Global overview

Patrick Bock and Alexander Waksman
Cleary Gottlieb Steen & Hamilton LLP

The rules governing an abuse of dominance are arguably the most complex component of competition and antitrust legislation. They presuppose a distinction between anticompetitive conduct and open competition on the merits that is rarely clear. And the distinction has 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 has produced exclusionary effects.

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, as a rule, 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, thereby allowing comparison 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 recent trends.

Excessive pricing: the Lazarus of antitrust

Excessive pricing cases have been a rarity in abuse of dominance enforcement. It is absent altogether from US antitrust rules, with Federal Trade Commission (FTC) Commissioner Ohlhausen arguing that 'simply condemning a high price ... is not antitrust. It is a regulatory action meant to re-engineer market outcomes to reflect enforcers' preferences' (*Concurrences*, September 2016). Even in the EU and other jurisdictions, some of the leading cases – until recently – were decisions or judgments rejecting allegations of exploitative abuse.

In 2003, however, the former Chief Economist at the European Commission's Directorate General for Competition made the following insightful prediction: '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). That prediction is proving to be prescient.

In a speech in November 2016, Commissioner Vestager argued that 'there can be times when prices get so high that they just can't be justified ... there can be times when competition rules need to do their bit to deal with excessive prices.' As Commissioner Vestager noted, antitrust agencies in the UK and Italy brought a series of cases alleging excessive pricing in the pharmaceuticals sector. Antitrust lawyers will watch closely the appeal by Pfizer and Flynn against a decision by the UK Competition and Markets Authority that a decision to de-brand a drug and increase prices by between 2,300 per cent and 2,600 per cent was an exploitative abuse of dominance.

The spread of excessive pricing cases has not been limited to Europe. Other examples include a fine imposed by China's NDRC on five Chinese pipeline gas supply companies in July 2016. And in Israel, declarations of excessive pricing have led to class actions against Tamar (in the natural gas market) and Tnuva (in the dairy product market).

The return of excessive pricing cases raises particular concerns. The concept has been criticised as lacking the support of economic theory as well as sufficiently clear limiting principles that are capable of guiding firms' conduct. From the perspective of legal certainty, the risk is that enforcers adopt the approach of US Supreme Court Justice Stewart towards defining pornography; namely, declining to give a clear definition, but asserting that 'I know it when I see it' (*Jacobellis v Ohio*). Excessive pricing actions also create a risk of deterring innovation in pharmaceutical and other sectors where multiple attempts to bring products to market may fail before one succeeds. In other words, high short-term prices may be a necessary trade-off for long-term innovation and the trial and error it involves.

The technology sector: novel theories and parallel investigations

Current investigations in the technology sector bear out the risk of companies facing investigations in multiple jurisdictions, as well as the possibility of antitrust agencies reaching different conclusions.

In 2016, the Canadian Competition Bureau rejected allegations that Apple had abused a dominant position through its agreements with carriers, and the Australian Competition and Consumer Commission considered – but ultimately issued a draft determination refusing – an application by a group of banks to collectively boycott Apple Pay, in response to Apple's alleged market power.

Both of these investigations reached conclusions that are relevant to – and seem to contradict – the Commission's continued investigation into Google's Android operating system, which moved to the stage of a statement of objections in April 2016. Likewise, the European Commission continued its investigation into Google Shopping, notwithstanding that the FTC in the US, the Taiwanese competition authority, the Canadian Bureau of Competition, and courts in Germany, Brazil, and the UK have all rejected complaints against the company.

In 2015, China's NDRC imposed a fine on Qualcomm of US$975 million in 2015 for failure to license its standard essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms. Subsequently, the Korean Fair Trade Commission fined Qualcomm US$854 million for unfair patent licensing practices. Likewise, the US FTC has recently 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.

In 2016, Germany's Bundeskartellamt opened a formal investigation relating to a 'suspicion that Facebook's conditions of use are in violation of data protection provisions', amounting to 'abusive imposition of unfair conditions on users'. Although Facebook does not (yet) face the issue of defending parallel antitrust investigations, the Bundeskartellamt's theory of harm has proved controversial, raising difficult questions about the whether there is any connection between

Facebook's 'dominance' and the allegedly abusive conduct, and under what circumstances a breach of data protection rules constitutes abuse.

Whatever the outcome of the *Facebook* investigation, questions about abuse of dominance and the importance of data as a source of market power are unlikely to recede.

Interaction of antitrust and intellectual property

Writing in 2008, a prominent commentator observed that the short-term effect of patents is 'to deprive its competitors of the possibility of using the invention for their own purposes' but that:

> *in the long term, patent legislation is considered by competition law to be procompetitive, because it encourages companies to develop new inventions, and requires them to be disclosed so that they are available to all when the patent expires. This does not imply that exercise of patent or other actual property rights can never be abusive. It merely means that the normal use of patent law is legitimate because it is considered to be procompetitive in the long term.*
> (John Temple Lang, Centre for European Policy Studies, 2008)

Almost 10 years later, recent cases have illustrated the difficulties of separating the 'normal use' of patents from potentially abusive conduct that seeks to extend the market power conferred on patent holders. A particularly fraught example are the 'pay for delay' or 'reverse payment settlement' cases that have been challenged as both abuses of dominance and restrictive agreements in the EU, the US and elsewhere. Proposed reforms to antitrust legislation in Argentina expressly seek to include 'pay for delay' as an example of anticompetitive conduct. This casts doubt on the ability of patent holders and generic producers to settle disputes in cases of genuine uncertainty as to the scope of the patent. The unintended consequence may be more (and longer running) patent litigation.

Abuse of dominance rules have also sought to address 'patent ambushes' in which patent holders commit to making their SEPs available to participants in a technical standard, but refuse to offer a licence on FRAND terms to willing licensees. European Commission investigations into Samsung and Motorola and the Court of Justice judgment in *Huawei v ZTE* are feeding through to disputes before national courts, including the resolution of the original *Huawei v ZTE* case before the German courts and ongoing litigation in the UK (*Unwired Planet v Huawei*).

Antitrust agencies are alive to the risk of companies seeking to 'game' administrative systems that are concerned with intellectual property. In 2014 the Italian Supreme Administrative Court upheld a finding that Pfizer had exploited a range of patent application procedures and 'sham litigation' in order to extend the period of protection for its product beyond expiry of its main patent. This included applying for supplementary protection on the basis of experimenting with new applications for its drug, despite allegedly lacking any intention of developing such applications.

Likewise, in the US, private actions have been brought against pharmaceutical companies for alleged 'product hopping' – the practice of modifying a branded drug that is nearing the end of its patent exclusivity period, getting a new patent exclusivity period on the modified drug and discontinuing the original version. So far, outcomes of 'product hopping' suits have been mixed with the Second Circuit Court of Appeals finding a violation from product hopping in *New York v Actavis*, while the Third Circuit Court of Appeals rejected a product hopping claim on the facts in *Mylan v Warner Chilcott*.

A new dawn for effects analysis?

In certain jurisdictions, antitrust agencies have been accused of paying insufficient attention to the effects of allegedly anticompetitive conduct, relying instead on a formalistic approach to distinguishing 'abusive' practices from competition on the merits.

There are signs, though, of a possible reversal. Advocate General Wahl's Opinion in *Intel* refuted the treatment of 'exclusivity rebates' as 'by nature' abuses, opining instead that all the relevant circumstances surrounding the rebates needed to be taken into account. Even for presumptively unlawful conduct it is necessary to examine the 'likely' effects on competition, which requires 'more than a mere possibility that certain behaviour may restrict competition'. Instead, antitrust agencies bear the burden of showing that 'in all likelihood, the impugned conduct has an anticompetitive foreclosure effect.' As AG Wahl explained, there would otherwise be a risk that 'EU competition law sanctions form, not anticompetitive effects'.

This risk was similarly addressed by a High Court judgment in the UK, which involved a standalone private action by Streetmap alleging that Google's placement of a Google Maps 'thumbnail' at the top of the Google Search results page foreclosed competitors. Finding no infringement, Roth J observed that absence of 'actual effects' was a very important consideration. He explained 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 move to a closer effects analysis is mirrored in Australia, where proposed reforms to antitrust legislation aim to introduce an effects standard for assessing unilateral conduct. The revised regime will prohibit a corporation that has a substantial degree of power in a market from engaging in conduct that has the purpose or likely effect of substantially lessening competition. In the explanatory memorandum, the reframing is described as shifting the focus of the provision on the competitive process rather than individual competitors and allowing anticompetitive conduct to be better targeted.