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

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Getting The Deal Through

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We are pleased to enclose a complimentary copy of Getting The Deal Through—Dominance, 2019

Cleary Gottlieb lawyers are the editors of this guide and authors of several country chapters.

We provide expert local insight in these and many other jurisdictions around the world and would be happy to answer any specific questions you have on dominance or antitrust matters more broadly.

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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.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Patrick Bock, Kenneth Reinker and David R Little of Cleary Gottlieb Steen & Hamilton LLP, for their assistance with this volume.

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Getting The Deal Through

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United States

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GENERAL FRAMEWORK

Legal framework

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

Section 2 of the Sherman Act, 15 USC section 2, is the primary US antitrust statute that applies to monopolies. US law recognises three separate violations arising under this statute:

- monopolisation, which requires possession of monopoly power in the relevant market and anticompetitive conduct that helps to obtain or maintain that power;
- attempted monopolisation, which requires a dangerous probability of achieving monopoly power, anticompetitive conduct that threatens to help achieve that power and a specific intent to monopolise; and
- conspiracy to monopolise, which requires a conspiracy, an overt act in furtherance of the conspiracy and a specific intent to monopolise.

Section 5 of the Federal Trade Commission (FTC) Act, 15 USC section 45 – which is enforced solely by the FTC and prohibits 'unfair methods of competition' – also applies to monopolists. Section 5 probably reaches more broadly than the Sherman Act, as the US Supreme Court has stated that there are more 'unfair methods of competition' than those prohibited by the Sherman Act.

Many US states have statutes that prohibit monopolisation or unfair methods of competition that are comparable to section 2 of the Sherman Act or section 5 of the FTC Act.

In certain industries, other statutes and regulations might also apply.

Definition of dominance

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

Monopoly power is not defined by statute, but is defined by the case law as the ability to control prices or exclude competition. It can be proven either through direct evidence of actual price increases or the exclusion of competitors or, more typically, through indirect evidence of high market shares plus barriers to entry. A share of below 50 per cent generally is not enough to support the inference of monopoly power. As shares increase above 50 per cent, the larger the share, the more likely they are to support the inference of monopoly power, with shares in the 70–80 per cent range generally sufficient. Other factors that are relevant when assessing the existence of monopoly power include the size and strength of competitors, potential future competition, price sensitivity, pricing trends, stability in shares and, in regulated industries, the scope and nature of regulation.

Monopoly power is a required element for monopolisation. As explained further in question 6, attempted monopolisation claims require only a 'dangerous probability' of achieving monopoly power, while conspiracy to monopolise claims arguably require only a specific intent to monopolise.

US law does not recognise the concept of relative dominance.

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 focus of the Sherman Act is economic, specifically, the preservation of competition and the promotion of efficiency and consumer welfare.

Section 5 of the FTC Act prohibits 'unfair methods of competition'. In an August 2015 Statement of Enforcement Principles Regarding Unfair Methods of Competition under section 5, the FTC stated that it will be guided by 'the promotion of consumer welfare' in applying section 5. However, some have suggested that section 5 could also be used to address various non-economic issues, such as environmental protection, privacy, employment or income equality.

Sector-specific dominance rules

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

There are a variety of sector-specific regulatory regimes at both the federal and state level, including in telecommunications, broadcasting, securities, energy, healthcare, transportation and agriculture. Some regulators can impose rate regulation (such as with public utilities), which might be appropriate in certain cases involving natural monopolies, or other rules that can limit monopolistic behaviour.

Generally speaking, all firms – including regulated firms – must comply with the antitrust laws. However, there are certain exemptions under federal statute, which are often industry specific. For example, certain insurance practices that are regulated by state law are exempt from the federal antitrust laws under the McCarran-Ferguson Act. In certain limited circumstances, notably involving the securities laws, courts have also found there is an implied immunity for certain conduct from the antitrust laws where there is a serious risk of conflict between the antitrust laws and a comprehensive regulatory regime. See *Credit Suisse Securities (USA) LLC v Billing*, 551 US 264 (2007).

Exemptions from the dominance rules

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

All types of entities are subject to the laws against monopolisation.

Federal government entities are immune from suit under the antitrust laws. State government entities – including the state legislature, highest court and executive – are also immune. State agencies and local governments (such as cities, counties and municipalities) are immune when the action is taken pursuant to a clearly articulated state policy to replace competition with regulation. The conduct of private entities can also be immune if the action is taken pursuant to a clearly articulated state policy and actively supervised by the state.

Private efforts to petition the government (such as lobbying) are also generally immune from antitrust challenge, provided that they are not 'shams' and do not otherwise involve an abuse of the governmental process, as discussed further in question 23.

Transition from non-dominant to dominant

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

Attempted monopolisation and conspiracy to monopolise claims do not require a showing of monopoly power.

An attempted monopolisation claim requires a showing of a 'dangerous probability' of achieving monopoly power. See *Spectrum Sports Inc v McQuillan*, 506 US 447 (1993). When evaluating if there is 'dangerous probability', courts look to many of the same factors as when evaluating whether monopoly power exists, in particular high market shares and barriers to entry. In some cases, a share of less than but close to 50 per cent can be sufficient to support an attempted monopolisation claim.

A conspiracy to monopolise claim arguably requires only showing specific intent to monopolise, with no requirement of showing that the conspiracy, if successful, would result in monopoly power. More recently, however, some lower courts have suggested that demonstrating a 'dangerous probability' of success is required.

Collective dominance

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

US law does not recognise collective dominance.

Dominant purchasers

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

Monopolisation law also applies to monopsonists. The analysis for monopsonists is similar to the analysis for monopolists.

For example, in 2007, in *Weyerhaeuser v Ross-Simmons Hardwood Lumber*, 549 US 312, the Supreme Court applied an analysis similar to predatory pricing to a predatory buying claim. The case involved a lumber manufacturer that had allegedly attempted to eliminate competition by driving up the cost of sawlogs that it was purchasing. The Court explained that a plaintiff seeking to establish a predatory buying claim must prove that the conduct caused the costs of the input to rise above the revenues that would be earned downstream and that the defendant has a dangerous probability of recouping its short-term losses from bidding up prices by increasing its monopsony power after driving out competition.

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?

US courts and agencies typically define markets by looking at what products or services are reasonably interchangeable substitutes for one another. Factors considered include prices, uses and quality. Geographic markets are defined by looking at the geographic area where other sellers operate and buyers can turn.

One method often used in market definition is to ask whether a hypothetical monopolist within a putative market could profitably impose a small, non-transitory price increase (typically 5 to 10 per cent) above competitive levels (in which case the relevant market would be no broader than the putative market) or whether, in response, so many customers would switch to alternatives outside the market that such a price increase would be unprofitable (in which case the relevant market would include other alternatives).

There are no market shares that automatically establish monopoly power, but as explained in question 2, a minimum 50 per cent share is required to find monopoly power and the greater the share above 50 per cent the more likely it is that monopoly power will be found.

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?

Simply possessing or exercising monopoly power is not illegal under US law.

Instead, US law prohibits only anticompetitive conduct that helps to obtain or maintain a monopoly. US law often refers to this type of conduct as 'predatory' or 'exclusionary'. US law considers both the potential anticompetitive and pro-competitive effects of the conduct. Monopolisation is not subject to per se rules.

The central challenge in monopolisation doctrine is differentiating between conduct that helps to obtain or maintain a monopoly through anticompetitive means (such as exclusive contracts that substantially foreclose competitors from the market without an offsetting pro-competitive justification) as opposed to conduct that helps to obtain or maintain a monopoly through pro-competitive means (such as introduction of a superior or lower cost product). In general, conduct that helps a firm gain or maintain a monopoly only because it makes the firm more efficient is generally viewed as pro-competitive, while conduct that otherwise impairs the efficiency of rivals could be anticompetitive. To establish illegal monopolisation, it is not enough to show that a particular competitor has been harmed; indeed, pro-competitive conduct, like offering a better product or lower prices, will naturally harm competitors. Instead, conduct must harm competition as a whole.

There is no definitive list of what conduct can constitute monopolisation, but the main categories that US law has recognised include predatory pricing, exclusive dealing, loyalty discounts, tying or bundling, refusals to deal and abuses of governmental process.

Exploitative and exclusionary practices

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

US law does not prohibit the exploitation of monopoly power. Instead, it prohibits only conduct that anticompetitively helps obtain or maintain monopoly power.

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?

Monopolisation requires proof of a causal connection between the anticompetitive conduct and the obtaining or maintenance of monopoly power. Provided that the anticompetitive conduct and the existence of monopoly power are rigorously proven, US law generally permits a looser standard of proof of the causal connection between the two. For example, in *United States v Microsoft*, 253 F.3d 34 (2001), the DC Circuit held that the causal connection can be established if the conduct 'reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power'.

Provided that the elements of monopoly power and anticompetitive conduct, as well as the causal connection between them, are established, the anticompetitive conduct can take place in an adjacent market to the market being monopolised. For example, in *Microsoft* the court found that Microsoft illegally maintained its monopoly in the operating system market by excluding competing internet browsers. However, if monopoly power in one market is used to obtain a non-monopoly advantage in another market, that is insufficient to state a monopolisation claim – the anticompetitive conduct must help obtain or maintain a monopoly in some market.

Defences

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

Beyond arguing that there is no monopoly power and no anticompetitive effect, a defendant can argue that the conduct has pro-competitive effects. Pro-competitive effects include reducing costs, providing higher-quality products, stimulating investment and preventing free-riding. Often, a burden-shifting analysis is applied in monopolisation cases, where the plaintiff must first establish anticompetitive effects, then the defendant must provide a pro-competitive justification, and then ultimately the burden is on the plaintiff to prove that the anticompetitive effects outweigh the pro-competitive benefits.

SPECIFIC FORMS OF ABUSE

To what extent conduct is considered abusive

14 | Rebate schemes

Loyalty conditions can have similar pro-competitive and anticompetitive effects as exclusive dealing (see question 16). Loyalty conditions typically are less than 100 per cent exclusive, but instead condition pricing on a customer making a certain percentage of its purchases from a particular supplier, such as 80 per cent or 90 per cent. Some courts apply an exclusivity analysis to loyalty conditions, focusing on what portion of the market is foreclosed. Other courts have analysed loyalty conditions by applying a predatory pricing analysis, suggesting that loyalty conditions can only be potentially anticompetitive when they result in a price that is below cost and where there is a dangerous probability that the monopolist will recoup its losses in the future (see question 17). Sometimes, loyalty conditions can be analysed similarly to tying and bundling by treating a customer's demand as consisting of both 'contestable' demand (that is, the portion that might be purchased from competitors, and thus is analogous to the tied product) and 'incontestable' demand (that is, the portion that would be purchased from the monopolist in any event, and thus is analogous to the tying product).

15 | Tying and bundling

Tying can have both pro-competitive and anticompetitive effects. The potential pro-competitive effects include reducing costs, improving quality, efficiently metering consumption and shifting risk. The potential anticompetitive effects include foreclosing rivals in the tied market, which can lead to increased market power in the tied market as well as protect market power in the tying market (eg, because there is partial substitution between the two markets or because entry or expansion in the tying market would be easier with a position in the tied market). Even if rivals are not foreclosed, tying can increase monopoly profits through enhancing price discrimination or the extraction of consumer surplus.

Under US law, a tying claim requires that the defendant have market power in the tying product, that the tying and tied items be separate products, that there be a tying condition and that the tying affect a not insignificant volume of commerce. (Proving substantial foreclosure of a relevant market is not a requirement for a tying claim, instead all that is required is that a not insignificant volume of commerce be affected.) In addition, ties can be justified by pro-competitive efficiencies. Although some older Supreme Court precedents might be read otherwise, in *Illinois Tool Works v Independent Ink*, 547 US 28 (2006), the Supreme Court clarified that tying arrangements can have pro-competitive effects and lower courts have considered pro-competitive effects when evaluating tying. In addition, in early 2017 the Department of Justice (DOJ) and FTC updated their joint Antitrust Guidelines for the Licensing of Intellectual Property and explained that they will consider both the anticompetitive effects and pro-competitive justifications of tying.

Bundling is a less extreme version of a tie, where instead of an absolute refusal to sell the two products individually, there is a pricing difference or other incentive to buy the products together rather than separately. Bundling has similar potential pro-competitive and anticompetitive effects as tying. Some courts have applied an exclusive dealing analysis and found that bundling can be potentially anticompetitive if it forecloses a substantial share of the market. Other courts have applied a predatory pricing analysis and suggested that bundling cannot be anticompetitive unless it results in prices that are below cost. (However, unlike predatory pricing, courts applying this approach generally decline to require recoupment in the context of bundled pricing. See question 17.) In assessing whether bundled prices are below cost, courts have applied a 'discount attribution test,' which takes the entire price discount across all bundled products, applies the entire discount to the individual price of the competitive product and then compares the resulting price to the cost of the competitive product.

16 | Exclusive dealing

Exclusive dealing can have both pro-competitive and anticompetitive effects. The potential pro-competitive effects include reducing uncertainty, encouraging relationship-specific investments and facilitating efficient contracting. The principal potential anticompetitive effect is that the exclusive dealing will foreclose rivals from so much of the marketplace that it impairs rival efficiency, including by depriving rivals of economies of scale, access to the most efficient distribution channels, or network effects, among other possible types of harm. Accordingly, exclusive dealing does not violate the antitrust laws unless it forecloses a 'substantial share' of the relevant market. Some courts have suggested that foreclosure of as little as 20–30 per cent might suffice, while others have suggested that 40–50 per cent might be required. Some courts have suggested that the foreclosure required might be somewhat lower where the defendant is a monopolist.

17 | Predatory pricing

Predatory pricing is actionable either as monopolisation or under a separate statute called the Robinson-Patman Act. The substantive standards are similar, although the Robinson-Patman Act might reach more broadly and apply to conduct by oligopolists as well as monopolists.

US law imposes rigorous requirements to sustain a predatory pricing claim. Specifically, a plaintiff must prove that the defendant's prices are below cost and that the defendant has a 'dangerous probability' of recouping the losses that it incurs when charging below-cost prices by in the future raising its prices above competitive levels after driving competitors from the market. See *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, 509 US 203 (1993). Although the Supreme Court has not expressly adopted a particular measure of cost, almost all lower courts have required that the price be below an appropriate measure of incremental cost.

18 | Price or margin squeezes

A price or margin squeeze is when a vertically integrated firm charges high prices for an upstream input and low prices for the downstream product, such that a competitor that is not vertically integrated cannot afford to compete because it must pay high prices for an input while charging low prices downstream. Under US law, a price squeeze is not an independent basis of liability and a plaintiff must prove either an upstream refusal to deal or downstream predatory pricing. See *Pacific Bell Telephone Co v linkLine Communications Inc*, 555 US 438 (2009).

19 | Refusals to deal and denied access to essential facilities

US law generally does not impose a duty to deal with competitors, even on monopolists. However, in limited situations, US law has found a duty to deal where:

- a monopolist over an input refuses to supply the input to its downstream competitors;
- the refusal helps create or maintain a monopoly;
- the monopolist ceases a prior, voluntary and profitable course of dealing with the competitors;
- the monopolist discriminates on the basis of rivalry by refusing to deal with its competitors while continuing to deal with non-competitors; and
- the refusal to deal lacks a pro-competitive justification.

Potentially, a refusal to deal claim could be based on a constructive refusal to deal, even if the monopolist did not absolutely refuse to deal (eg, if the monopolist set such a high price for the input that it was essentially equivalent to refusing to deal at all).

Lower courts have also recognised an 'essential facility' claim for monopolisation where:

- the monopolist has control of a facility that is necessary for rivals to compete;
- the monopolist has denied the use of the facility to the rival;
- rivals cannot practically duplicate the facility; and
- providing access is feasible.

The US Supreme Court, however, has never adopted the essential facilities doctrine; instead, it has adopted only the refusal to deal doctrine outlined above.

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

US law is generally reluctant to second-guess product design decisions. The antitrust laws encourage innovation, and courts and regulators are not well positioned to evaluate and weigh the pro-competitive and anti-competitive effects of product design decisions. Thus, US law is unlikely to find that a product design decision constitutes monopolisation, unless the product design change clearly is not an improvement and has no benefit to customers.

US law also generally does not impose liability for failure to disclose technology changes.

21 | Price discrimination

Price discrimination is not an independent basis of monopolisation liability. Instead, price discrimination only constitutes monopolisation if it is also predatory.

The Robinson-Patman Act, which is not specific to monopolists, prohibits certain discriminatory pricing (even if it is not predatory) where there are 'reasonably contemporaneous' sales of commodities to multiple customers that compete downstream. Although the statute requires showing a reduction in competition, US case law generally infers that there is a reduction in competition from the existence of a substantial price differential over a substantial period of time. In practice, however, there is essentially no enforcement of the Robinson-Patman Act by regulators, and private cases are difficult to win because the private plaintiffs must prove that they suffered antitrust injury (ie, that their injury resulted from the anticompetitive effects of the conduct) and, if they are seeking damages, the amount of damages, meaning that private plaintiffs must in effect prove anticompetitive effects. The Robinson-Patman Act does not prohibit discriminatory pricing if the sale does not involve commodities, if the favoured and disfavoured customers do not compete, or if the products sold are not of like grade and quantity. A number of other defences are available including that the pricing reflected a good-faith effort to meet a competitor's low price, that the price differential was justified by differences in cost or changing market conditions, that the lower price was available to the buyer that paid the higher price and that the lower price reflected a functional discount for services provided by the customer (eg, a lower price to distributors might reflect the value of their distribution services).

22 | Exploitative prices or terms of supply

US law does not recognise exploitative abuses.

23 | Abuse of administrative or government process

Valid, genuine efforts to petition the government are immune from liability under the antitrust laws (see question 5). The immunity extends to the direct effects of government action, as well as indirect effects that are incidental to the petitioning effort. However, abuse of government processes can constitute monopolisation. 'Sham' litigation that is both objectively and subjectively baseless can be monopolisation. See *Professional Real Estate Investors v Columbia Picture Industries*, 508 US 49 (1993). Other abuses of governmental processes include patterns of repetitive claims regardless of the merits to impose costs on competitors (see *California Motor Transp Co v Trucking Unlimited*, 404 US 508 (1972)); obtaining a patent through fraud (see *Walker Process Equipment v Food Machinery & Chemical Corp*, 382 US 172 (1965)); and making deliberate misrepresentations to a government agency promulgating a standard (see the FTC's action in *In the Matter of Union Oil Company of California (Unocal)*).

24 | Mergers and acquisitions as exclusionary practices

Mergers are typically challenged under section 7 of the Clayton Act, 15 USC section 18, which prohibits mergers that 'substantially … lessen competition' or 'tend to create a monopoly'. However, mergers that help obtain or maintain a monopoly can also be challenged as monopolisation.

25 | Other abuses

As mentioned, there is no definitive list of the types of conduct that can constitute monopolisation under US law.

In certain extreme cases, tortious conduct interfering with a competitor's business can be monopolisation. For example, *Conwood v United States Tobacco Co*, 290 F.3d 768 (6th Cir 2002), involved a monopolisation claim against a defendant smokeless tobacco manufacturer that removed and destroyed its competitor's display racks and advertising from retail stores without the permission of the retailers. In upholding the jury verdict for the plaintiffs, the court noted that tortious activity ordinarily does not constitute monopolisation, but found that point-of-sale advertising was particularly important in the smokeless tobacco industry given regulatory restrictions on mass advertising.

Again, in certain extreme cases product disparagement or false or misleading advertising might also be enough to support a monopolisation claim. Some courts have suggested that to sustain this type of claim, the plaintiff would need to prove that the statement was clearly false, clearly material, prolonged, clearly likely to induce reasonable reliance, made to buyers without knowledge of the subject matter, and not readily susceptible to neutralisation or other offset by rivals. Other courts have applied both stricter and more lenient standards.

ENFORCEMENT PROCEEDINGS

Enforcement authorities

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

The DOJ and the FTC are the federal regulators with primary responsibility for enforcement against monopolisation. (Some industry-specific regulators have enforcement authority with respect to their industry.) Investigations can start in a variety of ways, including on the regulator's own initiative (eg, learning about conduct from the news), complaints from interested parties, or requests from other governmental actors (eg, requests from the US Congress).

The investigatory powers of both regulators are extensive and include the powers to subpoena documents and data, compel testimony and require written responses to interrogatories.

Sanctions and remedies

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

Available remedies in monopolisation cases brought by regulators include injunctive relief and other equitable remedies, as well as civil penalties. Injunctive relief can include structural remedies (such as divestitures or, in extreme cases, dissolving or splitting the defendant firm) or behavioural remedies (such as prohibiting the defendant from engaging in certain activities or requiring that the defendant deal with rivals on certain terms). Equitable relief can also include monetary equitable remedies, such as disgorgement of profits or restitution. Although monetary equitable remedies are unusual, they can be quite significant, and in one case the FTC obtained monetary equitable relief in a settlement of over US$1 billion.

Although criminal sanctions are theoretically available in monopolisation cases, they are not pursued in practice.

Enforcement process

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

The DOJ must bring monopolisation actions in federal court.

The FTC can bring monopolisation actions in federal court, but it also can bring enforcement actions in its internal administrative courts. The FTC must sue in federal court to obtain injunctions, monetary equitable remedies or civil penalties. But the FTC can issue forward-looking 'cease and desist' orders after an administrative hearing, and it has very broad latitude in fashioning these orders to remedy the misconduct – it can require divestitures, prohibit otherwise lawful business activities that could be used to facilitate an unlawful activity, and require affirmative conduct to restore competition.

Enforcement record

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

The agencies regularly investigate monopolisation cases, but bring a relatively limited number of cases, at most a few cases a year.

Investigations can take significant time – with some lasting multiple years – and if a lawsuit is brought, it generally takes well over a year to reach an initial decision and longer through the appeals process. Thus, enforcement decisions often do not occur until long after the challenged conduct has occurred, during which time the industry might have changed, making it difficult to effectively remedy violations.

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?

A contract that violates the antitrust laws is unenforceable. Whether the particular offending provisions can be severed from the rest of the contract is determined on a case-by-case basis.

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?

Private parties can bring claims under the antitrust laws, although private parties cannot enforce the FTC Act. Private plaintiffs can seek damages or injunctive relief.

In addition, the US government, US states, and foreign governments can bring federal antitrust claims as an injured party (eg, if the government is a purchaser of the product). US states can also bring parens patriae actions seeking treble damages on behalf of their residents.

Damages

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

Private parties, as well as governments suing on their own behalf or on behalf of their residents, are entitled to three times their actual injury plus litigation costs and reasonable attorney fees. (There are a

few exceptions that typically do not apply in monopolisation cases – eg, a foreign government is generally limited to single damages, and a defendant in a cartel case that obtains amnesty and cooperates with private plaintiffs is subject only to single damages.)

To obtain damages, beyond proving an antitrust violation, a plaintiff must prove that it suffered injury, that the violation was a material and proximate cause of its injury, and that its injury was an 'antitrust injury', meaning that it resulted from the anticompetitive effects of the violation. A private plaintiff must also prove the amount of damages with reasonable certainty. Typically, damages are measured as the difference between the plaintiff's position in the actual world and the position that the plaintiff would have been in 'but for' the anticompetitive effects of the violation.

Damages can be significant. For example, in *Conwood v US Tobacco*, the plaintiff was awarded US$1.05 billion after trebling in a case alleging that a smokeless tobacco manufacturer had removed and destroyed a competitor's display racks and advertising from retail stores without the permission of the retailers.

Appeals

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

Cases brought in federal district court by regulators or private plaintiffs are entitled to an appeal to a federal appellate court. Subsequently, parties can petition for review by the US Supreme Court. On appellate review, findings of fact are given substantial deference and reversed only for clear error. Findings of law are reviewed de novo. Mixed questions of fact and law – such as how legal principles apply to particular facts – are generally reviewed on a sliding scale.

Cases brought by the FTC in its administrative courts can be appealed first to the Commission and then to a federal appellate court. In those cases, the appellate court will review whether the FTC's findings of fact are supported by substantial evidence. In addition, appellate courts generally give some deference to the FTC's conclusion that conduct violates section 5 of the FTC Act.

UNILATERAL CONDUCT

Unilateral conduct by non-dominant firms

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

As addressed in questions 1 and 6, monopoly power is not required for attempted monopolisation or conspiracy to monopolise claims.

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?

In June 2018, the Supreme Court decided *Ohio v American Express*, a case about the proper antitrust analysis of two-sided markets. The DOJ and several states sued Amex in 2015 alleging that anti-steering provisions of American Express's contract with merchants were anticompetitive because they limited the ability of merchants to encourage customers to use non-Amex credit cards that charge lower merchant fees. The Supreme Court held that these provisions were not anticompetitive. The Supreme Court reasoned that the credit card market is a two-sided 'transaction platform' with the merchant on one side and the cardholder on the other. Thus, the effect on both sides of the market needed to be considered when evaluating whether the provisions violated the antitrust laws. If Amex charged a higher fee to merchants, that could benefit card holders in the form of better rewards programmes, and in turn that could benefit merchants by encouraging more spending. Although the plaintiffs argued that the merchants paid higher fees to Amex, the Supreme Court found that they failed to demonstrate that the net price charged by Amex for credit card transactions were higher when considering both the merchant fees and the rewards paid to cardholders. The Supreme Court also found that the plaintiffs failed to demonstrate that the anti-steering provisions reduced output. The dissent disagreed with including merchants and cardholders in a single market and argued that plaintiffs had demonstrated anticompetitive effects including by demonstrating that Amex had the ability to increase its merchant fees without losing market share. This case was pursued as a unreasonable restraint of trade case under Section 1 of the Sherman Act, 15 USC section 1, but it is likely to be applicable in many cases involving alleged monopolists in multi-sided markets.

The Supreme Court also heard argument in a monopolisation case brought by a proposed consumer class action against Apple. The lawsuit alleges that Apple illegally monopolised the market for apps for iPhones by forcing app developers to sell only on Apple's app store platform, charging a percentage commission on those sales, and causing developers to raise the price of the app charged to consumers. The issue before the Supreme Court is whether the consumers have antitrust standing to sue under doctrines that typically limit the ability of indirect purchasers to bring federal antitrust lawsuits. The consumers contend they are the direct purchasers because they pay Apple for the apps, while Apple contends that the direct purchasers are app developers because they are the ones that pay the allegedly inflated commission to Apple. As of the time of writing, the Supreme Court has not yet issued a decision. However, at oral argument in November 2018, the questioning suggested that the majority could side with the consumers, which could make it easier for plaintiffs to have standing to bring antitrust lawsuits in federal court.

The FTC and DOJ did not file new monopolisation cases over the last year, but the FTC has continued to pursue several pending monopolisation cases and the DOJ has weighed in on a private case.

In January 2019, the trial concluded in the FTC's case against Qualcomm alleging that Qualcomm used its monopoly position in baseband chips for mobile phones to impose anticompetitive licensing terms for standard-essential patents that allegedly impaired Qualcomm's competitors in baseband chips by imposing a 'tax' on competing chips. A decision had not been issued at the time of writing.

The FTC has also pursued abuse of process cases involving pharmaceuticals. In June 2018, the FTC won a US$448 million judgment against AbbVie for sham litigation related to patent infringement lawsuits filed against potential generic competitors of its AndroGel product. In 2017, the court had granted summary judgment in favour of the FTC finding patent litigation was objectively baseless, and in its 2018 opinion, the court found that AbbVie had monopoly power and that the litigation was subjectively baseless. This case is among a limited number sustaining a sham litigation claim. The case is on appeal at the time of writing.

The FTC suffered a defeat in another abuse of process case. In a 2017 lawsuit, the FTC alleged that Shire ViroPharma had engaged in a campaign of serial, repetitive and unsupported filings before the US Food and Drug Administration to delay the entry of generic competitors for Vancocin capsules and sought an injunction against future FDA filings. In March 2018, a federal judge dismissed the lawsuit finding that the FTC did not have statutory authority to seek an injunction unless it has 'reason to believe' that the defendant 'is violating, or is about to violate' the law. According to the district court, that requires the FTC to show more than that a violation is 'likely to recur'. This decision runs

contrary to numerous other decisions interpreting the FTC's authority to seek equitable relief more broadly. If this decision is upheld on appeal, it could be a significant impediment to the FTC's ability to bring enforcement actions.

The FTC has also continued to pursue reverse payment patent settlements. In February 2019, the FTC entered into a settlement barring Teva from entering patent settlements that limited branded pharmaceutical companies from launching authorised generics (AG). This settlement expanded a prior 2012 order where Teva already agreed to disgorgement of US$1.2 billion and to not enter into patent settlements involving payments from or certain types of side deals with branded manufacturers. This settlement resolves Teva's involvement in three pending FTC cases about patent settlements.

In May 2018, an FTC administrative judge dismissed a case against Impax where the FTC alleged that Impax agreed to delay launch of a generic version of Opana ER until January 2013 in exchange for Endo's agreement that it would delay launch of an authorised generic and pay Impax US$40 million in an alleged side deal related to development and co-promotion of another drug. The judge found that Impax would have been unlikely to launch a generic drug 'at risk' prior to January 2013 because that would have been before a court decision in related patent litigation and the agreement between Endo and Impax that allowed Impax to enter in January 2013 and thus facilitated earlier entry. The FTC trial counsel has appealed this decision to the Commission. The decision was pending at the time of writing.

The DOJ does not have pending monopolisation litigation of its own, but In November 2018, it filed an amicus brief in an appeal of private litigation between Comcast and Viamedia involving refusal to deal allegations. The DOJ's amicus brief argued that the court should hold that a refusal to deal does not constitute illegal monopolisation where there are valid business reasons for the refusal and unless the refusal would make 'no economic sense' but-for the elimination of competition.

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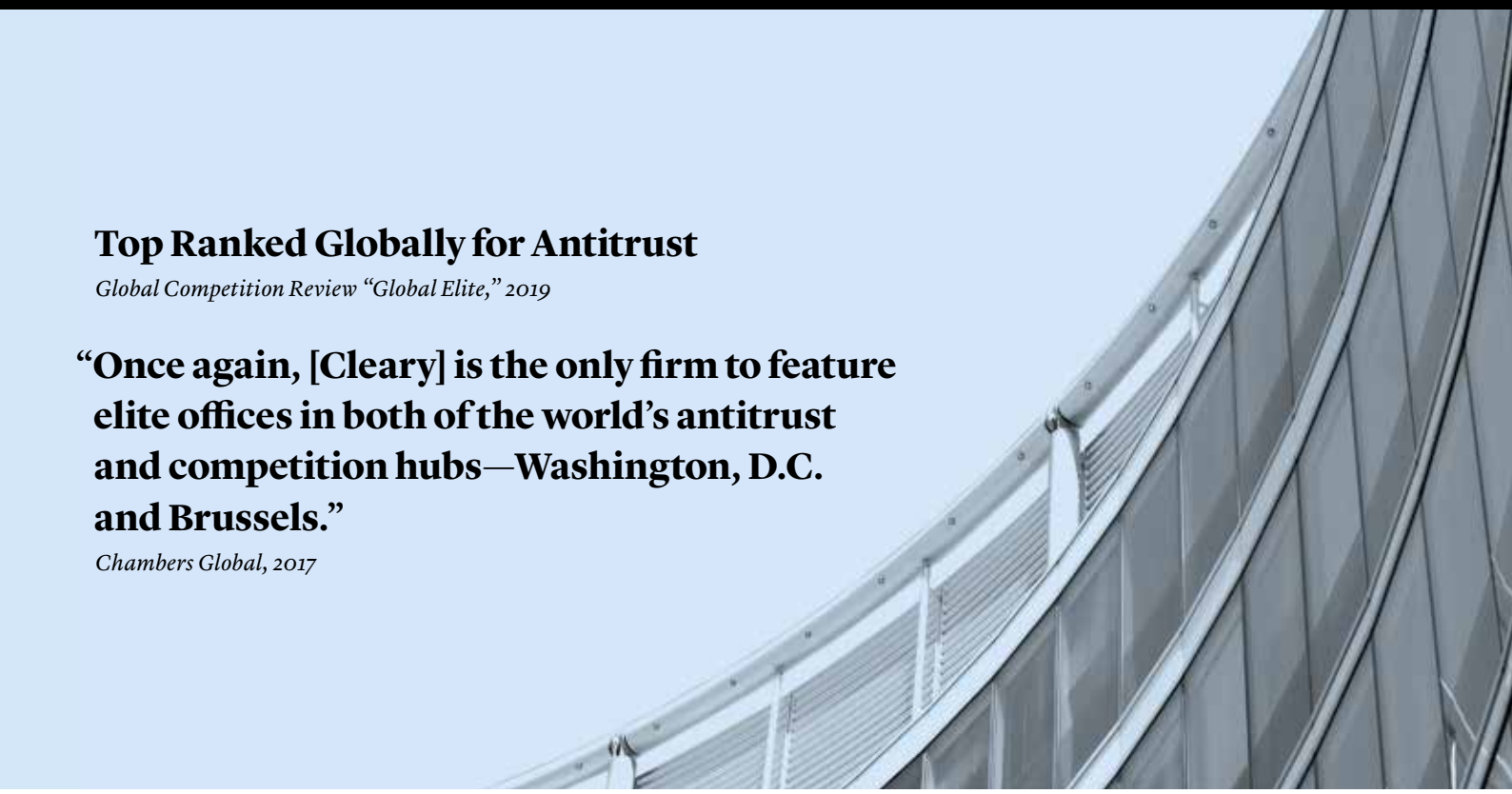

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