Dominance

Contributing editors
Patrick Bock, Kenneth Reinker and David R Little

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GETTING THE DEAL THROUGH

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Dominance 2018

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Fourteenth edition

Getting the Deal Through is delighted to publish the fourteenth edition of *Dominance*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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 **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 new chapters on Austria, Belgium, Saudia Arabia, Sweden and Taiwan.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

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, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

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Global overview

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Cleary Gottlieb Steen & Hamilton LLP

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. These distinctions are rarely clear and become ever harder to draw as antitrust agencies apply novel theories of harm to rapidly changing markets, sometimes without a detailed examination of whether the conduct at issue excludes efficient (or only less-efficient) competitors.

The complexity that pervades abuse of dominance rules is made worse by procedural challenges. Companies that operate across borders face the risk of parallel investigations in different jurisdictions, which can take years to resolve and may result in inconsistent outcomes. Moreover, in most jurisdictions and scenarios, companies cannot submit proposed conduct to antitrust agencies for ex ante review. In sum, the difficulty of managing compliance with abuse of dominance rules has never been greater, and the consequences of infringement are severe.

This guide aims to provide some respite. It draws on the insights of specialist counsel from a wide range of jurisdictions. These include long-established antitrust regimes, such as the US, EU and certain EU member states (and a soon to be ex-member state). It navigates the often complex rules that emerging markets such as China and India have developed, and it offers prospective guidance on nascent antitrust regimes like Hong Kong, where the first cases have yet to be decided. Each chapter answers a consistent set of questions to facilitate comparisons across diverse jurisdictions. And it offers the reader a detailed summary of applicable rules as well as 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 trends over the course of the past year.

Treatment of rebates: more clarity or less?

The treatment of rebates is a source of controversy. On the one hand, price decreases – whether reductions in headline prices or volume-related discounts – are generally welcomed as benefitting consumers. On the other hand, firms can leverage their 'non-contestable' sales to offer rebates that even efficient rivals cannot match while still covering their costs. Competition authorities have focused on two types of rebates in particular: 'exclusivity' rebates that require customers to purchase all (or almost all) of their inputs from a dominant supplier, and 'fidelity-enhancing' rebates (in particular, rebates that are applied retroactively to all of a customer's purchases). Traditionally, competition authorities in Europe have taken a formalistic approach, assessing exclusivity rebates as 'by nature' infringements – conduct that self-evidently harms competition such that an analysis of its effects is unnecessary. Fidelity-enhancing rebates are likewise regarded with scepticism.

In 2017, the Court of Justice of the European Union delivered its judgment in the *Intel* case concerning exclusivity rebates that Intel offered customers in return for using only its chipsets for certain categories of PCs. Setting aside a General Court judgment, the Court of Justice made clear that competition law does not aim to protect less efficient rivals or prevent their leaving the market. The 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 that evidence, taking into account the extent of the dominant position, the coverage of the practice in question, the conditions associated with the rebate in question, and the existence of any strategy to exclude equally efficient rivals.

The *Intel* judgment is important, but it is also brief and its discussion of exclusivity rebates is lightly reasoned. Perhaps unsurprisingly, it has given rise to several divergent interpretations. The European Commission has taken the view that the judgment essentially imposes a procedural requirement to review evidence submitted by the dominant firm, but does not overturn the 'presumption' that exclusivity rebates are anticompetitive. 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 respective 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' test. Rather, it analysed the factors listed in the *Intel* judgment (eg, market coverage of the practice) following Unilever's submission of an as efficient competitor analysis. (Interestingly, the CMA carried out its own effects analysis in the UK ice cream case and found that the conduct was not abusive.)

Other commentators note the Court's reference to the fact that competition law does not serve to protect inefficient rivals, as well as the need to consider the existence or otherwise of a strategy to exclude 'as efficient' competitors. These factors would tend to support a requirement to show that conduct is capable of excluding equally efficient rivals – in particular applying an 'as efficient competitor' 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 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'. In its press release on the recent *Qualcomm* decision concerning exclusivity rebates, the Commission purported to have reviewed – and rejected – Qualcomm's submission of a 'price-cost' test, albeit without stating whether it had assessed the position of equally efficient competitors.

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, Taiwan, and courts in Brazil and Germany, and in a similar case in 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. National courts in Germany and the United Kingdom have had to address a range of questions concerning the practical implementation of the *Huawei v ZTE* judgment. In *Unwired Planet v Huawei*, 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.'

That said, in other cases agencies have reached consistent conclusions and contributed to each other's enforcement practice, particularly in Europe. One such example is excessive pricing. In 2003 a former Chief Economist of the European Commission noted 'if the number of excessive pricing cases in the EU has been relatively modest (albeit not insignificant) until now, it may increase in the future due to the combined effects of the liberalisation of network industries and the decentralisation of the European antitrust' (Motta and de Streel, 8th Annual European Union Competition Workshop, Florence, 2003). Several excessive pricing cases have been brought since then (especially in the United Kingdom). 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 probe into Aspen's drug pricing in other member states.

Likewise, 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 in 2015 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. 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 required customers to pay elevated royalties on products that use baseband chips made by rivals, thereby excluding competitors. (It remains to be seen whether the Trump administration FTC will continue to pursue the case after new FTC Commissioners are appointed.) And Taiwan's TFTC found Qualcomm had committed an abuse by precluding competition through exclusivity agreements and related practices.

Online platforms, novel abuses

Online platforms and services have grown at an extraordinary rate, leading to unparalleled choice, lower prices and disruption of traditional business models. In 2017, ecommerce sales in the United States reached approximately US$453.5 billion, growing 16 per cent compared to the previous year and accounting for 11 per cent of total retail sales (Department of Commerce, Quarterly Retail E-Commerce Sales, Fourth Quarter 2017). Streaming of music on services like Spotify and Apple Music was projected to surpass physical music sales on CDs and other media in 2017 (*Financial Times*, June 2017). And photo apps continue to grow at unprecedented rates – Instagram was reported to have approximately 800 million active monthly users as of September 2017.

Despite the increased choice and availability of cheaper (or even free) online services, competition authorities have raised concerns about the emergence of purportedly 'dominant' online platforms and have scrutinised practices in online markets. The European Commission recently carried out its e-commerce sector inquiry and on 26 September 2017, Mexico's COFECE opened an investigation into tying and bundling in e-commerce. The most prominent case touching on e-commerce, though, is the *Google Shopping* investigation.

In its *Google Shopping* decision, the European Commission alleged that Google had leveraged its market power in general searches to favour its own comparison shopping service. The case is novel and raises questions for several reasons. First, the allegedly problematic designs are ads for product offers that Google shows in the ad space of its results pages and that indisputably improve quality. Second, it is questionable whether 'self-favouring' can constitute a competition law abuse, as competition on the merits is about improving one's own – and not rivals' – products. At a recent conference, Philip Marsden of the CMA stated: 'Favouring yourself on your own is not, in itself, an antitrust theory of harm'. Third, the remedy, which allows comparison shopping services equal access to Google's ads space, requires Google to supply rivals with placement on its search results page, without meeting the legal conditions for a duty to supply. Fourth, the Commission excluded from its analysis merchant platforms like Amazon, which are widely understood to be the main cause of the decline of comparison shopping sites.

Closer scrutiny of big data

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 in the process of building specialist teams to review and work with big data in antitrust assessments, and in February 2018 the Australian antitrust agency opened an in-depth review into competition issues concerning big data.

On one side of the debate, certain competition authorities have considered that the amassing of 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 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.

The German competition authority is investigating 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 in order to 'merge it with the user's Facebook account'. The authority announced in December 2017 that it had sent its preliminary assessment to Facebook, objecting that:

- users would not expect data generated on third-party sites to be provided to Facebook itself;
- users do not effectively consent to Facebook's data collection as it is a dominant social network;
- the data are personalised and valuable; and
- it is inappropriate for users to have to consent to this level of data collection, which may breach European data collection rules.

This assessment raises several questions:

- Why is antitrust intervention necessary, given the existence of data protection rules (which are themselves been strengthened by the GDPR)?
- How is Facebook's conduct related to its dominance, as online services without market power seem equally capable of imposing extensive data collection conditions?
- Does intervention risk unintended consequences (eg, Facebook withdrawing its APIs from third party sites)?

Continued focus on pharmaceutical products

The pharmaceutical sector has long drawn antitrust scrutiny. The leading *AstraZeneca* case confirmed that 'the illegality of abusive conduct under article 82 EC 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. The Commission followed up the *AstraZeneca* case with a sector inquiry into pharmaceutical drug supplier conduct, covering issues as diverse as pay-for-delay agreements and patent extension strategies, while the UK agencies identified abuses through predatory pricing (*Napp*) and withdrawal of a product to impede generic prescribing after patent-expiry (*Gaviscon*). 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'.

In recent years, antitrust challenges to pharma companies have intensified still further. As noted above, the CMA, Italian authority, and European Commission have been launching excessive pricing probes, which will need to take into account the recent Court of Justice judgment in *AKKA/LAA*, confirming that excessive prices need to be 'significantly and persistently' above the competitive level. Likewise, in August 2017, a decision taken by 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, which is 2 per cent of their previous year's sales in the relevant market.

There is also much enforcement activity outside the sphere of excessive pricing. In a decision of 20 December 2017, the French authority imposed on the laboratory Janssen-Cilag, and its parent company Johnson and Johnson, a €25 million fine 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 uphold before the appellate courts in France. And 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 HCI Capsules. The case was pending at the time of writing.

It is understandable that competition authorities might pay particular attention to sectors that are funded partly by public money; all the more so given the special importance accorded to healthcare. However, this focus comes at a cost. Excessive pricing probes risk deterring investment in expensive R&D and dampening signals to rivals to enter the market. Indeed, companies might impose high prices from the outset to avoid allegations of unwarranted price increases. And given the limited resources available for enforcement, the focus on pharmaceutical companies risks detracting from investigations in other sectors.

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