United States

Kenneth S Reinker and Lisa Danzig
Cleary Gottlieb Steen & Hamilton LLP

General

1 Legislation

What is the legislation in your jurisdiction applying specifically to 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 which are comparable to section 2 of the Sherman Act or section 5 of the FTC Act.

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

2 Definition of dominance

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 enough. 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 and conspiracy to monopolise claims arguably require only a specific intent to monopolise. US law does not recognise the concept of relative dominance.

3 Purpose of the legislation

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, employment or income equality.

4 Sector-specific dominance rules

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 may 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).

5 Exemptions from the dominance rules

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' or do not otherwise involve an abuse of the governmental process, as discussed further in question 23.

6 Transition from non-dominant to dominant

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.

7 Collective dominance

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

US law does not recognise collective dominance.

8 Dominant purchasers

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 alleging predatory buying 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 driving out competition.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds 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 to. 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 or whether, in response, so many customers would switch to alternatives outside the market that the price increase would be unprofitable.

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

10 Definition of abuse of dominance

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 to constitute monopolisation.

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.

11 Exploitative and exclusionary practices

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.

12 Link between dominance and abuse

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 monopoly power. Where anticompetitive conduct is rigorously proven, US law generally permits a looser standard of proof of the causal connection. 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 a 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 not sufficient to state a monopolisation claim – the anticompetitive conduct must help obtain or maintain a monopoly in some market.

13 Defences

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

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 80 per cent or 90 per cent of its purchases from a particular supplier. 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 over time (see question 17). Sometimes, loyalty conditions can be analysed similarly to tying and bundling by viewing a customer's demand as consisting of both 'contestable' demand (that is, the portion that might be purchased from competitors) and 'incontestable' demand (that is, the portion that would be purchased from the monopolist in any event).

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 helping a monopolist foreclose rivals in the tied market, which can both lead to increased market power in the tied market and protect market power in the tying market (eg, because there is partial substitution between the two markets or because a position in the tied market makes it easier to enter or expand in the tying market). Even if rivals are not foreclosed, tying can increase monopoly profits through price discrimination or 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 is not a requirement; 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 could 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 in 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 price or other benefit from buying the products together rather than separately. Bundling has similar potential pro-competitive and anticompetitive effects as tying. Some courts have found that bundling can be potentially anticompetitive if it forecloses a substantial share of the market. Other courts have suggested that bundling cannot be anticompetitive unless it results in prices that are below cost. In applying this test, courts often apply 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, such as 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 may suffice, while others have suggested that 40–50 per cent may be required. Some courts have suggested that the foreclosure required to sustain a claim may 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 may 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 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 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 absent an upstream duty to deal with competitors 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 helped create or maintain a monopoly;
- the monopolist had ceased a prior, voluntary and profitable course of dealing with the competitors;
- the monopolist discriminated on the basis of rivalry by refusing to deal with its competitors while continuing to deal with non-competitors; and
- the refusal to deal lacked 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 condoned 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 anticompetitive 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.

Update and trends

It remains to be seen what impact the Trump presidential administration will have on monopolisation enforcement. The expectation is that government enforcement is likely to significantly decrease. Private enforcement would continue.

Over the past several years, there have been a number of significant monopolisation cases in the pharmaceutical and medical device industries, in both cases brought by the FTC and private parties. This enforcement includes the following:

- **Acquisitions of potential competitors**: In early 2017, the FTC settled charges that Questcor Pharmaceuticals had a monopoly in therapeutic adrenocorticotropic hormone (ACTH) drugs in the US and engaged in monopolisation by acquiring the US rights to develop a synthetic ACTH product sold in Europe. The acquired drug was not patented, not approved for use in the US, not in clinical trials, and not unique, and the FTC conceded that entry in the US market was highly uncertain. Nevertheless, the FTC took the position that when a monopolist acquires a potential competitor that can violate the antitrust laws regardless of the likely competitive effects. The settlement required a sub-licence to certain US rights to the synthetic drug and imposed a US$100 million equitable monetary payment.
- **Abuse of process:** In early 2017, the FTC sued Shire ViroPharma for allegedly filing sham petitions with the US Food and Drug Administration to delay approval of competing generics. This case was pending at the time of writing.
- **Exclusive dealing:** In April 2016, the FTC settled charges that Invibio, a supplier to medical device makers, used long-term exclusivity agreements to maintain a monopoly in a polymer used in certain medical implants. Invibio was the first-to-market in the polymer and allegedly foreclosed new entrants. Invibio settled the charges by agreeing not enter into future exclusive supply contracts.
- **Reverse payments:** There has been continued enforcement against 'reverse payments' since the 2013 Supreme Court opinion in *FTC v Actavis* held that settlements where a branded drug manufacturer makes a payment to a generic competitor as part of settling patent litigation can violate the antitrust laws. One issue has been whether a reverse payment must be in cash or if non-cash value provided by the branded to the generic competitor can be a 'reverse payment'. Multiple federal appellate courts have held that non-cash value transfers can violate the antitrust laws. The FTC has also filed amicus curiae briefs in private cases, arguing that providing non-cash value to a generic can violate the antitrust laws.

  The FTC also filed a lawsuit against Endo Pharmaceuticals and several generic drug manufacturers challenging settlements where, among other things, Endo agreed not to introduce an authorised generic for a certain time following the introduction of a generic drug, allegedly in exchange for the generic's agreement to delay launch. Endo and two generic drug manufacturers settled the case by agreeing to not enter similar agreements in the future. The case was still pending against two other generic manufacturers as of the time of writing.
- **Product hopping:** Private cases have also been brought against pharmaceutical companies challenging 'product hopping,' the practice of modifying a branded drug that is nearing the end of its patent exclusivity period, getting a new patent on the modified drug, and discontinuing the original version. This practice makes it more difficult for generics to compete because prescriptions are frequently written for the branded drug, and state laws generally only permit automatic substitution for generics that are equivalent in every respect. Outcomes in product hopping cases have been mixed, with the Second Circuit Court of Appeals finding a violation from product hopping in *New York v Actavis*, but the Third Circuit Court of Appeals rejecting a product hopping claim on the facts in *Mylan v Warner Chilcott*.

The FTC also recently filed a complaint against Qualcomm, alleging that it 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. In particular, the FTC alleges that Qualcomm imposed a 'no licence, no chips' policy that forced customers to agree to licence terms that required them to pay royalties on all baseband chips, including chips bought from Qualcomm's competitors. The FTC alleges that raised the cost of using competing chips and thus impaired competition. In one instance, the FTC alleges that Qualcomm illegally required exclusivity on its baseband chips. The one Republican Commissioner dissented from the filing of this lawsuit. This case was pending at the time of writing, but it remains to be seen whether the Trump administration FTC will continue to pursue it. Apple has also filed a private lawsuit against Qualcomm.

The DOJ's most recent monopolisation lawsuit was a 2015 challenge to United Airlines acquiring landing slots at Newark Liberty International Airport from Delta Airlines. The DOJ alleged that United had a monopoly at Newark because it controlled of 73 per cent of the airport's landing slots and that the planned acquisition would enhance its monopoly, increasing its share to 75 per cent. The parties abandoned the acquisition several months after the DOJ sued.

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 effect 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 and, if they are seeking damages, the amount of damages. 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 may 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

26 Enforcement authorities

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.

27 Sanctions and remedies

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.

28 Enforcement process

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 and 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.

29 Enforcement record

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 may have changed, making it difficult to effectively remedy violations.

30 Contractual consequences

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.

31 Private enforcement

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, US states can bring federal antitrust claims as an injured party (eg, if the state is a purchaser of the product) as well as parens patriae actions seeking treble damages on behalf of their residents.

CLEARY GOTTLIEB

Kenneth S Reinker kreinker@cgsh.com
Lisa Danzig ldanzig@cgsh.com

2000 Pennsylvania Avenue, NW
Washington, DC 20006
United States

Tel: +1 202 974 1500
Fax: +1 202 974 1999
www.clearygottlieb.com

32 Damages

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 US states 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 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.

33 Appeals

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

34 Unilateral conduct by non-dominant firms

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.