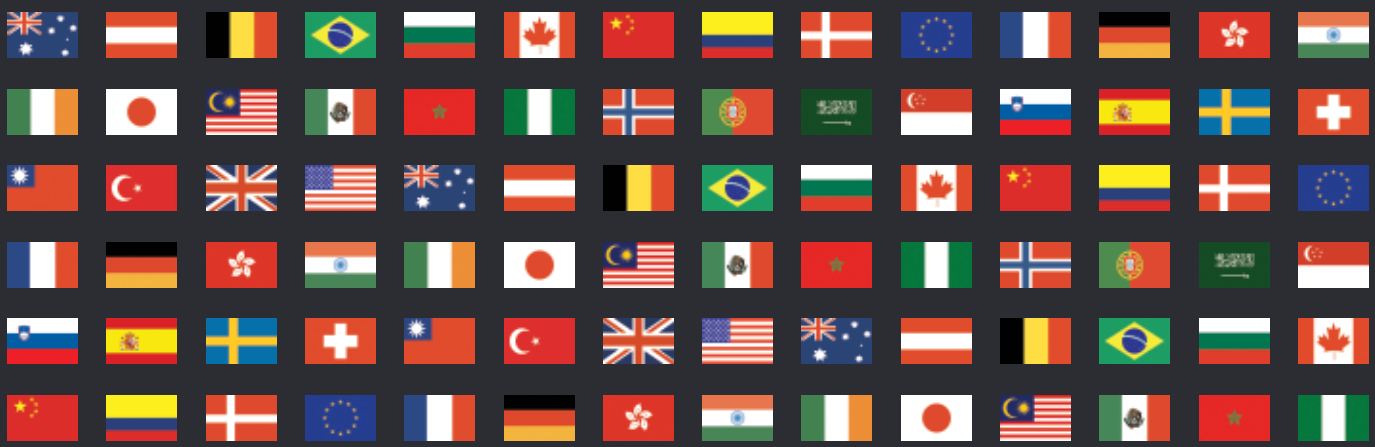
Dominance
2020

Contributing editors
Patrick Bock and Kenneth Reinker



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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the sixteenth 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 Nigeria.

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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.

Lexology 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 and Kenneth Reinker of Cleary Gottlieb Steen & Hamilton LLP, for their continued assistance with this volume.

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Global overview

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Abuse of dominance is arguably the most complex area in competition law. It presupposes distinctions between anticompetitive exclusionary conduct and competition on the merits, and between legitimate and 'exploitative' terms or prices. Such distinctions are rarely clear in practice. The task is more challenging still where antitrust authorities apply these principles to new markets, for example, in the digital sector, where prior case law and principles developed in traditional industries may be ill suited to capture rapid changes in competitive structures and consumer demand. Small wonder that there is often divergence in the enforcement priorities and practice of competition authorities around the world.

While the legal distinctions in this area of competition law are nuanced, and investigations are fact-specific and resource-intensive, the consequences of infringing rules on abuse of dominance may be severe. Antitrust authorities have imposed fines in the billions of dollars in single-firm conduct cases on household names, such as Google, Qualcomm and Intel.

Yet despite these significant costs, in most jurisdictions and scenarios, companies cannot submit proposed conduct to competition agencies for ex ante review. This guide aims to assist companies and their advisers with the complex exercise of self-assessment. In doing so, it draws on the insights of specialist counsel from a wide range of jurisdictions. They include long-established antitrust regimes, such as the US, Canada, the EU and Japan. The guide also covers fast-evolving practice and principles in ambitious, developing jurisdictions such as China and India, and nascent antitrust regimes such as Hong Kong, offering a detailed summary of applicable rules and an overview of the enforcement climate.

A high-level summary cannot do justice to the careful contributions of the various authors of this guide. In this introduction, though, we draw attention to a number of important recent trends.

Revolution and counter-revolution: the as efficient competitor test

Ever since the European Commission began its movement towards a 'more economic approach' to abuse of dominance issues with its 2005 white paper, lawyers, economists and agencies have debated the need to examine whether conduct would exclude as efficient rivals. This debate has intensified since the Court of Justice judgment in *Intel* in 2017, which made clear that the competitive assessment focuses on the 'exclusionary effect on competitors considered to be as efficient as [the dominant firm] is'. Thus, if a firm submitted evidence that its conduct was incapable of foreclosing competition, the European Commission would be required to analyse, among other factors, the existence of any strategy to exclude equally efficient rivals. Critically, the assessment should examine the 'intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking'.

Commissioner Vestager stated in a speech in 2018 that the *Intel* judgment confirmed the Commission 'can presume that this sort of rebate, from a dominant company, is against the competition rules' and 'in practical terms, our main conclusion is that you won't see fundamental change'. In December 2017, the Italian Competition Authority issued a decision fining Unilever €60 million in respect of allegedly anticompetitive rebates concerning single-wrap ice creams. The Authority noted that its judgment followed the *Intel* ruling, but did not appear to consider itself bound to apply the 'as efficient competitor' (AEC) test. Rather, it analysed the factors listed in the *Intel* judgment (eg, market coverage of the practice) following Unilever's submission of an AEC analysis. (Interestingly, the UK Competition and Markets Authority (CMA) carried out its own effects analysis in the UK and found that the conduct was not abusive.) In March 2019, the CMA determined that there were 'no grounds for action' in its long-running investigation into discounts that Merck Sharp & Dohme Limited offered on its Remicade medicine. The CMA denied, though, that the AEC test was a necessary component of the competition analysis. And, in 2019, the UK Competition Appeal Tribunal held that the UK's competition enforcer in the mail sector, Ofcom, was not required to carry out an AEC test in its assessment of 'competitive disadvantage', despite Royal Mail having submitted an AEC analysis during the administrative procedure

By contrast, other commentators argue that Intel creates a concrete legal requirement to examine the AEC test, consistent with the Commission's own guidance paper on abuse of dominance. Advocate General Wathelet's Opinion in *Orange Polska* in February 2018 explained that the analytical framework in Intel 'is by no means a purely procedural requirement'. Rather, he emphasised the need to show a capability or likelihood that the rebate would exclude equally efficient rivals and that article 102 of the TFEU does not 'seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market'.

The importance of the 'as efficient competitor' criterion has been confirmed in other categories of abuse too, including the 2018 Court of Justice judgment in MEO relating to discrimination and the 2018 General Court judgment in *Slovak Telekom* relating to an alleged margin squeeze. The precise requirements of the AEC criterion will likely continue to feature in abuse of dominance appeals, such as the *Qualcomm* and *Google Android* cases.

Interaction between agencies: commonalities and divergence

It has long been a concern that companies face divergent legal assessments of their conduct in different jurisdictions, contrasting the traditionally more interventionist Europe with a US enforcement climate that is concerned with avoiding errors of over-enforcement (known as 'Type I' errors), as well as less predictable emerging antitrust jurisdictions in Asia. A prominent example is the *Google Shopping* case, which in 2017 led to an infringement decision and a €2.3 billion fine in Europe, whereas the case was closed without a finding of infringement in the US (as well as in Canada and Taiwan and, in similar cases, in Germany and the United Kingdom).

A further example of potential divergence concerns the Court of Justice judgment in *Huawei v ZTE*, which set out the conditions under which standard essential patent owners could seek injunctions against implementers without committing an abuse of dominance. On one view, the prescriptive procedure laid down by the Court of Justice for negotiating SEP licences created a possibility for a harmonised framework for assessing conduct by SEP holders. In the UK case of *Unwired Planet v Huawei*, though, Mr Justice Birss stated: 'I am not persuaded that the CJEU in *Huawei v ZTE* sought to set out a series of rigid predefined rules, compliance with which is never abusive whereas deviation from which is always abusive, all regardless of the circumstances. Abuse of dominance is a serious matter and the court will have had well in mind that circumstances can vary.' This was confirmed by the Court of Appeal in 2018, which construed the *Huawei v ZTE* criteria as a 'safe harbour' rather than a set of mandatory conditions to avoid committing an abuse. It moreover accepted that its approach to assessing whether a proposed royalty rate was 'discriminatory' differed from the approach taken by courts in China and elsewhere. This case is now before the UK Supreme Court.

In other cases, agencies have reached consistent conclusions and contributed to each other's enforcement practice. For example, the European Commission's 2017 decision to fine Qualcomm almost €1 billion followed investigations into Qualcomm's patent licensing practices in other jurisdictions. In 2015, China's NDRC imposed a fine on Qualcomm of US$975 million for failure to license its standard essential patents on fair, reasonable and non-discriminatory (FRAND) terms. Subsequently, the Korean Fair Trade Commission fined Qualcomm US$854 million for unfair patent licensing practices (Qualcomm's appeal is ongoing). Taiwan's TFTC found Qualcomm had committed an abuse by precluding competition through exclusivity agreements and related practices. And the US FTC filed a complaint against Qualcomm, alleging that it used its monopoly position in supplying baseband chips for mobile phones to impose anticompetitive licensing terms on SEPs. In particular, the FTC alleges that Qualcomm would only supply its modem chips to mobile phone manufacturers that agreed to a Qualcomm patent licence requiring the customer to pay royalties to Qualcomm, even when using modem chips bought from Qualcomm's rivals. The FTC claimed this 'no licence, no chips' policy imposed an anticompetitive tax on competing chips. The FTC won a partial summary judgment in November 2018, with the case proceeding to trial in 2019. In her opinion of May 2019, Judge Koh found that the 'no licence, no chips' policy is anticompetitive. She also held that: (i) Qualcomm's payment of incentive funds to manufacturers such as Apple are de facto exclusive deals that are anticompetitive; (ii) Qualcomm's refusal to license its SEPs to other chip suppliers violates its FRAND commitments and is anticompetitive; (iii) Qualcomm's refusal to license is tantamount to an anticompetitive refusal to deal; and (iv) Qualcomm's royalties for its SEPs are unreasonably high. The Department of Justice, by contrast, has adopted a more pro-licensor policy. Assistant Attorney General Makan Delrahim referred in a September 2018 speech to the Department's 'New Madison' approach, which contends that 'antitrust law should not be used as a tool to police FRAND commitments'.

More broadly, antitrust authorities and courts are increasingly confident of their ability to assess abuse of dominance issues in respect of conduct by holders of standard essential patents. This has led to disputes between the same parties generating parallel claims and actions before courts and administrative agencies of different countries, creating scope for jurisdictional disputes, anti-suit injunctions and global rate setting by national courts or agencies. By way of example, a patent dispute between Samsung and Huawei resulted in a judgment by the Shenzhen Intermediate People's Court in January 2018 in favour of Huawei, ordering Samsung not to infringe Huawei's SEPs through the sale of infringing devices. In April 2018, though, the District Court of Northern California granted Samsung an anti-suit injunction preventing Huawei from enforcing the Chinese court injunction until US litigation concerning the dispute had been resolved.

Increased scrutiny of digital platforms

Online platforms and services have grown at an extraordinary rate, leading to disruption of traditional business models. US retail e-commerce sales for the third quarter of 2019 totalled US$145.7 billion, increasing approximately 17 per cent from the third quarter of 2018 and amounting to 11 per cent of total retail sales (Department of Commerce, Quarterly Retail E-Commerce Sales, Third Quarter 2019). Streaming of music on services such as Spotify and Apple Music have surpassed physical music sales on CDs and other media (Reuters, April 2018). And photo apps continue to grow at unprecedented rates – Instagram was reported to have approximately 1 billion active monthly users in 2018.

The increased choice and availability of cheaper (or even free) online services have delivered substantial consumer benefit. Professor Brynjolfsson et al surveyed consumers to assess what payments they would need in order to agree to forego search engines, social media, email and other services currently offered online. They found that 'according to the median estimates for 2017, search engines (US$17,530) is the most valued category of digital goods, followed by email (US$8,414) and digital maps (US$3,648).' However, competition authorities have raised concerns about the emergence of purportedly 'dominant' online platforms and have scrutinised practices in online markets. In January 2019, China's new e-commerce law came into effect, governing issues such as the reasonableness of operators' terms, taxation, and liability for the sale of counterfeit goods. In March 2019, the UK government-appointed Digital Competition Expert Panel published its report into 'Unlocking Digital Competition'. In May, the EC Special Advisers published their report into 'Competition Policy for the Digital Era'. On 26 July 2019, the Australian Competition and Consumer Commission published its report into Digital Platforms Inquiry. These reports contemplate a range of changes to the application of the abuse of dominance rule – as a well as supplementary rules – that aim to address the perceived market power of digital platforms such as Amazon, Apple, Facebook and Google. It has been suggested that, while 2019 was the 'year of reports', 2020 will be the 'year of action'. In October 2019, the German government published a draft amendment to national antitrust legislation to take better account of market power dynamics online, in particular the role of data.

Concerns about the power of digital platforms has led not only to reports and legislation, but also antitrust cases. In 2018, the European Commission opened an investigation into Amazon's 'dual role' as a marketplace operator and as a merchant selling products on its own platform, including (i) how it may use merchant data to benefit Amazon's own 'copycat' products; and (ii) how it selects products for the 'buy box'. The Commission is also investigating Spotify's complaint into Apple. It has also completed three cases – Google's shopping unit, Android operating system and the AdSense for Search business.

The focus on digital platforms is present even in emerging and nascent antitrust regimes. For example, the Nigerian competition authority issued a cease-and-desist order to several ride-hailing companies that required drivers, as a condition for being on their platforms, to take insurance from a particular insurance company. Likewise, in October 2019, the Malaysian competition authority proposed to fine ride-hailing firm Grab after investigations provisionally found that the company had abused its dominant position by imposing restrictive clauses on its drivers, relating to the transit media advertising market

Data aggregation and data privacy

Competition authorities have expressed concerns related to the rise of 'big data' – broadly defined as the collection and processing of large, accurate datasets at high speed, thereby enabling firms to enhance their services relative to rivals. The European Commission and CMA are building specialist teams to review and work with big data in antitrust assessments. Reviews into the possible use and abuse of big data have been carried out (or are ongoing) by competition authorities in Canada, France, Germany, Italy and elsewhere. And, in July 2019, the US Department of Justice announced a review into 'whether and how market-leading online platforms have achieved market power and are engaging in practices that have reduced competition, stifled innovation, or otherwise harmed consumers' – a review that is likely to feature heavily the role of data.

Two issues emerge in particular: (i) whether data aggregation gives rise to market power; and (ii) whether it raises privacy concerns that antitrust ought to address.

On one side of the 'market power' debate, certain competition authorities have considered that amassing large datasets could present a barrier to entry by smaller new entrants that lack the same scale of data. The Commission's e-commerce sector inquiry considered a possible concern whereby an online marketplace owner might require third parties using the marketplace to provide it with their sales data, which could be used to strengthen the owner's competing downstream service. And a joint paper by the French and German competition authorities considered possible abuses comprising refusal to supply access to 'essential' data and providing data access on a discriminatory basis, among others.

On the other side of the debate, commentators have pointed out that big data have facilitated high-quality services, often available for free, by allowing firms to monetise through targeted advertising rather than charging subscription fees. Moreover, while an initial pool of data helps develop an accurate algorithm and allows it to be improved and tested, data have a diminishing marginal return: adding data only helps up to a certain point, beyond which improvements to the underlying algorithm become more important. And data can become less useful over time, as the data become older and potentially less relevant. In a series of merger cases, the Commission has dismissed data-related concerns as the data in question were non-exclusive, replicable by rivals and available from third-party data providers.

Ultimately, the importance of data depends on the particular dataset at issue in a given case. In January 2020, Deputy Director-General for Mergers, Cecilio Madero, stated in a speech: 'As regards data, the Commission has progressively developed an approach to assess the role of data in merger cases. When reviewing *Apple/ Shazam*, the Commission used the so-called "4 Vs" for comparing one set of data against another set of data: Variety, Velocity, Volume and Value. With each case, the Commission will continue to fine-tune this approach further.'

As regards data privacy, in 2019, the German competition authority completed its investigation into Facebook's policy of conditioning access to its 'dominant' social networking site on users giving Facebook access to 'data generated by using third-party websites' that use Facebook APIs and other Facebook-owned sites (including WhatsApp and Instagram) in order to 'merge it with the user's Facebook account'. It considered that Facebook's policy violated the GDPR, which – under German constitutional legal precedents – was said also to constitute an abuse of dominance. The case raised a number questions:

- Why is antitrust intervention necessary, given the existence of data protection rules (which have themselves been strengthened by the GDPR)?
- How is Facebook's conduct related to its dominance, given that online services without market power seem equally capable of imposing extensive data collection conditions?
- At what point does data collection go from being 'extensive' to 'abusive' (and are their parallels with 'excessive pricing' cases)?
- How are the pro-competitive benefits of data collection taken into account?
- Does intervention risk unintended consequences (eg, Facebook withdrawing its APIs from third-party sites)?

Echoing these (and other) concerns, the Dusseldorf Court of Appeal granted Facebook interim relief, noting a range of concerns associated with the *Bundeskartellamt*'s decision, including: (i) the lack of connection between market power and the challenged terms; (ii) the failure properly to assess the counterfactual; (iii) the absence of cognisable antitrust harm to consumers; and (iv) the failure to substantiate exclusionary effects on rivals. The Court concluded that the decision's reasoning was, in certain respects, 'insubstantial and meaningless'.

Continued focus on pharmaceuticals

The pharmaceuticals sector has long drawn antitrust scrutiny. The leading *AstraZeneca* case confirmed that 'the illegality of abusive conduct under article 102 is unrelated to its compliance or non-compliance with other legal rules and, in the majority of cases, abuses of dominant positions consist of behaviour that is otherwise lawful under branches of law other than competition law'. Therefore, conduct of the type alleged in *AstraZeneca* – submitting misleading requests for supplementary patent certificates and strategic withdrawal of marketing authorisations to impede generic entry – were treated as abusive, even though patent law and regulatory rules permitted it. In Brazil – similar to the *AstraZeneca* case – CADE imposed a fine of 36.6 million reais in *Eli Lilly* (2015), for seeking to maintain its position as sole supplier of Gemzar, a cancer drug, by filing misleading and contradictory lawsuits with Brazilian courts and challenging the Brazilian Patent Office's refusal to grant the patent of the cancer drug. This conduct was viewed as abusive 'sham litigation'. Similarly, in February 2017, the US FTC sued Shire ViroPharma in federal court, alleging that ViroPharma engaged in a campaign of serial, repetitive and unsupported filings before the US Food and Drug Administration to delay the entry of generic competitors to Vancocin HCl Capsules. In December 2018, the 3rd US Circuit Court of Appeals in Philadelphia heard arguments from the parties concerning the FTC's ability to sue where no further violations of antitrust law were 'imminent'.

In recent years, antitrust challenges to pharma companies have intensified, particularly in the area of excessive pricing. In August 2017, China's NDRC found an abuse by two Chinese active pharmaceutical ingredients companies that sold active ingredients for isoniazid at unfairly high prices. The NDRC imposed a fine of total 443,916 yuan on the two companies, equivalent to 2 per cent of their previous year's sales in the relevant market. Shortly after that case, the NDRC published its 'Price Conduct Guidelines for Operators of Drugs Prone to Shortages and APIs'.

Also in 2017, the Italian authority fined Aspen for charging unfair prices for various cancer drugs, which has in turn prompted the European Commission to launch its own (ongoing) probe into Aspen's drug pricing in other member states. The Dutch competition authority appears to have prepared the legal and economic groundwork for excessive pricing probes, including through a submission to the OECD in 2018, followed shortly by a complaint submitted to the authority in respect of prices charged by Leadiant Biosciences. Outside of Europe too, pharmaceutical prices have raised concerns.

That said, the legal and economic tests for excessive pricing continue to raise challenges for enforcers. In *AKKA/LAA*, the Court of Justice confirmed that excessive prices need to be 'significantly and persistently' above the competitive level and there is a need for objective and consistent criterion in identifying the relevant comparators against which to test whether a price level is excessive. Failure properly to apply

the relevant test led the UK Competition Appeal Tribunal to annul the CMA's record fine that it imposed on Pfizer and Flynn in June 2018. The case is currently before the Court of Appeal.

There is also much enforcement activity outside the sphere of excessive pricing. In a decision of 20 December 2017, the French authority imposed a €25 million fine on the laboratory Janssen-Cilag and its parent company Johnson & Johnson, for abusing its dominant position by repeating legally unjustified approaches to the French health agency for the purpose of convincing the authority to refuse to grant generic status to competing medicinal products. This follows previous cases of disparaging a generic rival, including charges against Sanofi and Schering Plough, which were upheld before the appellate courts in France.

Another practice raising concerns is 'product hopping' – the withdrawal of an existing drug from the market and introduction of a new one with a view to making entry by generics more difficult following the expiry of patent protection. In 2016, Canada's Competition Bureau updated its Intellectual Property Enforcement Guidelines to cite product hopping as an example of a possible abuse of dominance. A series of product-hopping cases has made its way through courts in the US, including the ongoing *Asacol* litigation, which concerns the replacement of a drug used to treat ulcerative colitis.

At the EU level, at the end of 2018, the EU General Court upheld much of the Commission's findings that pay-for-delay agreements between Servier and generic manufacturers relating to its blockbuster drug perindopril were by object restrictions in violation of article 101, TFEU. The judgment is noteworthy for abuse of dominance rules, though, given the approach to identifying anticompetitive effects. The Court held it would be 'paradoxical' to permit the Commission to limit its assessment to likely future effects in a situation where the alleged abusive conduct has been implemented and its actual effects can be observed. The judgment is consistent with Mr Justice Roth's observation in *Streetmap* that he would 'find it difficult in practical terms to reconcile a finding that conduct had no anticompetitive effect at all with a conclusion that it was nonetheless reasonably likely to have such an effect'.

The appeal (from both the Commission and Servier) to the Court of Justice is something to watch closely out for in 2020. In the meantime, the Court of Justice handed down judgment in *GlaxoSmithkline and others v Competition and Markets Authority* in January 2020, on a reference from the British courts. It found that a strategy of concluding settlement agreements to exclude or delay generic entry can constitute an abuse of dominance, provided that strategy has 'exclusionary effects, going beyond the specific anticompetitive effects of each of the settlement agreements that are part of that strategy'. Whether and when such a strategy can have effects beyond 'the sum of its parts' remains to be seen.

Proposals to reform competition law

Finally, there is a growing clamour to overhaul competition rules to address the challenges of the modern world, including digitisation, globalisation and the impending climate crisis. For example, US presidential hopeful Senator Elizabeth Warren claims that 'competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy. Evidence of the problem is everywhere'. Similarly, Professor Joseph Stiglitz argues that 'current antitrust laws, as they are enforced and have been interpreted, are not up to the task of ensuring a competitive marketplace'.

Against this background, governments have commissioned several reports on whether competition law should be reformed. These include, in the UK, a report entitled Competition in Digital Markets, by a committee chaired by Professor Jason Furman; in the EU, a report entitled Competition Policy in the Era of Digitisation, written by Professors Heike Schweitzer, Jacques Crémer and Yves-Alexandre de Montjoye; and in Germany, a report entitled Modernising the Law on Abuse of Market Power, by Professor Schweitzer and others. In parallel, greater regulation of the digital sector is already underway through, for example, the GDPR in Europe; an EU platform-to-business regulation; and digital services taxes in France and the UK. We pick out three points to watch over the coming year:

- First, the Commission's report set out several proposals for reforming EU abuse of dominance rules. Perhaps the most eye-catching suggestion is the report's proposal to give the Commission greater intervention powers while advocating for a lowering of the legal and evidentiary standards that the Commission would need to meet to exercise these powers. These two proposals stand in some tension. More intrusive regulatory powers subject to lower standards conflict with fundamental legal principles and sit ill with the quasi-criminal nature of competition law proceedings.
- Second, in a speech in December 2019, Deputy Director-General for Mergers, Cecilio Madero referred to the Commission's wish to 'nuance or adjust' established concepts such as the essential facilities doctrine, to allow for a lower standard to mandate access in certain cases, such as data sharing. At the same time, however, the Commission recognises that the 'last word' on all EU cases will be for the EU courts, which have held that requirements to supply access should be subject to a high indispensability threshold. This is because, as Advocate General Jacobs made clear in *Bronner*, 'it is generally procompetitive 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'.
- Third, on announcing the *Broadcom* interim measures decision, Commissionner Vestager stressed that that interim measures decisions are 'so important' especially in 'fast-moving markets'. The Commissioner emphasised that she is 'committed to making the best possible use of this important tool' so as to enforce competition rules 'in a fast and effective manner'. National authorities have likewise pushed for greater use of interim measures. We can therefore expect to see greater use of the interim measures tool in fast-moving markets, although Broadcom's appeal of the decision to the General Court may determine the scope of future action by the Commission.

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