Dominance
2019

Contributing editors
Patrick Bock, Kenneth Reinker and David R Little
Cleary Gottlieb Steen & Hamilton LLP

LEXOLOGY®
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Dominance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Colombia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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Getting The Deal Through

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GENERAL FRAMEWORK

Legal framework

1 | What is the legal framework in your jurisdiction covering the behaviour of dominant firms?

Article 102 of the Treaty on the Functioning of the European Union (TFEU) is the statutory provision governing the abuse of dominance in the European Union. European Council Regulation No. 1/2003 sets out the procedures for applying article 102 (and 101) of the TFEU. It is complemented by a series of implementing regulations, notices and guidance papers – the most important of which, for abuse of dominance purposes, is the European Commission's Guidance on its Enforcement Priorities in Applying article [102 TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings (the Guidance Paper).

Broadly, there are four conditions for article 102 TFEU to apply:

- the entity engaged in the relevant conduct is an 'undertaking';
- the undertaking must hold a dominant position on a relevant market;
- the conduct at issue must qualify as an abuse; and
- the conduct must affect trade between member states.

Definition of dominance

2 | How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Dominance is not defined in article 102 of the TFEU. EU Court judgments, Commission decisions and the Guidance Paper, however, define dominance as a position of economic strength that confers on a company 'the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers' (Guidance Paper, paragraph 10; case *27/76 United Brands* ECLI:EU:C:1978:22 (*United Brands*), paragraph 65; case 85/76 *Hoffmann-La Roche* ECLI:EU:C:1979:36 (*Hoffmann-La Roche*), paragraph 38). The courts also refer to a dominant company as 'an unavoidable trading partner' (*Hoffmann-La Roche*, paragraph 41).

A first step to assess dominance is to define a relevant market (see question 9). An undertaking can then be considered dominant where it is able to raise (or maintain) prices on that market above the competitive level for a significant period of time (Guidance Paper, paragraph 11).

Because determining the competitive price is difficult, the Courts and the Commission have identified various factors that can indicate dominance. The Guidance Paper classifies these factors into three non-exhaustive categories (paragraph 12):

- constraints imposed by competitors (involving an assessment of market structure and market shares);
- the threat of expansion by existing competitors or entry by potential competitors; and
- the importance of countervailing buyer power.

Market shares can provide a useful first indication of a company's potential market power or dominance, but the broader market context must also be taken into account. This includes fluctuations in shares over time, the existence of barriers to entry, customer buyer power, spare production capacity, rates of innovation, and the ease and rate of customer switching.

As just one example, the General Court in case T-79/12 *Cisco v Commission* ECLI:EU:T:2013:635, (*Cisco*), found that even shares of above 90 per cent do not indicate market power where products are offered for free, there is a high rate of innovation, and users can easily switch between alternatives.

Purpose of the legislation

3 | Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The dominance standard is strictly economic. Socio-political or other non-economic factors are not considered.

The overarching goal of article 102 of the TFEU is to protect consumer welfare by putting in place a system of undistorted competition as part of the internal market established by the EU (case C-52/09 *TeliaSonera Sverige* ECLI:EU:C:2011:83, paragraph 22). The aim is to protect the competitive process, not individual competitors (case C 8/08 *T-Mobile Netherlands BV*, Opinion of Advocate General Kokott ECLI:EU:C:2009:110, paragraph 71). As Advocate General Wahl has stated, 'EU competition rules seek to capture behaviour that has anti-competitive effects' (case C-413/14 *Intel*, Opinion of Advocate General Wahl ECLI:EU:C:2016:788, paragraph 43).

Sector-specific dominance rules

4 | Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Article 102 of the TFEU applies equally to all sectors.

There may, however, be sector-specific rules implemented at member state level through national laws and national regulations. The Commission has also issued directives in certain sectors, including communications, the postal sector, energy and rail transport. These may create specific, additional obligations on companies in these sectors.

Exemptions from the dominance rules

5 | To whom do the dominance rules apply? Are any entities exempt?

The prohibition on abuse of dominance applies to 'undertakings'. This is interpreted widely: 'The concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.' (case C-41/90 *Höfner* ECLI:EU:C:1991:161, paragraph 21).

If public bodies carry on economic activities, they are subject to abuse of dominance rules regarding those activities. Public bodies, however, are not subject to the dominance rules with respect to their public tasks.

For example, in *Eurocontrol*, the exercise of powers relating to the control and supervision of air space was not of an economic nature and Eurocontrol, therefore, did not constitute an undertaking for those purposes (case C-364/92 *Eurocontrol* ECLI:EU:C:1994:7).

Transition from non-dominant to dominant

6 Does the legislation only provide for the behaviour of firms that are already dominant?

Article 102 of the TFEU applies only to dominant firms. It does not cover the conduct of non-dominant companies attempting to become dominant (such as 'attempted monopolisation' under section 2 of the US Sherman Act).

Collective dominance

7 Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

Although not mentioned in the Guidance Paper, article 102 of the TFEU may apply to one or more undertakings (acting individually or collectively). The leading cases on collective dominance are *Airtours* (case T-342/99 *Airtours* ECLI:EU:T:2002:146 (*Airtours*)) (which concerned collective dominance under merger control) and *Laurent Piau* (case T-193/02 *Laurent Piau* ECLI:EU:T:2005:22) (which concerned collective dominance under article 102 TFEU).

As a general matter, for there to be a finding of collective dominance, the collectively dominant firms must either enjoy some structural or contractual link or be active in a market that otherwise allows them to coordinate their behaviour.

So far, all article 102 of the TFEU decisions finding collective dominance have been based on agreements between firms allowing them to behave as a collective entity; there are no cases to date where article 102 of the TFEU has applied to mere tacit collusion.

In the merger context, the Commission has found that collective dominance may occur as a result of tacit collusion among competitors where: a monitoring mechanism permits firms to arrive at tacit collusion; a deterrence mechanism permits firms to sustain collusion; and current and future competitors, as well as consumers, cannot jeopardise the collusion (*Airtours*, paragraph 62).

If collective dominance is proved, each individual undertaking is in principle subject to the special responsibility of dominant firms under article 102 of the TFEU. One collectively dominant company can commit an abuse even if not acting jointly with the others, but the conduct must be 'one of the manifestations of such a joint dominant position being held' (case T-228/97 *Irish Sugar* ECLI:EU:T:1999:246, paragraph 66).

Dominant purchasers

8 Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

Yes. Article 102 of the TFEU applies to dominant purchasers (see, eg, case T-219/99 *British Airways* ECLI:EU:T:2003:343 (*British Airways*), paragraph 86). In that context, the assessment of dominance turns on the buyer's ability to impose purchasing terms on their suppliers.

Market definition and share-based dominance thresholds

9 How are relevant product and geographic markets defined? Are there market-share at which a company will be presumed to be dominant or not dominant?

The approach to market definition is the same in article 102 of the TFEU cases as in merger control or under article 101 of the TFEU. A relevant (product and geographic) market circumscribes the sources of competitive constraint faced by the company under investigation. It comprises all those products or services 'which are regarded as interchangeable or substitutable by the consumer, by virtue of the products' characteristics, their prices and their intended use' (Market Definition Notice, paragraph 36).

Substitutability should be assessed by the SSNIP or hypothetical monopolist test: this asks whether a hypothetical monopolist could profitably sustain a price that is a 'small but significant' amount (usually 5–10 per cent) above competitive price levels over the candidate market. If not, the market definition is widened to include the products that customers would switch to in response to a price increase.

As to market share thresholds, in the *Akzo* judgment, the Court of Justice established a (rebuttable) presumption that a company is dominant if it holds a market share of 50 per cent or more (case C-62/86 Akzo ECLI:EU:C:1991:286 (*Akzo*), paragraph 60). The Guidance Paper states that dominance is not likely if the undertaking's market share is below 40 per cent (paragraph 14).

That said, even above the 50 per cent threshold, it is necessary to consider the nature and dynamics of a particular market. In markets subject to a high degree of innovation or where services are offered for free, shares (even above 90 per cent) may not be a good proxy for market power (case T-79/12 *Cisco v Commission* ECLI:EU:T:2013:635 and case COMP/M.7217 *Facebook/WhatsApp* 3 October 2014).

ABUSE OF DOMINANCE

Definition of abuse of dominance

10 How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Holding or acquiring a dominant position is not unlawful under EU competition law. A dominant company infringes article 102 of the TFEU only if it abuses its dominance to restrict competition.

Article 102 of the TFEU does not define the concept of abuse. Instead, it lists four categories of abusive behaviour:

- article 102(a) prohibits directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- article 102(b) prohibits limiting production, markets or technical developments to the prejudice of consumers;
- article 102(c) prohibits applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- article 102(d) prohibits making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Broadly, the categories of abuse can be grouped into (i) exclusionary abuses (where a dominant company strategically seeks to exclude its rivals and thereby restricts competition), and (ii) exploitative abuses (where a dominant firm uses its market power to extract rents from consumers). Exclusionary abuses are by far the most common type of abuse (although the Commission and national authorities have recently begun to pursue more exploitative abuse cases).

The definition of abuse has largely grown out of the case law and been fleshed out in the Guidance Paper. The classic formulation of an abuse is behaviour 'which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operator, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition' (*Hoffmann-La Roche*, paragraph 91).

Not all conduct that negatively affects rivals is anticompetitive. It is a normal and desirable part of the competitive process that companies that have less to offer customers leave the market. Accordingly ,the Courts have emphasised that 'not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient' (case C-209/10 *Post Danmark I* ECLI:EU:C:2012:172 (*Post Danmark I*), paragraph 22, case C-413 *Intel* EU:C:2017:632 (*Intel*), paragraph 134). This is because competition rules do not 'seek to ensure that competitors less efficient than the undertaking with the dominant position should remain the market' (*Intel*, paragraph 133).

The challenge for agencies and undertakings alike in abuse of dominance cases is therefore to distinguish between abusive conduct and vigorous competition on the merits.

Case law qualifies certain categories of conduct as 'by nature' abuses (such as exclusive dealing). The *Intel* judgment brings important clarity to the treatment of these abuses: by nature abuses remain presumptively unlawful, but if a dominant firm submits evidence that its conduct is not capable of restricting competition, the Commission must assess all the circumstances to decide whether the conduct is abusive. This entails, in particular, an assessment of rivals' efficiency because competition law does not seek to protect inefficient rivals. In addition, even if the conduct does produce exclusionary effects, the Commission (or Court) must determine whether those effects 'may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer' (*Intel*, paragraph 140). Accordingly, by nature abuses are not the same as per se infringements.

Outside the 'by nature' exceptions, the Commission has to perform a fully-fledged effects analysis. This will apply, for example, to tying, product design, pricing abuses and refusals to supply. An effects analysis for exclusionary conduct requires proving at least the following four elements.

First, the dominant company's abusive conduct must hamper or eliminate rivals' access to supplies or markets (Guidance Paper, paragraph 19). In other words, the abusive conduct must create barriers to independent competition (case T-201/04 *Microsoft* ECLI:EU:T:2007:289 (*Microsoft*), paragraph 1088).

Second, the abusive conduct must cause the anticompetitive effects (case C-23/14 *Post Danmark II* ECLI:EU:C:2015:651 (*Post Danmark II*), paragraph 47). Causation should be established by comparing prevailing competitive conditions with an appropriate counterfactual where the conduct does not occur (Guidance Paper, paragraph 21).

Third, the anticompetitive effects must be reasonably likely (Microsoft, paragraph 1089). If conduct has been ongoing for some time without observable anticompetitive effects, that suggests the conduct is not likely to cause anticompetitive effects in the first place (case T-70/15 *Trajektna luka* ECLI:EU:T:2016:592, paragraph 24).

Fourth, the anticompetitive effects must be sufficiently significant to create or reinforce market power (Guidance Paper, paragraph 11, 19). In the recent *Servier* judgment, the General Court found that it would be paradoxical to permit the Commission to limit its assessment to likely future events in a situation where the alleged restrictive conduct has been implemented and its actual effects observed (case T-691/14, *Servier*, EU:T:2018:922). While those findings relate to article 101 of the TFEU, the same reasoning should apply to article 102 of the TFEU because the concept of a restriction of competition is the same, as the English High Court found in *Streetmap v Google* [2016] EWHC 253.

Exploitative and exclusionary practices

11 | Does the concept of abuse cover both exploitative and exclusionary practices?

Yes. As explained in response to question 10, article 102 of the TFEU covers both exclusionary abuses (such as tying, refusal to supply, or exclusive dealing) and exploitative abuses (such as excessive pricing or imposing unfair trading conditions).

The Commission's enforcement activity over the past decade has focused almost wholly on exclusionary abuses, and the Guidance Paper sets enforcement priorities only for exclusionary conduct. There are, however, indications that the Commission would like to increase its caseload on exploitative abuses (in May 2017, the Commission opened an investigation into whether Aspen Pharma committed an exploitative abuse by allegedly imposing sudden price increases for cancer medicine of up to several hundred per cent). National authorities in the UK, Italy, France, and Germany are also pursuing – or have pursued – exploitative abuse cases, mostly in the pharmaceutical sector.

Link between dominance and abuse

12 | What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

There is case law suggesting that it is unnecessary to show a causal connection between dominance and the abuse (case 6/72 *Continental Can* ECLI:EU:C:1973:22 paragraph 27). These cases are quite old, however, and it is generally expected today that the Commission must demonstrate a connection between the dominant position and the abusive conduct. Indeed, in *Tetra Pak II*, the Court held that article 102 of the TFEU 'presupposes a link between the dominant position and the alleged abusive conduct' (case C-333/94 *Tetra Pak* ECLI:EU:C:1996:436 (*Tetra Pak II*), paragraph 27).

In exceptional circumstances, an abuse may occur on an adjacent market to the dominant market (*Tetra Pak II*). For this to apply, there must be 'close associative links' between the adjacent market where the conduct occurs and the dominant market. More generally, in leveraging abuses (such as tying or refusal to supply), the abuse occurs on the dominant market, but produces effects on a neighbouring (usually non-dominant) market.

Irrespective of the above, the Commission must still prove causation in fact. In particular, it must show that the abusive conduct actually causes the posited anticompetitive effects (as noted in response to question 10, usually by reference to an appropriate counterfactual). In *AstraZeneca*, the Court confirmed that 'a presumption of a causal link . . . is incompatible with the principle that doubt must operate to the advantage of the addressee of the decision finding the infringement' (case C-457/10 *AstraZeneca* ECLI:EU:C:2012:770, paragraph 199).

Defences

13 | What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

Even if conduct is found to constitute an abuse and to restrict competition, a company can always attempt to show that its conduct is objectively justified. This applies for all abuses, including 'by nature' abuses.

The dominant company bears the evidentiary burden to substantiate an objective justification. It is then for the Commission to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the 'justification put forward cannot be accepted' (*Microsoft*, paragraph 688). In *Intel*, the Court of Justice recently confirmed that the Commission must examine whether the benefits the conduct at issue creates outweigh its alleged restrictive effects (*Intel*, paragraph 140).

Conduct may be justified if it is either objectively necessary or produces efficiencies that outweigh the restrictive effects on consumers (*Post Danmark I*, paragraph 41; Guidance Paper, paragraph 28). The Guidance Paper notes that 'the Commission will assess whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking' (Guidance Paper, paragraph 28). The EU Courts have also held that a dominant company may justify its conduct based on legitimate 'commercial interests' (*United Brands*, paragraphs 189 to 191). In *Motorola* and *Samsung*, for example, the Commission accepted that it is legitimate for a holder of standard essential patents to seek injunctions against patent users that are not 'willing licensees' (case AT.39985 *Motorola*, 29 April 2014; and case AT.39939 *Samsung* 29 April 2014).

The Guidance Paper sets out four requirements for a company to justify abusive conduct that forecloses its rivals (paragraph 30):

- first, the conduct must cause efficiencies; these efficiencies are not confined to economic considerations in terms of price or cost, but may also consist of technical improvements in the quality of the goods (*Microsoft*, paragraph 1159; Guidance Paper, paragraph 30);
- second, the conduct must be indispensable to realising those efficiencies;
- third, the efficiencies must outweigh the negative effects on competition; and
- fourth, the conduct must not eliminate effective competition by removing all or most existing sources of actual or potential competition.

As to exclusionary intent, this is not a necessary element of an abuse because an abuse is 'an objective concept' (*Hoffmann-La Roche*, paragraph 91). That said, evidence as to the company's intent may be useful in interpreting its conduct (Guidance Paper, paragraph 20). As the Court of Justice held in *Tomra*, 'the existence of any anticompetitive intent constitutes only one of a number of facts which may be taken into account in order to determine that a dominant position has been abused' (case C-549/10 P *Tomra* ECLI:EU:C:2012:221, paragraph 20).

SPECIFIC FORMS OF ABUSE

To what extent conduct is considered abusive

14 | Rebate schemes

The grant of rebates is generally pro-competitive. But certain forms of rebates may constitute an abuse if applied by a dominant company. The concern is that the dominant company exploits its larger base of sales to offer discounts in ways that preclude smaller (but equally efficient) rivals from competing for the contestable portion of a customer's demand.

The case law generally distinguishes between three categories of rebates: rebates based on volumes of purchases, rebates conditioned on exclusivity and loyalty-inducing rebates.

The first category of rebates – forward looking volume-based rebates – are presumptively lawful (*Hoffmann-La Roche*, paragraph 90; case T-203/01 *Michelin v Commission* ECLI:EU:T:2003:250 (*Michelin*), paragraph 58). This reflects gains in efficiency and economies of scale.

The second category – rebates conditioned on exclusivity – has been condemned in a number of cases, including *Hoffmann-La Roche*, *Michelin* and *British Airways,* as presumptively unlawful. The *Intel* judgment clarifies that while exclusive dealing remains presumptively unlawful, if firms submit evidence that the conduct is not capable of restricting competition, the Commission must assess all the circumstances to decide whether the conduct is abusive. This is not merely a procedural requirement: if the dominant firm submits plausible evidence, the Commission must properly review that evidence and demonstrate that the conduct will nonetheless exclude equally efficient rivals.

The third category – fidelity-building rebates – require a full assessment of circumstances to analyse whether the rebate is likely to foreclose equally efficient competitors or make it more difficult for purchasers to choose their sources of supply (*Post Danmark II*, paragraphs 30 to 32).

The relevant circumstances include whether the rebates are individualised or standardised; the length of the reference period; the conditions of competition prevailing on the relevant market; the proportion of customers covered by the rebate; and whether the rebate is ultimately likely to foreclose an equally efficient competitor.

In addition, whether a rebate is retroactive or incremental is an important part of the assessment of all the circumstances. The Commission and EU Courts take a strict approach to retroactive rebates (which pay discounts retroactively on past purchases over a reference period if the customer meets predefined quantity targets). The concern is that the rebate creates a suction effect that makes it less attractive for customers to switch small portions of incremental demand to rivals (Guidance Paper, paragraph 40). Incremental rebates, on the other hand, do not create the same suction effect and are considered less of a concern (although they can still be problematic depending on the other factors set out above).

15 | Tying and bundling

Tying occurs when a supplier sells one product, the 'tying product', only together with another product, the 'tied product.' Five conditions must be established for a finding of abusive tying (*Microsoft*):

- the tying and tied good are two separate products;
- the undertaking concerned is dominant in the tying product market;
- customers have no choice but to obtain both products together;
- the tying forecloses competition; and
- there is no objective justification for the tie.

Typically, one of the main issues is establishing whether two components constitute separate products or an integrated whole. In *Microsoft*, the Court held that this assessment must be based on a number of factors, including 'the nature and technical features of the products concerned, the facts observed on the market, the history of the development of the products concerned and also . . . commercial practice' (*Microsoft*, paragraph 925).

Another important issue in tying cases is proving the tie has the effect of foreclosing competition. In *Microsoft*, for example, the Commission acknowledged that 'a closer examination of the effects that tying has on competition' was required and that there were 'good reasons not to assume without further analysis that tying WMP constitutes conduct which by its very nature is liable to foreclose competition' (paragraphs 841, 905–926). The Commission then demonstrated that Microsoft's tying of Windows Media Player with Windows had the actual effect of foreclosing qualitatively superior rival media players (paragraphs 819, 949–950). The Court, for its part, reviewed the Commission's analysis of 'the actual foreclosure effects of Microsoft's abusive conduct' (paragraphs 971, 1010, 1057).

A company could achieve the same effect as tying by ostensibly offering a standalone version of the tying product alongside a tied version, but at a price that realistically means customers will not purchase the standalone version. This is referred to as mixed bundling.

The Guidance Paper states that such bundled discounts should be assessed not under the tying framework described above, but in the same way as other forms of pricing abuse, by allocating the discounts fully to the price of the non-dominant tied product (paragraph 60). According to the Guidance Paper, if that calculation results in a price below the dominant company's long-run average incremental costs of supplying the tied product, the discount is anticompetitive – unless equally efficient rivals can replicate the bundle.

In its recent *Android* decision, the Commission maintains that Google engaged in abusive tying of the Google Play Store with the Google Search app and the Chrome browser. The Commission alleges that Google prevents pre-installation of rival search apps and browsers by OEMs on Android devices and that this forecloses competition. Google has appealed the decision and the matter is now before the General Court.

16 | Exclusive dealing

The Guidance Paper defines exclusive dealing as an action by a dominant undertaking 'to foreclose its competitors by hindering them from selling to customers through use of exclusive purchasing obligations or rebates' (paragraph 32).

The concern is that the exclusivity condition enables the dominant company 'to use its economic power on the non-contestable share of the demand of the customer as leverage to secure also the contestable share' (case T-286/09 *Intel* EU:T:2014:547, paragraph 93). A threshold question is therefore whether the clause involves the company leveraging a non-contestable share of demand.

If leveraging of a non-contestable share is established, the next question is to determine whether the condition constitutes exclusivity. The test is whether the purchaser has 'to obtain all or most of their requirements exclusively from the dominant undertaking' (*Intel,* paragraph 72).

As to what 'all or most of their requirements' actually means: 70–80 per cent of a purchaser's requirements will constitute 'most' and therefore be considered as exclusivity (*Hoffmann-La Roche*, paragraph 83). Similarly, the Vertical Restraints Block Exemption refers to an exclusive agreement as one where a buyer must purchase more than 80 per cent of its requirements from the seller (article 1d).

Exclusivity arrangements are considered presumptively unlawful. Under the new framework of *Intel* judgment, however, firms can submit evidence that the conduct is not capable of restricting competition and the Commission must then assess all the circumstances to determine whether the conduct is abusive (see question 14).

17 | Predatory pricing

Predatory pricing arises when a dominant company prices its products below cost such that equally efficient competitors cannot viably remain on the market.

A two-stage test applies to classify predatory pricing as abusive: first, pricing below average variable cost (AVC) is presumptively abusive (*Akzo*, paragraph 71); second, pricing below average total cost (ATC) but above AVC is abusive if it is shown that this is part of a plan to eliminate a competitor (*Akzo*, paragraph 72).

The Guidance Paper, however, indicates that the Commission will usually use alternative benchmarks – in particular, long-run average incremental cost (LRAIC) and average avoidable costs (AAC). In practice, however, this makes little difference because AVC and AAC will usually be the same, and ATC and LRAIC are good proxies for each other (Guidance Paper, fn. 18).

Recoupment (that is, the ability of the dominant firm to raise prices once other competitors have been foreclosed and thus recoup its costs associated with predatory pricing) is not a formal precondition of predatory pricing under article 102 of the TFEU (*France Telecom v Commission* case C-202/07 *France Telecom* ECLI:EU:C:2009:214). The Guidance Paper, however, suggests that the Commission will likely assess the impact of below-cost pricing on consumers as part of its analysis (paragraphs 69 to 71).

18 | Price or margin squeezes

A margin squeeze occurs when a vertically integrated company sells an input to its downstream rivals at a high price and, at the same time, prices its own downstream product at a low price such that its competitors are left with insufficient margin to compete viably in the downstream market.

This is abusive in EU law when 'the difference between the retail price charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market' (Guidance Paper, paragraphs 64 to 66; C-280/08 *Deutsche Telekom* ECLI:EU:C:2010:603).

In several cases, the EU Courts have emphasized that what matters for the margin squeeze analysis is as-efficient competitors. In other words, the analysis should be carried by reference to the costs and prices of the dominant company. This not only ensures that the competition rules do not protect less efficient competitors, but also provides legal certainty because the dominant firm is able to assess the lawfulness of its conduct (case T-851/14 *Slovak Telekom* ECLI:EU:T:2018:929, paragraphs 108, 230).

19 | Refusals to deal and denied access to essential facilities

Generally, dominant companies are free to decide whether to deal (or not) with a counterparty. As Advocate General Jacobs confirmed in Bronner, it is 'generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business' (case C-7/97 *Bronner* ECLI:EU:C:1998:264, paragraph 57). Refusal to supply cases have generally concerned alleged exclusion of rivals (ie, refusals to deal that may eliminate competition). As a practical matter, absent a competitive relationship between the customer and the dominant company, a refusal to supply an actual or potential customer is very unlikely to infringe article 102 of the TFEU.

Even when dealing with rivals, though, a refusal to supply products or access to facilities can be found abusive only in exceptional circumstances. The following three conditions need to be met for this to be the case (case C-7/97 *Bronner* ECLI:EU:C:1998:569; cases 6/73 to 7/73 *Commercial Solvents* ECLI:EU:C:1974:18; cases T-374/94 et al, *European Night Services and Others* ECLI:EU:T:1998:198):

- the requested input must be indispensable (ie, it is an essential facility);
- the refusal to supply is likely to eliminate competition in the downstream market; and
- there is no objective justification for the refusal.

If the refusal involves intellectual property, the refusal to license must also prevent the emergence of a new product (C-418/01 *IMS Health GmbH & Co* ECLI:EU:C:2004:257 (*IMS Health*); cases C-241/91 to C-242/91 *Magill* ECLI:EU:C:1995:98; and *Microsoft*).

A refusal to supply can be express or constructive (ie, the dominant company insists on unreasonable conditions for granting access to the facility).

The indispensability requirement is a high threshold: the input must be essential for a commercially viable business to compete on the downstream market. The test is whether there are 'technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult' to compete without access to the input (*Bronner, IMS Health*).

If there are 'less advantageous' alternatives, that means the input is not indispensable. For example, in *Bronner*, access to Mediaprint's (a newspaper distributor's) delivery network was not indispensable because Bronner could have used kiosks, shops and post. Mediaprint's refusal to grant access was therefore not abusive.

For this reason, past essential facilities cases have typically involved state-funded natural monopolies such as ports (case IV/34.689 *Sea Containers v Stena Sealink*), airport facilities (case IV/35.613 *Alpha Flight Services/Aéroports de Paris*), or gas pipelines (case IV/32.318 *London European – Sabena*, 4 November 1988), essential inputs for downstream products like basic chemicals (Joined cases 6/73 to 7/73 *Commercial Solvents* ECLI:EU:C:1974:18), or interoperability information (*Microsoft*).

In its *Google Shopping* decision (case AT.39740 — Google Search (*Shopping*)), the Commission arguably takes a different position. The decision appears to impose a duty on Google to supply access to comparison shopping services to its search results pages, without satisfying the Bronner criteria (indispensability and a risk of eliminating competition). It has been suggested that under the reasoning of the *Shopping* decision, the legal conditions the Court of Justice has identified for a duty to supply could be sidestepped and conduct that the Court has previously found lawful could be treated as an illegal abuse. Google has challenged this apparent change in the law in its pending appeal (case T-612/17 *Google and Alphabet v Commission* (2017/C 369/51)). The court proceedings should provide more guidance on where the limits for a duty to supply are to be drawn.

20 | Predatory product design or a failure to disclose new technology

Product design

Product design should only be found abusive in exceptional circumstances. Either the design must have no redeeming value and serve only to exclude competition or there must be additional factors that impede rivals' ability to compete independently.

In the first scenario, the design must be introduced solely to render rivals' products incompatible or to exclude rivals from the market. A good example is the changes in transmission frequencies in Decca Navigator that deliberately caused rival devices to malfunction (case IV/30.979 *Decca Navigator Systems*, 21 December 1988).

In the second scenario, the design change must create barriers that hinder rivals from reaching customers through their own means. In the *Microsoft* tying case, for example, Microsoft's tie foreclosed competing media players from access to third-party PC OEMs as a distribution channel. Microsoft therefore prevented rivals from reaching users independently of Microsoft via PC OEMs.

Absent a barrier to independent competition, a product improvement ought not to infringe article 102 of the TFEU. As Bo Vesterdorf, former president of the General Court, explained in comments on the *Microsoft* judgment: 'a technical development or improvement of . . . products is to the advantage of competition and thus to the advantage of consumers' (B Vesterdorf, article 82 EC: 'Where Do We Stand after the Microsoft Judgment?', *Global Antitrust Review*, 2008).

Failure to disclose IP

The Commission has found that an intentional and deceptive failure to disclose relevant IP during a standard-setting process may contribute towards an abuse (case COMP/38.636 *Rambus*). This is known as a 'patent ambush'.

In this scenario, the abuse actually constitutes the claiming of royalties for use of the IP after the IP is incorporated in the standard. This is because the company will not hold a dominant position at the time of its failure to disclose IP; it only achieves dominance once the IP is (deceptively) incorporated into the standard.

21 | Price discrimination

Unlawful price discrimination under article 102(c) of the TFEU may arise if a dominant company applies different terms to different customers for equivalent transactions.

Abusive price discrimination requires a number of elements:

- the dominant company must enter into equivalent transactions with other trading parties;
- the company must apply dissimilar conditions to these equivalent transactions (case C-174/89 *Hoche* ECLI:EU:C:1990:270, paragraph 25);
- if there are legitimate commercial reasons for the discrimination, there is no abuse (case C-322/81 *Michelin* ECLI:EU:C:1983:313, paragraph 90); and
- the discrimination must restrict competition downstream (i.e., on the relevant market where the customers are competing) by excluding equally efficient competitors (case C-525/16 *MEO* ECLI:EU:C:2018:270 .

Price discrimination abuses are relatively rare under article 102 of the TFEU. Price discrimination will generally only be found to be abusive if it is part of a strategy to drive rivals out of the market.

22 | Exploitative prices or terms of supply

Exploitative abuses, such as excessive pricing, fall under article 102(a) of the TFEU. This provides that an abuse may consist of 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions'.

Excessive pricing cases are rare; the leading case is *United Brands*. There, the Court held that a price is excessive if 'it has no reasonable relation to the economic value of the product supplied' (*United Brands*, paragraph 250).

This is assessed by a two-stage test: first, the difference between the dominant company's costs actually incurred and the price actually charged must be excessive; second, the imposed price must be either unfair in itself or when compared to the price of competing products (*United Brands*, paragraphs 251 to 252; case COMP/A.36.568/D3 *Port of Helsingborg* 23 July 2004, paragraph 147).

In the recent Latvian bank case, the Court of Justice (and Advocate General Wahl) has provided guidance on the conditions under which the imposition of high prices by a dominant firm might infringe article 102(a). The Court of Justice found that to identify unfair prices, comparisons with prices in neighbouring member states may be appropriate, provided that the reference countries are selected 'in accordance with objective, appropriate and verifiable criteria and that the comparisons are made on a consistent basis' (case C-177/16 *AKKA/LAA* ECLI:EU:C:2017:689, paragraph 51). The court also confirmed that excessive prices need to be significantly and persistently above the competitive level.

23 | Abuse of administrative or government process

Misuse of administrative or government processes may constitute an abuse. In December 2012, the Court of Justice upheld the Commission's decision finding that AstraZeneca had committed an abuse by misusing patent and regulatory procedures to boost its patent protection and exclude new entrants (case C-457/10 *AstraZeneca* ECLI:EU:C:2012:770).

AstraZeneca's abuse consisted of two elements: first, AstraZeneca submitted false and misleading statements to patent offices in various member states to extend its patent protection for the drug omeprazole. Second, AstraZeneca withdrew market authorisations of certain drugs so that new entrants could not rely on them. Even though this conduct was lawful under the relevant EU Directive, it still constituted an abuse of competition law because it was pursued with an anticompetitive strategy of excluding rivals from the market.

These cases, however, are rare. They would require a clear anticompetitive intent and proof of anticompetitive effects to found any enforcement action.

24 | Mergers and acquisitions as exclusionary practices

'Concentrations' (including mergers and acquisitions) with an EU dimension are covered exclusively by the EU Merger Regulation. If applicable national thresholds are met at the member state level, concentrations that do not have an EU dimension are assessed by member state competition authorities.

But this is not to say that acquisitions falling outside the EU Merger Regulation cannot constitute an abuse. In case AT.39612 *Perindopril* (*Servier*) 9 July 2014, for example, the Commission investigated a series of acquisitions by Servier of rival technologies – which Servier then did not use – to produce Perindopril. The Commission found that these strategic, blocking acquisitions constituted an abuse of a dominant position under article 102 of the TFEU. In December 2018, the General Court annulled article 102 part of the decision, primarily because the Commission committed a series of errors in defining the relevant market and therefore wrongly concluded that Servier was dominant.

Finally, if a transaction ultimately results in a dominant position (whether reviewed by the Commission or not), the Commission could later investigate the company if it suspected the company was abusing that dominance.

25 | Other abuses

The categories of abuse under article 102 of the TFEU are not a closed or exhaustive set. Other abuses found in the past include:

- removing competing products from retail outlets (case T-228/97 *Irish Sugar* ECLI:EU:T:1999:246);
- bringing frivolous litigation (case T-111/96 *ITT Promedia* ECLI:EU:T:1998:183);
- seeking and enforcing injunctions based on standard essential patents (case AT.39985 *Motorola* 29 April 2014, case AT.39939 *Samsung* 29 April 2014 and case C-170/13 *Huawei* ECLI:EU:C:2015:477); and
- petitioning for the imposition of anti-dumping duties on rivals (case T-2/95 *Industrie des poudres sphériques* ECLI:EU:T:1998:242).

New abuses, however, cannot be postulated without limitation. If a type of conduct falls within an existing category of abuse (such as refusal to supply or tying), the legal conditions necessary to establish that abuse need to be satisfied. The application of the relevant legal conditions turns on the substance of an objection, not the form. The terminology used to describe the conduct is not relevant. What matters is what the conduct constitutes as a substantive matter. For example, if a remedy in substance imposes a duty to supply, then the legal conditions for a duty to supply must be satisfied.

Also, exclusionary abuses must bring about anticompetitive foreclosure according to the criteria set out in response to question 10. This includes erecting barriers to independent competition; causation; a reasonably likely anticompetitive effect; and creating or reinforcing a dominant position.

ENFORCEMENT PROCEEDINGS

Enforcement authorities

26 | Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

At the EU level, the European Commission is the body with the power to investigate and sanction abuses of dominance. In parallel, national competition authorities of individual member states are competent to apply article 102 of the TFEU as long as the Commission has not opened a formal investigation on the same matter.

The Commission's primary instrument for investigation is issuing requests for information (including through formal decisions that are subject to penalty payments if the company does not respond), as well as interviews with the company under investigation, complainants and third-party industry participants. The Commission may also conduct unannounced inspections (dawn raids) at a company's premises, although these are relatively rare in article 102 of the TFEU cases.

Sanctions and remedies

27 | What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

The Commission can impose structural or behavioural remedies, interim measures, fines and periodic penalty payments. Alternatively, an undertaking can itself offer commitments to bring the infringement to an end, thereby avoiding a formal finding of an infringement and a fine.

Fines

For infringements of article 102 of the TFEU, the Commission can impose a fine of up to 10 per cent of a company's total turnover of the preceding business year. The methodology used to calculate the fine is set out in detail in the Commission's Fining Guidelines: the calculation takes it account the nature, length and scope of an infringement; the value of goods or services affected; and whether there are aggravating or mitigating circumstances. The record fine under article 102 of the TFEU is the €4.34 billion fine the Commission imposed on Google in its *Android* decision (currently under appeal).

Remedies

The Commission may impose both structural and behavioural remedies. Structural remedies, however, are only a means of last resort in article 102 of the TFEU cases when no behavioural remedies are appropriate; they are therefore very rare.

There are two main elements of remedies imposed under article 102 of the TFEU.

First, the remedy must be appropriate, necessary and proportionate to bring the identified infringement to an end (article 7 of Regulation 1/2003; and case T-395 *Atlantic Container Line* ECLI:EU:T:2002:49, paragraph 418).

Second, in cases where an infringement can be brought to end in different ways, the Commission cannot 'impose . . . its own choice from among all the various potential courses of actions which are in conformity with the treaty' (case T-24/90 *Automec* ECLI:EU:T:1992:97, paragraph 52; case T-167/08 *Microsoft* ECLI:EU:T:2012:323, paragraph 95). This means that the Commission can only impose a specific behavioural remedy if it is 'the only way of bringing the infringement to an end'.

For example, in the *Microsoft* interoperability case, the Commission's decision stated that Microsoft had to disclose inter-operability information at reasonable rates. But the decision did not prescribe the precise terms and conditions, and the Commission argued in court that it did not have the power to make such an order.

Individual sanctions

Individuals may not be fined or sanctioned at the EU level.

Enforcement process

28 | Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The Commission can impose sanctions directly. If a company appeals a Commission infringement decision and fine, the fine is not suspended pending the appeal. The company may, however, post a bank guarantee and pay the full fine (plus annual interest) if its appeal is unsuccessful.

As to remedies imposed by the Commission, companies may apply for interim suspension of the decision to the General Court pending the outcome of the substantive appeal. The Court will grant interim suspension if the company discloses a prima facie case; demonstrates urgency (which requires serious and irreparable harm if the suspension is not granted); and the balance of interest favours suspension.

Enforcement record

29 | What is the recent enforcement record in your jurisdiction?

The Commission is an active enforcer of abuse of dominance rules in Europe. Since 2010, the Commission has opened around 37 abuse of dominance cases. It has found nine infringements in that time (and closed 15 cases with commitments or via no action). It has roughly 15 cases ongoing.

The average length of proceedings in its closed cases is about three and a half years, although complex cases can span for considerably longer (the *Google Shopping* case took around seven years, for example). The sectors most commonly investigated are utilities, former regulated sectors and technology. The Commission has mainly investigated cases involving alleged exclusionary conduct (across the full spectrum of abuses), although there are some indications it would like to increase its caseload on exploitative abuses (such as its *Aspen Pharma* investigation).

At the Commission level, 2018 saw two notable enforcement actions: first, in January 2018, the Commission fined Qualcomm around €1 billion for granting exclusive rebates on its baseband chipsets in agreements with Apple; second, in July 2018, the Commission fined Google €4.34 billion for committing an abuse via the Android mobile operating service by, among other things, bundling Google Play with Google Search and Chrome. In addition, the Commission reached three commitment decisions with: Gazprom (concerning upstream gas supplies in Central and Eastern Europe), Greece (concerning lignite-fired electricity generation), and TenneT (concerning electricity trading between Denmark and Germany).

At the Court level, 2018 saw a number of notable developments:

- In *Servier*, the General Court annulled the article 102 aspect of a Commission decision, finding that the Commission erred in defining the relevant market and therefore failed to show that Servier was dominant. As noted in question 10, the Court also held that where conduct has been implemented and ongoing for some time, it would be paradoxical to permit the Commission to limit its assessment to likely future effects.
- In *Slovak Telekom*, the General Court confirmed the importance of the as-efficient competitor test in a margin squeeze case. This benchmark provides legal certainty and ensures that competition rules are not used to subsidise inefficient competitors.
- In *MEO*, the Court of Justice found that in the case of second-line price discrimination, it is necessary for the competition authority to show a restriction of competition between customers. This goes beyond a mere competitive disadvantage – the discrimination must cause a reduction in competition by excluding as-efficient competitors. Moreover, because in second-line discrimination cases, the dominant firm has no obvious interest in discriminating and restricting competition between its customers, courts and authorities must exercise 'particular care' before finding an infringement. They cannot merely presume the existence of anti-competitive effects.

In general, the past few years have seen both the General Court and the Court of Justice take an increasingly interventionist approach when reviewing Commission decisions, as demonstrated by the Court of Justices' landmark *Intel* judgment, and the General Court annulling the abuse of dominance aspect of the *Servier* decision.

Contractual consequences

30 | Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Although there is no express equivalent to article 101(2) of the TFEU for article 102 of the TFEU, a contractual provision that infringes article 102 of the TFEU will likely (by analogy with article 101(2)) be void. Provided the infringing provision can be severed from the rest of the contract, the rest of the contract will remain valid (case 56-65 *Société Technique Minière* ECLI:EU:C:1966:38).

Private enforcement

31 | To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

At the EU level, all antitrust enforcement is public enforcement by the Commission. Nonetheless, the Commission aims to encourage and facilitate actions brought by private claimants before member state courts. See question 32.

Damages

32 | Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Breaches of competition law are directly actionable in damages claims in member state courts.

In addition, companies can bring follow-on claims before member state courts, where a Commission decision finding an infringement acts as proof of breach. In such claims, the claimant only needs to prove causation and loss.

As to quantum, the Court of Justice established in *Courage v Crehan* (case C-453/99 *Courage and Crehan* ECLI:EU:C:2001:465) that a claimant has the right to compensatory damages for harm incurred as a result of the infringement. The Commission has published a Communication on quantifying harm in damages cases, which states that compensation should include the full value of any loss suffered, as well as loss of profit and interest from the time damage was incurred.

The Damages Directive, published on 5 December 2014, aims to ensure that victims of competition infringements can obtain full compensation for the harm they have suffered. Among other things, the

Directive introduces rules on the disclosure of evidence in such cases, as well as on the standing of indirect customers, the length of limitation periods, joint and several liability of infringers, and the passing-on of damages as a possible defence.

Appeals

33 To what court may authority decisions finding an abuse be appealed?

Commission decisions can be appealed to the General Court on points of fact and law. The General Court must establish 'whether the evidence relied on is factually accurate, reliable and consistent . . . and contains all the information [needed] to assess a complex situation . . . [and] is capable of substantiating the conclusions drawn from it' (*Microsoft*, case T-21/05 *Chalkor* ECLI:EU:T:2010:205, and case E-15/10 *Posten Norge AS*).

After the General Court appeal, the appeal is to the Court of Justice on points of law only.

UNILATERAL CONDUCT

Unilateral conduct by non-dominant firms

34 Are there any rules applying to the unilateral conduct of non-dominant firms?

Not at the EU level. See question 6.

UPDATE AND TRENDS

Forthcoming changes

35 Are changes expected to the legislation or other measures that will have an impact on this area in the near future? Are there shifts of emphasis in the enforcement practice?

We identify five main trends to watch out for over the next year:

- First, Commisssioner Vestager's term ends in October 2019. During her last few months, she may look to wrap up a number of open cases, as well as develop a framework for the assessment of the digital sector that will form part of her legacy and shape her successor's enforcement practice.
- Second, and relatedly, the Commission is looking to 'shape competition policy in the era of digitisation' and held a conference in Brussels in January to this end. The next year may see the Commission emerge with new proposals on how to apply competition law to the digital sector.
- Third, there are growing calls on both sides of the Atlantic for more vigorous competition enforcement, and even possibly a move away from the consumer welfare standard towards a broader public interest test (hipster antitrust). We do not think, however, that such radical changes are likely in the short to medium term.
- Fourth, the Commission and national authorities have several exploitative abuse cases in the pipeline. The pending Court of Appeal proceedings in the UK in *Pfizer/Flynn* (where the Commission is intervening) may provide some additional guidance on how to apply the excessive pricing test.
- Finally, 2019 is, of course, the year when the UK is currently scheduled to exit the EU. Depending on how, when, or even if Brexit takes place, we can expect a significant impact on EU antitrust enforcement – not just procedurally (eg, on matters such as concurrent jurisdiction over antitrust cases), but also perhaps substantively.

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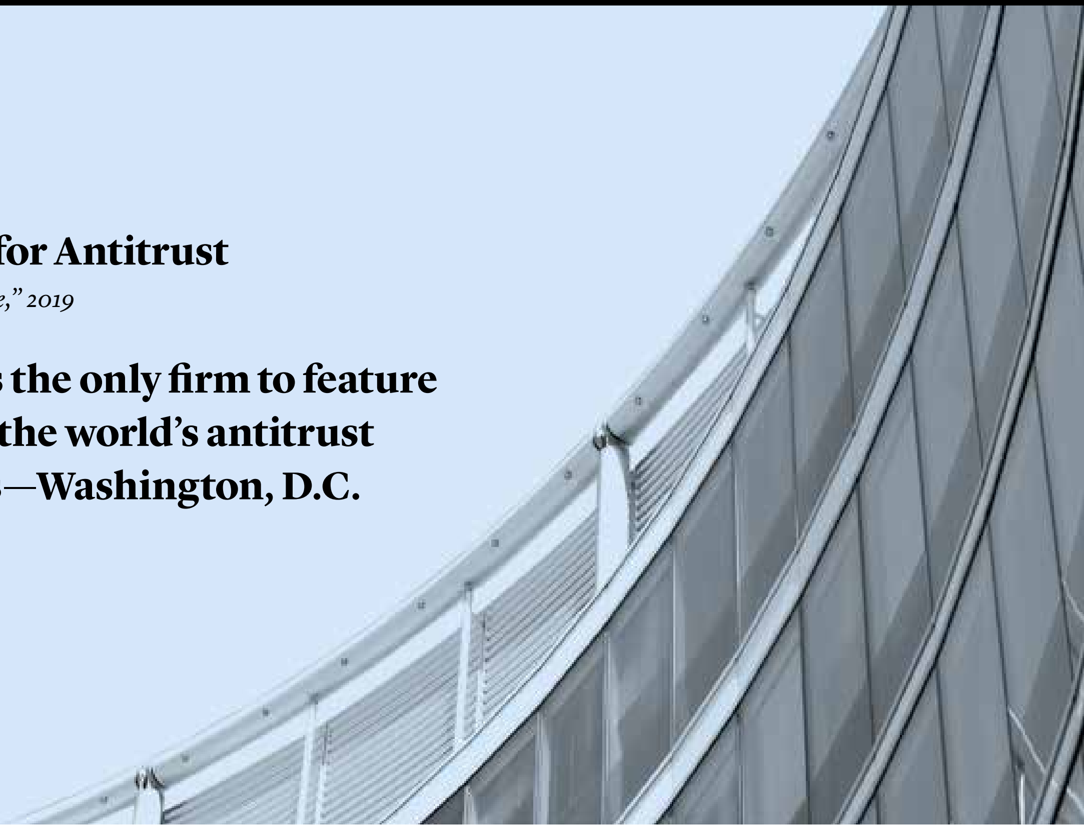

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