 603 (2005) (“This leaves what is to some, including myself, a curious void between the availability of penalties for possibly more minor violations on one end and for criminal antitrust violations on the other. For conduct that falls in between, there is a penalty-free zone.”).

on it.⁸⁴ A civil fine clouds the message. If used against behavior that we now consider “hard-core” cartel activity, it could blunt whatever deterrent impact we now get from a conviction in criminal court.⁸⁵ If used against behavior that is not considered blameworthy, it could be seen as unfair.⁸⁶

The second institutional issue relates to prosecutorial incentives. Civil fines may be an attractive nuisance both for prosecutions and settlements. They are institutionally cheaper from the prosecutor’s point of view and collaterally less-disadvantageous from the defendant’s. This institutional attractiveness is one way to explain the data on state preference for civil fines over criminal prosecutions in cartel cases. It can also be observed in federal corporate fraud prosecutions, which often feature press releases trumpeting the imposition of large fines without making clear their civil nature (they are imposed by the SEC) and without criminally prosecuting the offending corporations.⁸⁷

Whether these institutional concerns outweigh the desirability of filling the enforcement gap in Section 1 cases is a close question. Perhaps not surprisingly, Justice Department officials, who have invested substantial institutional resources in building a consensus against “hard-core” price fixing, have opposed civil fines for fear of blunting their case against such conduct.⁸⁸ FTC officials, on the other hand, have used their Section 5 authority in a broader range of civil matters and see the issue differently. Indeed, one Commissioner has expressed the

⁸⁴ For a full discussion of the role of morality in cartel prosecutions, see Maurice E. Stucke, *Morality And Antitrust*, 2006 COLUM. BUS. L. REV. 443, 489-505.

⁸⁵ See Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 519-20 (2006) (“Civil liability conveys the message that corporate crime is merely priced and is therefore less effective at shaping preferences against crime and inducing law-abiding behavior.”).

⁸⁶ This is an argument classically made against regulatory crimes. See Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L.REV. 423 (1963).

⁸⁷ See First, *supra* n. 53 (in Enron-era prosecutions for “corporate fraud,” Arthur Andersen LLP was the only corporation actually prosecuted).

⁸⁸ See Testimony of Thomas O. Barnett, Assistant Attorney General for Antitrust, U.S. Department of Justice, Before the Antitrust Modernization Comm’n, *supra* note 75, at 51 (“I have some concerns about blurring the distinction between a civil violation and a criminal violation. We have worked very hard to keep those as separate as possible, so that criminal violations—when we go into court and tell a judge, you need to put this person in jail for five years, they’re more comfortable doing it if it’s a very narrowly circumscribed set of violations.”).

view that civil fines make more enforcement sense than the equitable monetary penalties the Commission has been willing to impose.⁸⁹

2. *Section 2*

The argument over optimal penalties in Section 2 cases has been different than the argument in Section 1 cases, probably because we have lost the sense that violations of Section 2 should be “penalized.” The last major criminal monopolization case the federal government brought was against American Tobacco in 1940.⁹⁰ Government monopolization cases, infrequently brought in any event, now aim for some form of injunctive relief that stresses remediation rather than deterrence. The notion of prosecuting an individual for monopolizing barely receives rhetorical attention.⁹¹ The result is that the deterrence debate in Section 2 cases takes place mostly on the liability side, where recent concern has focused on over-deterrence from false positives and little attention has been given to under-deterrence from false negatives.

The use of civil fines in Europe shows that the current U.S. approach is not the only one possible. The EC’s fining Guidelines treat abuses of dominant position in the same way as cartel price-fixing. European fining practice has been to categorize at least some abuses of dominant position as “very serious,” fining them no differently than cartels are fined. By mixing together elements of economic optimal deterrence and fault considerations—including the idea that firms should be sanctioned for not obeying the law—the European approach moves closer to the penalty end of the spectrum but without embracing the criminal label.

⁸⁹ See Leibowitz, *supra* note 83, at 63 (“Indeed, I would almost be willing to trade away restitution, which may involve potential duplicative recovery, but also may result in nothing, for the ability to get a court to sanction an antitrust violator monetarily.”)

⁹⁰ The information is reproduced in part in HARRY FIRST, BUSINESS CRIME: CASES AND MATERIALS 28-31 (1990). See also *American Tobacco*, 328 U.S. 781 (1946) (affirming conviction of American Tobacco for violating Section 2).

⁹¹ See R. Hewitt Pate, *What I Heard in the Great Hall of the People—Realistic Expectations of Chinese Antitrust*, 75 ANTITRUST L.J. 195, 197, 207 (2008) (reporting being asked in China “why your government does not imprison Bill Gates”; “The suggestion of criminal prosecution based on U.S. findings of violations of Section 2 by Microsoft may strike the experienced practitioner as the strangest of all. . . . [T]here has been no criminal case brought under Section 2 for decades and no serious suggestion that there should be.”).

The theory of optimal penalties could support the use of civil fines in monopolization cases in the United States as well, at least if we have set the liability rule in the correct place. Given the low level of government monopolization cases, and the difficulties of private litigation, one would be hard-pressed to argue that current penalties are adequately deterring corporations from violating Section 2. Perhaps monopolizing conduct is more overt than cartel price fixing, but the chances of successful prosecution would appear to be significantly lower given the uncertainties of legal standards and proof of damages. Fines could help.

A major problem, of course, is that liability rules in Section 2 cases are often unclear. The use of a “rule of reason” approach to monopolizing conduct may have much to commend itself as a way to analyze the question of liability, but it offers only modest *ex ante* guidance. If our concerns for over-deterrence are valid—and they may be for some types of aggressive business conduct—then the addition of a fine on top of uncertain liability may produce uncertain deterrent effects as business people try to stay further from the liability line. This would counsel caution in using civil fines in monopolization cases.

As with civil fines for Section 1 cases, institutional concerns also complicate the question whether civil fines are appropriate in Section 2 cases. Here, however, the complicating factors may actually incline in favor of civil fines rather than against. The ambiguous moral message of civil fines for monopolization cases does not carry the same potential institutional cost as it does for cartel cases. We do not prosecute monopolization cases criminally today, so using a civil fine would not undercut the criminal deterrence message. In fact, a civil fine might be used to underline the serious harm from monopolizing conduct in a way that is unavailable to prosecutors today. Further, the fault component of a civil penalty (shown, for example, in the way the European Commission administers its fining authority) might be used by government prosecutors as a way to distinguish certain types of monopolizing conduct that do deserve sanction. Thus, as with the question of over-deterrence, institutional concerns do not argue against having any system of civil fines. They argue caution.

There is one additional institutional factor that cuts in favor of civil fines in Section 2 cases and it relates to the assumption of optimal penalties theory that money is fungible, so that it does not matter to whom the money is paid. Overlooked in this theory are the different tax consequences of fines and civil damages awards.

Fines are not deductible, whether denominated as “civil” or “criminal.”⁹² Damages awards are deductible, even treble-damages awards unless there has been a criminal conviction (in which case 1/3 of the damages award is deductible).⁹³ This means that we get less than dollar-for-dollar deterrence from civil damages in monopolization cases (although how much less is unclear, given the varying tax situations and strategies of individual corporate taxpayers). This also means that we will get more deterrence from civil fines, which do count dollar-for-dollar.

B. COMPENSATION

Civil penalties can have compensatory objectives where they involve an order of restitution. The U.S. FTC currently uses civil penalties in this way, although to a very limited extent, as do some state jurisdictions. The Justice Department has not sought such civil penalties, although it certainly could argue that it has the power to do so when seeking equitable relief.⁹⁴ The European Commission has not sought to impose restitutionary penalties either.

The case for restitutionary civil penalties is strongest when there is no practical way for victims to recover their damages from the violator. Their use in antitrust cases would thus seem to be rather weak, given the existence of treble-damages, a strong plaintiffs’ bar, and state enforcers with power to sue in federal and state courts on behalf of injured consumers. Indeed, in each of the three recent cases in which the FTC asserted a civil penalty, other plaintiffs were on the scene suing for damages. Whatever the case might be for having a compensatory civil penalty, then, is slight.

The more important issue is the interrelationship between civil fines and treble-damages recoveries. Although civil fines do not have a compensatory objective—they are paid to the government, not to victims—optimal penalty theory would treat them the same. This makes the case for instituting civil fines subject to an argument that private civil remedies should be recalibrated in some way to be certain that there is not over-deterrence. Indeed, a former head of the Antitrust Division, when

⁹² See *supra* note 15

⁹³ See 26 U.S.C. § 162(g).

⁹⁴ See Reply Brief of Petitioner United States at 3-4, *United States v. Philip Morris USA, Inc.*, No. 05-92 (S.Ct. Sept. 29, 2005) (arguing that the power to seek injunctive relief under RICO includes the power to seek disgorgement).

urging the Antitrust Modernization Commission to consider civil fines in Sherman Act cases, argued that adding civil fines would be “problematic” even though they would add to deterrence, because of the current system’s “extreme weighting of the civil enforcement balance toward private lawsuits as opposed to federal government enforcement.” His proposal was to study adding civil fine authority “in conjunction with adjustments to private damages remedies” such as de-trebling private Section 2 cases.⁹⁵

It is hard to quarrel with this optimal penalty argument on a theoretical level, but it is hard to agree with it on an empirical level. If there is an “extreme weighting” toward private enforcement in Section 2 today it is because there is no public enforcement from the Justice Department. It would be a bad deterrence bargain to trade off a modest increase in deterrence from giving the Justice Department civil fine authority against the broader decrease in deterrence that would come from detrebling in all private suits. This trade-off equation also assumes that we have optimal deterrence in Section 2 cases now, so that we need to be careful to avoid over-deterrence in the future. In light of the generally held view that damages in antitrust cases are compensatory at best, and the doctrinal difficulties of successfully winning a Section 2 case, the case for having reached optimality is weak.⁹⁶ Finally, if government enforcers do become concerned about excessive deterrence through the imposition of civil fines, they can forgo them and return to seeking injunctive relief only. One of the attractive qualities of civil fines is that they are subject to public control and prosecutorial discretion. No civil fine statute requires an enforcer to seek the fine in all circumstances.

C. REMEDIATION

When courts consider remedies in Section 2 cases they emphasize a number of goals. A remedial decree should seek to “unfetter a market from anticompetitive conduct.”⁹⁷ The decree

⁹⁵ See Letter from R. Hewitt Pate, Ass’t Attny Gen’l, Antitrust Div., to Deborah A. Garza, Chair, Antitrust Modernization Comm’n, at 2 (Jan. 25, 2005), available at <http://govinfo.library.unt.edu/amc/comments/pate.pdf>.

⁹⁶ See Robert H. Lande, Why Antitrust Damage Levels Should Be Raised, 16 Loy. Consumer Law Rev. 329, 334 & n.15 (2004) (treble damages turn out to be, at most, single damages) (citing commentators).

⁹⁷ *Ford Motor Co. v. United States*, 405 U.S. 562, 577 (1972).

should “terminate the illegal monopoly” and “ensure that there remain no practices likely to result in monopolization in the future.”⁹⁸ Learned Hand, when asked by the government to dissolve Alcoa, emphasized the remedial over the punitive. “Dissolution,” he wrote, “is not a penalty but a remedy.”⁹⁹

Civil penalties, particularly civil fines, would appear to fit poorly with these remedial objectives.¹⁰⁰ More fitting are injunctive decrees that restrict the defendant’s future dealings or place on it affirmative obligations which, if fulfilled, are intended to restore competitive conditions in the market. But if injunctive decrees seem fitting, they can also be difficult to write. This is particularly true if the illegal conduct is complicated to describe or widespread, and the government is unsure how to write a decree that will block the “untraveled roads” as well as the “worn one.”¹⁰¹ Indeed, like any contract drafted with incomplete knowledge, ambiguities in language and changes in circumstances are bound to lead to future disputes. Of course, dissolution of the monopolist is an option to an on-going decree, but it is an option that the courts have been extremely reluctant to choose.¹⁰²

In the context of the difficulties of drafting an on-going remedial decree, and the costs of its administration, one could argue that there might be circumstances when a civil fine could be preferable to a complex conduct decree. Civil fines are cheap to decide and administer, offering at least some transactions costs benefits.¹⁰³ They may also offer some specific deterrence benefits

⁹⁸ *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 250 (1968). Both statements were relied on in *United States v. Microsoft Corp.*, 253 F.3d 34, 103 (D.C. Cir. 2001).

⁹⁹ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 446 (2d Cir. 1945).

¹⁰⁰ Note that Court in *United Shoe* also referred to the need to “deny to the defendant the fruits of its statutory violation,” 391 U.S. at 250, a remedy that sounds similar to disgorgement but the language has been used to justify divestitures, not monetary disgorgement. *See Schine Chain Theatres, Inc v United States*, 334 US 110, 128 (1948) (“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.”).

¹⁰¹ *See International Salt Co. v. United States*, 332 U.S.392, 400 (1947).

¹⁰² *See Kevin J. O’Connor, The Divestiture Remedy in Sherman Act, Section 2 Cases*, 13 HARV. J. ON LEGIS. 687 (1976).

¹⁰³ *See Majoras Testimony, supra* note 75, at 51 (“There are also instances in antitrust law where a conduct remedy (because no structural remedy is available) may actually be worse than the conduct that you are trying to avoid

(deterrence for the particular defendant as opposed to the general deterrence that flows from imposing civil fines on antitrust violators), benefits that are consistent with remedial goals. A defendant who is fined (enough) has an incentive to fix up its business practices so as to avoid the imposition of another financial penalty in the future. Rather than relying on the command-and-control approach of a court injunction to map out what the defendant can and cannot do, civil fines would rely on the defendant to figure out how to stay out of trouble.

But it is also possible to view civil fines as a complement to a remedial decree rather than a substitute. With a little imagination, it might be possible to use the incentivizing effects of a civil fine to “unfetter” the market and restore competition by structuring fine payments in a way that would lower the fine if certain benchmarks were reached. The crudest benchmark might be market share, but other ways could be imagined to measure the competitive vitality of a market. Such an approach would diminish command-and-control regulation of a defendant’s behavior, focus the parties (the government and the defendant) on increasing competition rather than just on avoiding acts covered by a court decree, and provide incentives for compliance.

Using money’s incentivizing effects as a remedial tool might be an unusual use of civil fines, but it is not without precedent in antitrust remedial decrees. A familiar example comes in the merger area, where parties may be required to spin off assets or license technology in a way that will stimulate new competition to make up for whatever competition may be lost in the merger. These decrees also often contain “crown jewel” provisions that require divestiture of important assets if the decree is not complied with. In addition, decrees can be enforced through the imposition of civil penalties.¹⁰⁴ These are financial incentives for compliance.

Private parties, as well, have structured monetary payments in ways that depend on future competitive conduct. A particularly imaginative version of this idea is the settlement of American Express’s suit against Visa for excluding Visa from access to its network of card issuing banks.¹⁰⁵ Part of Visa’s payments to

for the future. Consequently, there may be some circumscribed instances where we could use civil fine authority”).

¹⁰⁴ See, e.g., *Boston Scientific*, *supra* note 64.

¹⁰⁵ See American Express Co. Form 10-K for 2007, at 47-48, <http://library.corporate-ir.net/library/64/644/64467/items/282370/2007AXP10K.pdf>.

American Express are contingent on how successful American Express turns out to be in getting Visa issuing banks to issue American Express cards. The more successful American Express is, the more money Visa will pay in damages (because this will show how costly AMEX's exclusion from the Visa network was). Similarly, it should be possible to structure a civil fine in a monopoly case so that the defendant's payments will go down the more successful its formerly excluded competitors become. This will give the defendant the incentive to remove obstacles to effective competition—to “unfetter” the market.

IV. THE MODEST PROPOSAL

A. CIVIL FINES FOR MONOPOLIZATION CASES

The arguments in favor of civil penalties for antitrust violations are not confined to any one type of penalty or to any one type of antitrust violation. The remedial functions of civil penalties could call for a mix of fines, restitution, and remediation (similar to the mix now available in federal criminal prosecutions). There are good arguments for using these penalties in Section 1 cases, where federal government enforcers have no choice in between a criminal sanction and an injunction, as well as in Section 2 cases, where criminal penalties are not in use at all. Nevertheless, there are significant concerns about the effect of civil penalties on cartel prosecutions and there are only weak arguments for using civil penalties for restitution (and the FTC claims such authority now anyway).

A cautious way to enlarge government antitrust remedies to include civil penalties would be to start with civil fines in monopolization cases. Recognizing the discretionary nature of civil fine authority, I would begin by limiting these civil fines to two types of cases: systemic conduct and “no economic justification” cases.

1. *Systemic Conduct*

There are rare, but important, monopolization cases that are not directed at just a specific business practice but involve a systemic effort to maintain monopoly. These cases are difficult to try (it is tactically problematic to try to prove every bad act at trial) and difficult to remedy (the monopolist will just switch its tactics to avoid the decree but continue the overall effort to maintain monopoly). If we are not going to prosecute these cases criminally, and we are not going to break up the monopolist, and

we are faced with a difficult conduct decree, it would be useful to consider a monetary fine.

The archetype for this fine is *Microsoft*. The first-best remedy there might very well have been the restructuring decree that Judge Jackson entered (or, perhaps, the least-worst remedy), but judicial and political resistance to this approach was quite strong.¹⁰⁶ The chosen remedy, a conduct decree with certain affirmative obligations, has proven costly to administer and questionable in its effect. After five years in operation the district court judge had to extend it (for at least another two years) because Microsoft had not complied with a critical provision which the judge decided was necessary if the decree is to have its desired effect of lowering barriers to entry into the PC operating system market.¹⁰⁷

When courts and enforcers were considering remedies options in *Microsoft*, a number of commentators suggested the idea of a civil penalty. Lawrence White, for example, proposed a \$10 billion “settlement fee” as an alternative either to an on-going conduct decree or to Jackson’s restructuring order. The basis for White’s proposal was deterrence—the payment “would surely make even Microsoft . . . think twice about committing a similar offense in the future . . . [and] other companies in similar circumstances would surely be deterred.”¹⁰⁸ Howard Shelanski and Gregory Sidak questioned why the government plaintiffs excluded the possibility of “monetary remedies” from their case¹⁰⁹ and argued that given the difficulties of the various proposed injunctive remedies, the “efficacy and feasibility of monetary remedies” should have been seriously considered.¹¹⁰ They based the utility of monetary penalties on setting the correct price to the defendant “of committing the conduct in question.”¹¹¹ Both proposals were indifferent to the form of the penalty or to whom it might be paid: “To an economist, all monetary remedies look alike,

¹⁰⁶ For discussion of the resistance and settlement, and the subsequent administration of the settlement decree, see Harry First & Andrew I. Gavil, *Reframing Windows: The Durable Meaning of the Microsoft Antitrust Litigation*, 2006 UTAH L. REV. 641, 685-89, 698-708.

¹⁰⁷ See *New York v. Microsoft Corp.*, 531 F. Supp. 2d 141, 170-73 (D.D.C. 2008).

¹⁰⁸ Lawrence J. White, *A \$10 Billion Solution To The Microsoft Problem*, 32 J. CYBER RIGHTS, PROTECTION, AND MARKETS 69, 79 (2001).

¹⁰⁹ Actually, they did not, at least the states did not. See *supra* note 58.

¹¹⁰ See Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 96-97 (2001)

¹¹¹ *Id.* at 97.

whether they are called damages, fines, restitution, disgorgement, or something else.”¹¹² Not to a lawyer, of course, nor to an injured plaintiff.¹¹³

A civil fine imposed in a case like *Microsoft* would have no compensatory aim, nor would it be computed on the basis of the amount of monetary harm caused to identifiable parties by particular conduct. Not only will there likely be private plaintiffs available to obtain monetary redress (as there were in *Microsoft*), but measuring harm this way would provide a poor guide for injury caused by systemic monopoly. How to measure the loss in *Microsoft*, for example, from the innovations that “never occur” because of the way that Microsoft stifled innovation?¹¹⁴ How to have measured the loss in the *AT&T* monopolization case from AT&T’s ability to exclude competition in long-distance service and equipment, and control the pace of innovation in telephony? Surely not by deciding how much higher long-distance rates were to the consumers of the day.

A civil fine for systemic monopolization should be deterrence- and remedial-based. The deterrence aspect, as White suggests, would be meant to shore up the prohibition on the “willful maintenance of monopoly power” by adding an additional measure of general deterrence to the system, as well as providing specific deterrence for the offender. The remedial aspect would use penalty reductions as an incentive to having the monopoly firm meet specified competition benchmarks. This might allow government enforcers to seek a different kind of conduct decree than the one that was eventually negotiated in *Microsoft*, one that would use incentives rather than prohibitions.¹¹⁵

¹¹² *Id.*

¹¹³ In response to Tunney Act comments received on its settlement proposal, the Department of Justice took the position that it had no authority to order “monetary damages” because the proceeding was an equitable one and that such a remedy would be inconsistent the goals of remedy “in this case” because “punishment is not a valid goal.” *United States v. Microsoft Corporation*; Notice of Availability of Public Comments; Memorandum of the United States in Support of Entry of Proposed Final Judgment; Response of the United States to Public Comments on the Revised Proposed Final Judgment; Stipulation and Second Revised Proposed Final Judgment; and United States’ Memorandum Regarding Modifications Contained in Second Revised Proposed Final Judgment, 67 FR 12090, 12135 (March 18, 2002).

¹¹⁴ *See United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 112 (D.D.C. 1999) (findings of fact).

¹¹⁵ Looking for a remedy that would align Microsoft’s incentives with increasing competition would be consistent with the overall restructuring approach that the government plaintiffs originally sought.

One obvious problem is setting the amount of the fine. The European Commission faced this issue in its *Microsoft* case. The Commission first assessed the gravity of the offense, characterizing Microsoft's two violations as "very serious," in part because of their impact on future related markets; next found that Microsoft's behavior was "particularly anti-competitive in nature" with "significant impact" on markets that are "strategically important" to the information technology sector; and then determined that Microsoft's conduct affected the entire European Economic Area.¹¹⁶ The Commission then set the basic fine at €65,732,101.¹¹⁷ It next doubled this amount to insure "sufficient deterrent effect," the doubling reflecting the fact that Microsoft "is currently the largest company in the world by market capitalization" and that its resources and profits are "significant."¹¹⁸ And finally it increased that amount by another half to reflect the "long duration" of Microsoft's infringements (five years and five months). The total was €497,196,304, a considerable amount (about \$600 million at the time¹¹⁹) albeit less than White's \$10 billion.

Was this the "right" number? Microsoft argued in the Court of First Instance that the fine was "excessive"—indeed, that it should have been zero because the Commission's legal theories were "novel"—but the CFI upheld the Commission.¹²⁰ In response to Microsoft's claim that the Commission arbitrarily set the base fine (the Commission did not indicate in its decision how it chose the figure), the CFI explained the calculation: the base number was 7.5 percent of Microsoft's EEA turnover in PC and work group server operating systems for the fiscal year 2003.¹²¹ This was good enough to allow the CFI to conclude that the Commission was not acting arbitrarily, but neither the Commission nor the CFI explained why a fine should be calculated on the basis of sales revenue or why this percentage was correct. The CFI also upheld

¹¹⁶ For the Commission's discussion of the fine, see *EC Microsoft Decision*, *supra* note 33, paras. 1054-1080. Despite the existence of the 1998 Fining Guidelines, see *supra* note 22 and accompanying text, the Commission made no reference to them in its decision.

¹¹⁷ *EC Microsoft Decision*, para 1075.

¹¹⁸ *Id.* at para. 1076 and n. 1342.

¹¹⁹ See <http://www.x-rates.com/cgi-bin/hlookup.cgi>.

¹²⁰ See Case T-201/04, *Microsoft Corp. v. Commission of the European Commty*s, Court of First Instance, 17 Sept. 2007, paras. 1299, 1303. For the Court's discussion of Microsoft's arguments, see paras. 1326-67.

¹²¹ *Id.* para. 1360. The CFI figured out the number from references in other documents, see *id.*

the doubling of the base fine to insure deterrence. The CFI did not refer to Microsoft's asset size as a reason, but pointed to the likelihood that Microsoft would continue to maintain its dominant position "over the coming years," which would yield "other opportunities" to engage in the leveraging behavior the Commission had found abusive.¹²² In other words, the CFI recognized that Microsoft's actions were systemic and that additional deterrence would be necessary to deter future variations of the conduct which had incurred liability in the current proceeding.

However the Commission arrived at the €497 million fine, was it large enough to have a deterrent effect? Economists argue that deterrence works once the price is set, but it is not so easy to figure out how managers would take the "price" of a civil fine calculated as the Commission did in *Microsoft*. Obviously, the size conveys seriousness, but the variables that affected the size of the fine make exact ex ante calculations difficult (sales revenues for which products? in which years? how much of an additional deterrence penalty might be imposed? how long will the Commission decide the violation lasted?).

What about specific deterrence? The Commission's 2004 decision ordered Microsoft to furnish, on "reasonable and non-discriminatory terms," the server-to-server interoperability information it had refused to supply in violation of Article 82.¹²³ Despite the fact that Microsoft was on notice that its failure to comply with the Commission's order could subject it to daily penalties (up to five percent of average daily turnover in the preceding year, per day of noncompliance¹²⁴), Microsoft's compliance was not forthcoming. In 2005 the independent monitoring trustee called Microsoft's documentation "not fit for use by developers" and in 2006 the Commission imposed a €80 million fine (about \$350 million) for inadequate disclosure, setting the fine for continuing noncompliance with the Commission's original order at €3 million a day (about \$3.8 million at the time).¹²⁵ Even then Microsoft did not comply. In February 2008

¹²² See *id.* para. 1363.

¹²³ See EC *Microsoft* Decision, *supra* note 33, Art. 5(a).

¹²⁴ See EC Treaty, Art. 24(1) ("Periodic Penalty Payments").

¹²⁵ See Comm'n of the European Comtys., Comm'n Decision of 12 July 2006, Case COMP/C-3/37.792 *Microsoft* para. 52, Arts. 1, 3. The Commission wrote that it sought to set the fine at an amount that would render it "economically rational for the undertaking concerned to comply with such a decision rather than to reap the benefits of noncompliance" and that would be "sufficient to compel compliance from an undertaking such as Microsoft, with

the Commission imposed an additional penalty of €999 million (about \$1.3 billion) for charging unreasonable royalties for the interoperability information that it did disclose.¹²⁶ This means that Microsoft has been fined approximately \$1.7 billion for failure to comply with the 2004 decision, an amount that is nearly three times the fine for the original two violations of Article 82. And the Commission apparently is still not done with Microsoft. It has opened up two new formal investigations, one involving integration of the Internet Explorer browser and the Windows operating system and the other involving interoperability “across a broad range of products,” particularly with Microsoft’s Office suite.¹²⁷ Perhaps even the large fines imposed on Microsoft—the total of all three fines is now more than \$2.3 billion—are just not large enough to matter much to this company.

Given the uncertain deterrence effects of even large fines, it would be unwise to rely solely on a civil fine as a remedy for systemic monopolization offenses. More likely is combining the civil fine with some form of remedial decree designed to restore competition to the market. Once again, *Microsoft* is the exemplar, but not necessarily a happy one. In addition to the protocol disclosure order to remedy the failure to supply, the Commission sought to remedy the effects of bundling the Windows Media Player with the Windows operating system by requiring Microsoft to offer a version of Windows without the Media Player. Neither remedy has mattered in the marketplace. The Commission has decided that the required interoperability information now “appears to be complete and accurate,” but there is no indication that the workgroup server operating system market has become more competitive;¹²⁸ its order to require Microsoft to provide

its very substantial size and financial resources.” *Id.* at para. 242. For exchange rate, see *id.* para. 239.

¹²⁶ See Comm’n of the European Comtys., Comm’n Decision of 27 Feb. 2008, Case COMP/C-3/37.792 Microsoft para. 299. Microsoft has appealed. See WALL ST. J., May 10, 2008, at A6.

¹²⁷ See Press Release, Antitrust: Commission initiates formal investigations against Microsoft in two cases of suspected abuse of dominant market position, 14 Jan 2008, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/19&format=HTML&aged=0&language=EN&guiLanguage=en>; NYT article

¹²⁸ On compliance, see MEMO/07/420, Antitrust: Commission ensures Microsoft’s compliance with the 2004 Decision - frequently asked questions, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/420&format=HTML&aged=0&language=EN&guiLanguage=en>. For effect, see Decision of Feb 27, 2008, *supra* note 126, at n.353 (“no competitor of Microsoft in the workgroup server operating systems market has entered into a WSPP licence

Windows without a media player failed completely, in part because the Commission did not force Microsoft to charge less for the version without the media player.¹²⁹

It may be that the Commission's combination of civil fine and affirmative conduct orders just shows that the Commission did not get the conduct part right. Indeed, as the U.S. experience shows, the problems of writing the conduct part grow as the bases for liability become more systemic than episodic. The challenge, then, is to combine the penalty and the conduct requirements and to write the conduct requirements more in terms of competition benchmarks than specific behavior. We will likely never know the exact amount of additional deterrence a civil fine will buy, but we do know that incentives matter. Giving a violator economic incentives to remove blockages to competition might make a conduct decree more effective.

2. *No Efficiency Justification Monopolization Cases*

Commentators have always reserved the possibility of finding a Section 2 violation based on conduct that we might call obviously predacious—burning down a competitor's factory being the classic hypothetical.¹³⁰ These are cases in which there is no

agreement in order to develop and bring to market a competing workgroup server operating system"). Note that Microsoft has yet to comply fully with the protocol disclosure requirements in the U.S. decree, requiring extension of those provisions of the final settlement decree until at least May 12, 2009. See First & Gavil, *supra* note 106, at 702

¹²⁹ Microsoft began complying with the unbundling requirement approximately one year after the Commission's original decision, offering a version of Windows called "Windows XP Home Edition N," the N standing for "not with Media Player." See Steve Lohr & James Kanter, *Microsoft Facing Fines in Europe*, N.Y. TIMES, Dec. 23, 2005, at C1 (Microsoft indicates that no OEMs have asked for licenses for the product and retail sales "have been few"); *Microsoft Strikes Deal on Windows*, N.Y. TIMES, Mar. 28, 2005, at C8 (reporting agreement on name of new product, clearing way for its distribution).

¹³⁰ Such cases are presumably rare. Cf. *United States v. Empire Gas Corp.*, 537 F.2d 296, 298 n.1 (8th Cir. 1976) (government abandons allegations of threats and attempts to destroy the business or property of competitors; corporate executives had been acquitted in earlier trial involving alleged destruction of property). There are occasional cases where less destructive patterns of improper conduct forms the basis of a monopolization charge. See *Conwood Co., L.P. v. United States Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002) (providing false and misleading information to retailers in carrying out category management duties; routinely removing competitor's sales racks and POS advertising; used its exclusive vending rights to exclude competing brands by "losing them" in their exclusive racks); see also [State amicus brief in *Trinko*, citing cases "alleging persistent anticompetitive behavior by ILECs," including fraudulent claims that there was no room to collocate a competitor's equipment

efficiency justification (“NEJ”) for the conduct in question, that is, there is no case to be made that the conduct provides social benefit. That means that these are cases in which we have little concern for optimal occurrence, but we would like to get optimal deterrence. Imposing a civil fine would thus come with little cost in terms of over-deterrence, but might increase deterrence because of the financial disincentive and the additional opprobrium that a fine carries over a simple injunction.

One type of NEJ case in which these penalties could usefully be applied involves patent holders that engage in fraud as part of an effort to obtain or maintain monopoly. A good example is the European Commission’s case against AstraZeneca, involving its drug called Losec, which was used to treat gastro-intestinal disease and was the best-selling prescription pharmaceutical product in the world for several years.¹³¹ The active substance for Losec was omeprazole, on which AstraZeneca had a patent.¹³² European Community law provides for “Supplementary Protection Certificates” for pharmaceutical products which effectively extend the basic patent protection for the active substance in a pharmaceutical drug to take account of the regulatory delay involved in bringing pharmaceutical drugs to market.¹³³ These SPCs are granted by national patent offices.¹³⁴ The Commission found that AstraZeneca knowingly engaged in a pattern of misleading representations to patent agents, patent offices, and national courts as part of its strategy for securing SPCs for omeprazole. These misrepresentations were part of a centralized and coordinated strategy involving numerous countries,¹³⁵ done to keep generic competition out of the market for as long as possible and thereby to maintain AstraZeneca’s monopoly.¹³⁶ The Commission labeled the abuse “serious,” imposing a €60 million fine (about \$72 million).¹³⁷ In so doing, the Commission noted

in Verizon’s central offices, requiring a competitor to build unnecessary special rooms before collocating, and “abusing” the regulatory and negotiation process to impede competitive entry).

¹³¹ See Commission decision of June 2005, Case COMP/A. 37.507/F3 – AstraZeneca, para. 914, available at <http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37507/en.pdf>.

¹³² See *id.* para 19.

¹³³ See *id.* para. 143. For a description of SPCs, see *id.* para. 147.

¹³⁴ See *id.* para. 6.

¹³⁵ See *id.* paras. 626-631.

¹³⁶ The markets in which AstraZeneca was found to have a dominant position were the national markets for oral formulations of prescription proton pump inhibitors, see *id.* para. 516.

¹³⁷ Art. 2. The case is on appeal to the CFI, see Action brought on 25 August 2005 — AstraZeneca/Commission (Case T-321/05) (2005/C 271/47),

that it did not matter that AstraZeneca's efforts were not as successful as it had hoped. Even though the market impact of the infringement could not be "precisely measured," adequate deterrence needs to take account of the "object of the course of conduct."¹³⁸

Civil fines could be used in the United States for similar cases. Indeed, it turns out that there are more cases of fraud in connection with obtaining patents than one might otherwise expect.¹³⁹ Although it is well-accepted under the *Walker Process* doctrine that fraud on the patent office can amount to monopolizing conduct,¹⁴⁰ enforcement of *Walker Process* claims has been left solely in the hands of private parties, with the claim often raised in the context of a patent infringement suit. So far as appears there has been no public enforcement in this area (although it is not clear why this should be so).¹⁴¹ In terms of remedies, government enforcement now adds nothing to what a private party can get (that is, a fraudulently obtained patent is unenforceable, the same effect as if its enforcement were enjoined in a government monopolization suit). Adding a civil fine would not only add a penalty not now available to private parties, but would also support the government's interest in dealing honestly with the PTO.

Walker Process fraud is not the only type of fraudulent or deceitful conduct in which firms have engaged in an effort to obtain or maintain monopoly power. Recent cases have involved misrepresentations of patent positions to standards setting organizations prior to adoption of a particular standard,¹⁴² falsely promising a standards setting organization to abide by its requirement that adopted technology be licensed on fair,

available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:271:0024:0024:EN:PDF>.

¹³⁸ See AstraZeneca, *supra* note 131 paras. 911, 913, 914.

¹³⁹ See Harry First, *Controlling The Intellectual Property Grab: Protect Innovation, Not Innovators*, 38 RUTGERS L.J. 365, 396 n.155 (2007) (citing cases).

¹⁴⁰ See *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965). For fuller discussion of the doctrine, see Christopher R. Leslie, *The Anticompetitive Effects of Unenforced Invalid Patents*, 91 MINN. L. REV. 101 (2006).

¹⁴¹ See First, *supra* note 139, at 396 & n.154.

¹⁴² See *Dell Computer Corp.*, 121 F.T.C. 616 (1996) (finding liability under Section 5); *Rambus, Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008) (vacating FTC decision finding that conduct constituted monopolization, although indicating that such conduct might be monopolizing if it caused standard setting organization to choose a different standard).

reasonable, and nondiscriminatory terms,¹⁴³ misrepresenting to a State board that research was non-proprietary and in the public domain while pursuing patent rights that would enable the patent holder to charge substantial royalties once the research was incorporated into state regulations,¹⁴⁴ and Microsoft's deceiving software developers into using a technology that they thought would be cross-platform but which interoperated only with Windows.¹⁴⁵ In none of these cases does there appear to be any efficiency justification for the deception, although there certainly may be questions about whether the deception was, in fact, intentional, or whether it led to the acquisition or maintenance of monopoly power, or whether it harmed competition. Once such cases are no longer novel, such blatant fraudulent behaviors could be good candidates for a civil fine.¹⁴⁶

B. INSTITUTIONAL DESIGN

Adding civil fines to federal antitrust remedies will likely require statutory amendment. Whatever the scope of authority for either the FTC or the Justice Department to seek restitution or disgorgement as "monetary equitable remedies" under current law, civil fines lie closer to the criminal side of the remedial spectrum.¹⁴⁷ Their function is more to sanction and deter than it is to provide redress to those harmed by antitrust violations.

Civil fine authority should be given both to the Justice Department and the FTC. Although as a general matter, civil penalties are most closely associated with administrative action, there is no inherent reason to so limit them. The FTC would have some institutional advantage in imposing civil fines because it could determine the fine administratively, while the Justice Department, proceeding through court action, would need to provide a jury trial, but this should not make much of a practical

¹⁴³ See *Broadcom v. Qualcomm*, 501 F.3d 297 (3d Cir. 2007) (reversing motion to dismiss plaintiff's claim).

¹⁴⁴ See *Union Oil Co.*, 140 F.T.C. 123 (2005) (complaint and consent order).

¹⁴⁵ See *United States v. Microsoft*, 253 F.3d at 76-77 (quoting Microsoft document setting out a strategic goal to "Kill cross-platform Java by growing the polluted Java market.>").

¹⁴⁶ Compare *AstraZeneca*, where the Commission took account of the novelty of some of the facts.

¹⁴⁷ See *Tull v. United States*, 481 U.S. at 424 (rejecting argument that under the Clean Water Act's provision for injunctive relief, court could have awarded penalties without a jury trial as incidental to that injunctive relief) ("First, while a court in equity may award monetary restitution as an adjunct to injunctive relief, it may not enforce civil penalties.")

difference.¹⁴⁸ On the other hand, there is good reason to maintain the dual enforcement structure of current federal antitrust law for this penalty. The agencies often have different enforcement priorities, interests, and experiences, all to the benefit of antitrust enforcement. Both agencies should have the benefit of this enforcement tool.

Civil fine authority should be limited to monopolization cases until enforcement agencies gain experience with using these fines. This would be consistent with the “modest case” in favor of such penalties and would avoid the possibility of weakening the use of criminal sanctions against cartel behavior. At the same time the enactment of a civil fine for monopolization cases would underscore the importance of deterring exclusionary conduct. Cartels raise price, harm enough to consumers. But monopolists control markets, affecting not just price but also the availability to downstream purchasers of alternatives and, ultimately, affecting the pace of innovation. These harms are far more detrimental in the long run than transient price-raising power.

There is no perfect way to set the amount of the fine. The pattern for civil fine statutes is to set a statutory maximum and then leave the amount of the fine to judicial or administrative discretion. Civil fines are often specified on a daily basis for ongoing violations (failure to comply with the premerger notification requirements of Hart-Scott-Rodino, for example), but they could simply be specified by reference to the criminal fine in the Sherman Act (New York’s civil penalty statute, for example, references the criminal provision of the Donnelly Act). The Sherman Act’s \$100 million limit might prove too low for cases of systemic monopolization, however (by comparison, in 2007 the EC imposed a fine in excess of \$200 million in a price squeeze case¹⁴⁹), and the “twice the gain or loss” provision of the Criminal Fines Improvement Act might be problematic where the future gains and losses of exclusionary conduct are difficult to quantify. A better approach might be to follow the European example and cap fines at some percentage of sales or assets.

More important for setting the fine will be adopting guidelines to control discretion. These guidelines can develop

¹⁴⁸ See *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977) (administrative determination of civil fine does not violate Seventh Amendment jury trial right). Enforcement of the civil fine, if necessary, would require court action, however.

¹⁴⁹ See *Telefonica*, *supra* note 36, para. 768 (€151,875,000 fine).

criteria that are aimed specifically at monopolization, rather than being generally written for a range of antitrust violations that includes cartel behavior. The guidelines should have a fault component (recognizing the deserts and deterrence bases of civil fines) and a harm component (recognizing that antitrust violations are ultimately related to economic injury). Drawing on European experience in setting these fines, the guidelines could take account of novelty of the conduct (reserving fines for clear violations) but could also increase fines to take account of the size of the defendant (a “no pain, no gain” theory of deterrence). Transparency in fine setting may be at least as important as the ultimate amount of the fine. European fining decisions still have an element of arbitrariness in the setting of the base fine. For U.S. civil fines to be accepted, the rational bases for a fine determination must be clearer.

A final ambiguity in civil penalties is their recipient. Restitution goes to victims (as the FTC has tried to do) and criminal fines go to the Treasury. Civil antitrust fines need not go to either, however. A better approach would be to recycle the fines into antitrust enforcement. Federal antitrust enforcement budgets now live off of premerger filing fees, but this is a bad inventive structure.¹⁵⁰ Premerger filing fees are a bureaucratic tax on business transactions, one designed, in part, to finance the cost of processing the paperwork. Allowing enforcement agencies to keep the fines from antitrust violations provides a different incentive structure. Enforcers would be rewarded for enforcing the antitrust laws, thereby aligning bureaucratic interest with the public interest.

V. CONCLUSION

Civil penalties are in wide use outside federal antitrust law. The European Commission imposes civil fines for a broad range of anticompetitive behavior, including what we would call monopolizing conduct. State antitrust statutes and enforcers do as well. The FTC has a very modest program for the “monetary equitable remedies” of restitution and disgorgement, but has not considered the utility of civil fines. The Antitrust Modernization Commission considered whether the addition of civil fines should

¹⁵⁰ The Antitrust Modernization Commission recommended de-linking antitrust agency funding and Hart-Scott-Rodino filing fees so that the agencies would not be dependent on these fees and so that other countries would not get similar ideas. The Commission stated that the agencies should be funded from general revenues. *See* AMC REPORT, *supra* note 3, at 161.

be recommended to Congress, but ended up paying very little attention to the idea.

Civil fines could be imposed to advance the deterrent and remedial objectives of antitrust remedies. The argument for adding them in Section 1 cases is to increase deterrence against concerted practices that we are today reluctant to bring to criminal court, such as advertising restrictions that affect price. But the deterrence case is clouded by its potential overspill to cartel practices that are vigorously prosecuted as criminal matters today. In Section 2 cases, on the other hand, civil fines could be used to increase general and specific deterrence without this overspill concern, given our current unwillingness to prosecute such cases criminally. Indeed, considering the potential for large economic harm from monopolization, an increase in deterrence should be welcomed.

Out of concern for the possibility of over-detering legitimate aggressive conduct, however, my modest proposal for civil fines would limit their imposition to two types of monopolization cases, systemic conduct monopolization and no efficiency justification monopolization. In the former, if divestiture is not called for, and a conduct decree is difficult to write, a civil fine could be a complement to a remedial decree, both by increasing deterrence and acting in conjunction with a decree that would reduce the fine as competition increased. In the NEJ case, where over-deterrence is not a keen concern, a civil fine could again increase deterrence, for example, by having government enforcers assist in the policing of deceitful anticompetitive conduct of which we seem to have plenty today.

Although my proposal is modest, the amount of the fines need not be. Statutory caps should be sufficiently high to allow large penalties against major firms that engage in systemic monopolizing conduct that has substantial economic impact. Enforcement guidelines can then establish a rational basis for determining a particular fine, based on a combination of fault and impact. There is no perfect number for this fine, but there should be no arbitrary ones.

Civil fines are not the remedial cure-all. We need only look at the European Commission's experience with Microsoft, where one must question whether \$2.3 billion in civil fines has made much difference to Microsoft's conduct. Still, \$2.3 billion is not nothing. Other companies may have taken note. If economics teaches anything, it is that incentives matter. How much they matter is another story.