The Dominance and Monopolies Review

Fifth Edition

Editors
Maurits Dolmans and Henry Mostyn

The Law Reviews

THE DOMINANCE AND MONOPOLIES REVIEW

The Dominance and Monopolies Review
Reproduced with permission from Law Business Research Ltd.

This article was first published in The Dominance and Monopolies Review, - Edition 5

(published in July 2017 – editors Maurits Dolmans and Henry Mostyn)

For further information please email
Nick.Barette@thelawreviews.co.uk

THE DOMINANCE AND MONOPOLIES REVIEW

FIFTH EDITION

Editors
Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

PUBLISHER
Gideon Roberton

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGERS
Thomas Lee, Joel Woods

ACCOUNT MANAGERS
Pere Aspinall, Sophie Emberson,
Laura Lynas, Jack Bagnall

MARKETING AND READERSHIP COORDINATOR
Rebecca Mogridge

RESEARCHER
Arthur Hunter

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Martin Roach

SUBEDITOR
Janina Godowska

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-910813-67-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

THE LAW REVIEWS

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ANJARWALLA & KHANNA

ANJIE LAW FIRM

BAKER MCKENZIE LLP

CASTRÉN & SNELLMAN ATTORNEYS LTD

CLEARY GOTTLIEB STEEN & HAMILTON LLP

CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ SC

DE BRAUW BLACKSTONE WESTBROEK NV

DLA PIPER DINU SCA

ELIG, ATTORNEYS-AT-LAW

ESTUDIO BECCAR VARELA

FATUR LAW FIRM

JONES DAY

KIM & CHANG

LEVY & SALOMÃO ADVOGADOS

P&A LAW OFFICES

PRAGMA LEGAL

SOEMADIPRADJA & TAHER

VDA VIEIRA DE ALMEIDA

CONTENTS

PREFACE

Previous editions of the *Dominance and Monopolies Review* spoke of the law of abuse of dominance undergoing evolutionary – rather than revolutionary – change. Although we do not yet see competition lawyers mounting the barricades, abuse of dominance law appears to be entering a phase of more rapid development. Increasing international protectionism in industrial policy, overlapping parallel investigations, novel theories of harm deployed in rapidly changing markets, and around 100 jurisdictions applying competition law (often in starkly different ways) mean that it is harder than ever before for businesses to understand how to regulate their conduct.

This Fifth Edition of *The Dominance and Monopolies Review* is, therefore, more welcome than ever. As with previous years, each chapter summarises the abuse of dominance rules in a jurisdiction, as well as providing a review of the regime's enforcement activity in the past year and a prediction for future developments. From the thoughtful contributions of the specialist chapter authors, this editorial – as in previous years – attempts to identify a common theme to global competition enforcement. This year's theme is 'fairness'.

Competition regulators have recently emphasised that they see the role of competition enforcement as ensuring that everyone has a 'fair chance', creating 'fair conditions' in the markets, 'keeping markets fair' and sending 'a message of fairness'. It is fair enough in political discourse to explain competition policy in simple terms, but using them as criteria for a finding of infringement creates serious risks of antitrust populism, endangering the rule of law. It is not always clear what is meant by 'fair'. Fairness can mean different things to different people in different countries at different times – for example, equality (everybody should receive the same), equity (rewards are somehow allocated in proportion to deservedness) or need (those with the greatest need are protected).

And some concepts of fairness can be diametrically opposed to the goals of competition law. Equality of outcomes (i.e., the notion that everyone should receive an equal share) contradicts the purpose of competition. Equality of resources, cooperation, and sharing of information may facilitate the ultimate evil of antitrust – collusion. Equality of treatment (in the EU at least) is inconsistent with the principle that only dominant companies are subject to special responsibilities. And fairness in the sense of sharing assets conflicts with the rule that only essential facilities and state monopolies have a duty to assist rivals. Indeed, requiring such asset-sharing depresses innovation and investment in resources. The invocation of 'fairness' appears to be a tool to justify political intervention in the decision-making process, and creates the risk of arbitrary decision-making.

This is not to say that fairness has no role in competition law. But in our view, fairness is best achieved by relying on the following more precise and better-defined concepts: consumer welfare and allocative efficiency as the goal of competition law; competition on the merits as the criterion for assessing a firm's unilateral conduct; proportionality and 'useful effect' as benchmarks for remedies; and due process and the rule of law as the hallmark of a proper procedure for applying the law.

The developments from the last year described below illustrate how 'fairness' can be applied in different ways in the antitrust context. While ostensibly these cases may refer to fair pricing, fair conduct, or fair processes, at core they are about one of the four concepts outlined above.

The first development is the return of unfair or excessive pricing cases – at least on the eastern side of the Atlantic. In the UK, the Competition and Markets Authority (CMA) imposed a record £85.2 million fine on Pfizer (as well as a £5.2 million fine on Flynn Pharma) for increasing the price of an anti-epilepsy drug by 2,600 per cent overnight. The EU Commission has recently opened a probe into Aspen Pharma's pricing of cancer drugs, with its press release referring to 'unjustified price increases of up to several hundred per cent'. (The Italian authority has already adopted an infringement decision against Aspen concerning the same conduct.) And Gazprom's recently proposed commitments to the EU Commission include price review mechanisms based on competitive price benchmarks. In *Facebook*, the German antitrust authority is reviewing Facebook's imposition of allegedly unfair privacy terms.

The renewed focus on excessive pricing is not only limited to Europe. In China, an authority has imposed fines on five gas suppliers that were determined to be charging customers unfairly high prices. 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).

By contrast, Patricia Brink of the US Department of Justice recently discussed whether excessive prices are a matter for competition enforcement. She stated, 'in the United States, both historically and at present, the answer is an unequivocal no'. Ms Brink pointed to the statement by Justice Scalia in *Trinko* that the opportunity to charge monopoly prices is what attracts business acumen, induces risk taking, promotes innovation and encourages economic growth.

The conflicting positions, however, are not necessarily irreconcilable. In the CMA's *Pfizer/Flynn* decision, the drug at issue, phenytoin sodium, was first synthesised in 1908 and has not changed since then. Flynn acquired the distribution rights in 2012, at the time phenytoin sodium was debranded (and, therefore, no longer subject to price regulation). Around 48,000 patients in the UK still take the capsules, and these patients cannot be changed to a new manufacturer's product without risking therapeutic failure and toxic side effects. The CMA considered that the 2,600 per cent price increase at the time of debranding was excessive compared to the costs incurred and a reasonable rate of return. In these circumstances, it is quite difficult to see on its face how the decision risks restricting innovation or investment in the way that worried Justice Scalia in *Trinko*. The CMA's reasoning is that the fact epilepsy patients are locked in to one manufacturer's drug permitted the excessive price hike; the price had nothing to do with risk taking, investment, or innovation because there had not been any in very many years.

This is presumably what Advocate General Wahl had in mind when, in his recent opinion in the Latvian collecting society case, he advised that an excessive price cannot exist in a free and competitive market. Concerns only arise if there are legal barriers to entry or expansion and there is a legal monopoly (which, in effect, existed in the CMA case because official guidance prohibited switching patients to a different manufacturer's drug).

Indeed, the excessive-pricing cases are rare examples of enforcement against exploitative abuses – where a firm uses its market power or privileged position to extract rents from consumers directly, thereby reducing consumer welfare. As Advocate General Wahl recently advised, the prices are abusive because 'being excessively high, they exploit customers'. That requires there to be an excess (a 'significant difference') between the price actually charged and the competitive price, and for there to be no valid justification for the difference. In our view, referring to a more amorphous 'unfairness' standard makes this already difficult task only more tricky.

The second development concerning fairness is the continued focus on the licensing of standard essential patents (SEPs) on fair, reasonable, and non-discriminatory (FRAND) terms. In 2015, China's NDRC fined Qualcomm $975 million for failing to license its SEPs according to its FRAND promise. In December 2016, the Korean Fair Trade Commission (KFTC) followed suit, fining Qualcomm $854 million. In essence, Qualcomm engaged in a variety of interrelated behaviours that together excluded rivals from the market and allowed Qualcomm to impose unfair terms and conditions: a refusal to license SEPs to rival modem chipset makers, thus requiring device makers who buy and use these chipsets to take a licence directly from Qualcomm. Qualcomm then imposed unfair terms on device makers, including a royalty-free cross-licence that provided it with a unique advantage over rival chipset makers (Qualcomm was the only chipset maker that could offer its customers the full package of SEPs and non-SEPs, including patents from all other device makers). If device makers objected to the demand to cross-license their patents for free, Qualcomm refused to supply chipsets. 'No license, no chips', as the US Federal Trade Commission put it in a parallel claim against Qualcomm.

The Taiwan Fair Trade Commission is investigating similar conduct. Likewise, in January 2017, in conjunction with Apple initiating litigation against Qualcomm, the US FTC sued Qualcomm for its SEP licensing practices. Finally, the European Commission is poised to adopt decisions against Qualcomm for selective predatory pricing and loyalty rebates. This series of investigations and cases on three continents is worth watching closely.

In a related development, a UK court has ruled, for the first time, on what constitutes a FRAND rate. Mr Justice Birss held that that there is only one FRAND rate, and this should be determined (as a first step) by looking at a wide range of comparable licences.[1] In terms of the interaction with competition law, the judge found that there is no correlation with what is a contractual FRAND offer and what is anticompetitive. For a price to be excessive under Article 102 TFEU, it has to be 'substantially more than FRAND' (i.e., the price can be 'unfair' and in breach of the contractual FRAND promise, but still not 'unfair' according to competition law). Conversely, the judge found that a price can be discriminatory and in breach of the contractual FRAND promise only if it also violates competition law – a discrepancy that remains puzzling and may be explored on appeal.

The underlying purpose of the FRAND undertaking is to secure a fair and reasonable reward for innovation while avoiding a hold-up and holdout. Competition law can intervene to prohibit the conduct of SEP owners if they use their market power gleaned through the standard to restrict competition (e.g., through premature litigation). The touchstone for

1 The judge held that the FRAND terms are the terms that a truly willing licensor and truly willing licensee would agree upon in the relevant negotiation in the relevant circumstances absent irrelevant factors, such as hold-up and holdout.

the assessment is whether the conduct deviates from competition on the merits and harms the competitive process. The difference in what is 'fair' in the contractual FRAND promise and in competition law contexts (identified by Mr Justice Birss) confirms the inherent ambiguity underlying 'fairness' as a concept. The concepts developed in SEP cases could also appropriately be applied in other cases where IP owners violate legitimate expectations and use hold-up techniques to extract unreasonable royalties.

The third development concerns the debate, discussed in previous editorials, of the circumstances in which a full effects analysis is necessary to prove an abuse of dominance. Advocate General Wahl's Opinion in *Intel*, discussed in the EU chapter of this book, affirms the general proposition that competition law analysis should not be purely abstract and should not deal with mere possibilities. Outside the narrow exceptions of 'by nature abuses', a 'fully-fledged effects analysis must be performed'. This is because, ultimately, 'EU competition rules seek to capture behaviour that has anticompetitive effects'. (In *Unwired Planet,* Mr Justice Birss similarly recently held that outside 'by nature' abuses, 'a close analysis of the actual effects would be required'.)

The move to a more rigorous effects analysis is mirrored in other jurisdictions. In Australia, proposed new legislation will introduce an effects standard for assessing unilateral conduct. The Competition Commission of India in *XYZ v. REC Power Distribution Company Ltd* confirmed that establishing a denial of access abuse in India requires proving 'anti-competitive effect/distortion in the market in which denial has taken place'. This reinforces older statements from the Indian Competition Appellate Tribunal in *Schott Glass* that, unless the conduct at issue harms competition and, ultimately, consumers, there can be no abuse. And in the KFTC's *Qualcomm* decision, the exclusionary effects caused by Qualcomm's conduct were an important part of the case, with the KFTC insisting on such proof as a precondition to finding an infringement.

In these instances, the courts' and authorities' enforcement is not guided solely by seeking to achieve a 'fair' outcome. Rather, the cases examine the factual, legal and economic circumstances to assess whether there is a deviation from competition on the merits and harm to the competitive process. Those are the circumstances in which an abuse of dominance can properly be established.

The fourth development on 'fairness' relates to the continued international focus on due process. Here, the picture is mixed. In relation to competition law in Korea, for example, Gregory Sidak wrote a colourful open letter to President Trump criticising the KFTC's decision in the *Qualcomm* case as being based on an 'autocratic brand of due process.' But a review of the KFTC's process in that case shows that it complied with and perhaps even surpassed many international norms on due process: for example, Qualcomm received access to the authority's file, had the opportunity to rebut the KFTC's preliminary concerns, appeared at multiple hearings and could cross-examine witnesses. The investigative team was completely separate from the decision-makers (the Commissioners), and the latter all read the entire file and attended all hearings. Qualcomm can also appeal the decision to an active and discerning judiciary – which has several times in the past overturned KFTC decisions. This is a contrast with the European Commission, where the case team is directly involved in both investigation and decision-making, and the Commissioner for Competition (let alone the College of Commissioners that decides the cases) does not read the file and does not attend the hearing. As explained in previous prefaces, this situation creates a serious risk of confirmation bias and, thus, undermining due process.

In contrast to Korea, there are troubling developments in India, where the government has passed legislation to dissolve the specialist Competition Appellate Tribunal (COMPAT), and replace it with a more general tribunal focused on company law. Worryingly, the legislation follows a number of high-profile instances of the COMPAT overturning decisions made by the Competition Commission of India (CCI) on due process grounds (e.g., *Hiranandani* and *GSK*). Even more worryingly, the legislation permits the government to remove tribunal members at any time by paying them three month's salary. These developments undermine one of the most basic principles of 'due process' in competition enforcement – that a full appeal on facts and law to an independent judiciary must always be available.

In conclusion, in our view it is unhelpful to discuss 'fairness' as the yardstick of competition law enforcement. Fairness is too subjective and vague a criterion for authorities to decide cases, or for firms to determine their commercial conduct. Experiments conducted by Kahnemann, Knetsch and Taylor show that humans have irrational conceptions of what constitutes a fair price.[2] For example, consumers perceive changes in price as unfair even if they are rational, reasonable and good for consumers in the long run. And consumers were almost unanimous in concluding that any increase in price because of a decrease in competition – for example, because of a store temporarily closing – was unfair. Importing these irrational biases into competition policy creates serious risks or arbitrary and inefficient results.

Instead, we should stick to the more objective and precise concepts of consumer welfare, competition on the merits, proportionality and due process. These concepts, which capture the same goals as 'fairness', are less ambiguous, relatively well defined in case law and less susceptible to lead to outcome-focused – instead of fact-driven – results.

As in previous years, we would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this fifth edition of the *The Dominance and Monopolies Review*. We look forward to seeing what evolutions – or even revolutions – 2017 holds for the next edition of this book.

Maurits Dolmans and Henry Mostyn
Cleary Gottlieb Steen & Hamilton LLP
London
June 2017

2 Kahnemann, Knetsch, and Taylor, Fairness as a Constraint on Profit Seeking: Entitlements in the Market, *American Economic Review*, Vol. 76, No. 4 (September 1986), pp. 728–741.

Chapter 3

BELGIUM

Robbert Snelders, Thomas Woolfson and Athina Van Melkebeke[1]

I INTRODUCTION

Abuses of dominance are prohibited under Belgian law pursuant to Article IV.2 of the Code of Economic Law (CEL). Article IV.2 of the CEL is the domestic equivalent of Article 102 of the Treaty on the Functioning of the European Union (TFEU) and its wording is almost identical to the EU provision. As expressly acknowledged by the Belgian legislature, Article IV.2 of the CEL is intended to be a 'carbon copy' of Article 102 of the TFEU to align the interpretation of the Belgian and EU rules on dominance.[2] In effect, such a legal transplant allows companies to rely on EU precedents before the Belgian Competition Authority (BCA) and the Belgian courts,[3] that is, on the European Commission's decisional practice and the case law of the EU General Court and the European Court of Justice.

In the same spirit, Article I.6 of the CEL defines the notion of dominant position in the same way as the European Court of Justice did in *Hoffmann-La Roche*, namely as a position enabling an undertaking to 'prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers'.[4] Again, that transplant was expressly intended by the Belgian legislature to ensure consistency with EU precedents in the application of dominance rules and, therefore, to bring as much legal certainty as possible in an area of competition law that is notoriously unstable.[5] References to EU case law are, therefore, very common before the BCA and the Belgian courts, which rely heavily on EU precedents in their decisions and judgments irrespective of whether Articles IV.2 of the CEL and 102 of the TFEU are applied jointly or not. In the absence of Belgium-specific guidelines

1 Robbert Snelders is a partner and Thomas Woolfson and Athina Van Melkebeke are associates with Cleary Gottlieb Steen & Hamilton LLP. The authors wish to thank Damien MB Gerard, case handler at DG COMP, who drafted this chapter in recent years. The authors also wish to thank Hannelore Buelens, associate with Cleary Gottlieb Steen & Hamilton LLP, for providing her input and assistance for the 2017 edition of this chapter.

2 Draft Bill on the Protection of Economic Competition, Explanatory memorandum, Doc. Parl., Ch.repr., ord. sess. 2005–2006, No. 2180/001, page 19.

3 Ibid., page 10.

4 Case 85/76, *Hoffmann-La Roche & Co. AG v. Commission* [1979] ECR p. 461, paragraph 38.

5 Draft Bill on the Protection of Economic Competition, Comments on Articles, Doc. Parl., Ch.repr., ord. sess. 2005–2006, No. 2180/001, page 36 (see discussion on Article 2, which became old Article 1 of the 2006 APEC).

or policy statements on the application of Article IV.2 of the CEL, the Commission Guidance Paper can also be used as a source of authority in the Belgian context,[6] at least as much as it can be relied upon in the EU context.

Moreover, Belgium has so far refrained from taking advantage of the flexibility afforded by Article 3(2) of Regulation 1/2003, that is, from 'adopting and applying on [its] territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings'.[7] In particular, Belgian law does not know of notions such as abuse of economic dependency and does not contain specific provisions on unilateral practices applying to specific sectors of the economy, such as the energy or telecommunications sectors.[8] However, as is the case at EU level, competition rules apply to state-owned enterprises and undertakings benefiting from special rights 'in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'.[9] According to the theory known as the 'reflex effect' of competition law on the law of unfair trade practices (now included in Book VI of the CEL),[10] a commercial practice implemented by a dominant company that is considered permissible under Article IV.2 of the CEL (and Article 102 of the TFEU) cannot constitute an unfair trade practice insofar as the essence of the plaintiff's claim relates to an impediment to the functioning of the free market resulting from that practice (save for a case of abuse of right). In other words, the law on unfair trade practices is not supposed to catch unilateral practices that are not caught by or are compliant with Article IV.2 of the CEL.[11]

In theory, Belgian and EU rules on dominance are therefore perfectly aligned.[12] However, in practice, Belgian law is characterised by the same tensions that have long affected the enforcement of dominance rules at EU level, notably between a more formal and a more effects-based approach to the assessment of abusive practices. In particular, Belgian courts sometimes rely on somewhat formalistic reasoning and tend to interpret Article IV.2 of the CEL in the light of perceived 'fairness' requirements (i.e., without assessing the existence of (likely) anticompetitive effects or the actual incentives of dominant undertakings to engage in foreclosure strategies).

---

6 Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJC 45/7 (Commission Guidance Paper).

7 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJEC, 4 January 2003, L 1/1-1/25.

8 As is the case at EU level, compliance with the applicable regulatory framework does not shelter dominant undertakings from the application of competition – including dominance – rules (see, for example, Competition Council, Case 2012-P/K-32, *Publimail, Link2Biz International and G3 Worldwide Belgium/bpost*, 10 December 2012, paragraph 281). See also the presumption of discriminatory abuse of dominance provided for at Article 23 *ter* of the 1999 Electricity Act (Official Gazette, 11 May 1999, page 16,264).

9 Article IV.12 of the CEL.

10 That theory was upheld by the Belgian Supreme Court in 2000 (see Cass., 7 January 2000, *Multipharma/Louis Widmer*, RCJB, 2001, page 255).

11 Some restrictions still apply to consumer sales in relation to, for example, product bundling.

12 For a recent restatement, see Court of Appeal of Brussels, 27 February 2014, *Bureau d'Assurances Desert/AXA*, (Case 2013/AR/1783), paragraph 6, as published in *TBM/RCB*, page 353.

II YEAR IN REVIEW

Over the 2008–2016 period, the BCA adopted approximately one-third of its decisions on the basis of Articles IV.2 of the CEL and 102 of the TFEU. This high average hides a significant drop over the past couple of years, which suggests convergence between the BCA and competition authorities in neighbouring jurisdictions and at the EU level (independently of commitment decisions). In fact, the BCA did not issue any abuse of dominance decision on the merits in 2016. Similarly, abuse of dominance cases have been less frequently litigated before the Belgian courts in recent years, as evidenced by the few developments in 2016.

i Belgian Competition Authority (BCA)

As noted, the BCA did not issue any abuse of dominance decision on the merits in 2016. Of note is a BCA decision not to further pursue its investigation of a 'most favoured nation' clause in the real estate sector. Also noteworthy is that the BCA rendered one interim measure decision involving the interplay between merger control and abuse of dominance rules.

On 7 November 2016, the Auditorate (the investigative body in the BCA two-tier structure) adopted a decision in a dominance case involving Immoweb, the operator behind Belgium's most frequented real estate website.[13] In 2015, the Auditorate opened an investigation into Immoweb's use of 'most favoured nation' (MFN) clauses in its contracts concluded with software developers for real estate agencies. The developers offer software that allows real estate agencies to automatically upload the properties in their portfolio to real estate websites. Operators of real estate websites conclude contracts with developers in order to list real estate agencies' portfolios on their website, against a fee for developers per property listed through their software. Pursuant to the MFN clauses, the software developers were obliged to offer Immoweb the same contractual conditions as those offered to competing real estate websites, if the latter were more favourable. After a preliminary analysis, the Auditorate concluded Immoweb was dominant on a national market for web portals dealing primarily in real estate and that the MFN clauses prevented Immoweb's competitors from negotiating more commercially favourable terms with software developers, which increased the barriers to entry. The MFN clauses prevented competing real estate websites from obtaining lower fees and, thus, increased their costs. In response, Immoweb committed unilaterally to terminate the clauses at issue and not to such MFN clauses in contracts concluded in the next five years. On this basis, the Auditorate decided to close its investigation, essentially dismissing the case without coming to a final determination about any abuse of dominance under Article IV.2 of the CEL and Article 102 of the TFEU. This decision, thus, opens a possibility for early investigation closure through informal commitments, separate from a formal commitment decision adopted by the College (the decision-making body in the BCA's two-tier structure) under Article IV.47 of the CEL.

On 21 November 2016, the College decided not to order interim measures in a case dealing with the extent to which Articles IV.2 of the CEL and 102 of the TFEU may be invoked in a merger control case.[14] The brewery Alken-Maes NV (AM) had filed a request with the BCA to suspend the acquisition of Brouwerij Bosteels (BB) by Anheuser-Busch

13 Auditorate, 7 November 2016, Decision No. ABC-2016-I/O-31-AUD, *Immoweb* (case CONC-I/O-15/0002).

14 College, 21 November 2016, Decision No. ABC-2016-V/M-36, *Alken Maes NV/Anheuser-Busch InBev NV* (case CONC-V/M-16/0029).

InBev NV (ABI). AM argued that, even though the transaction did not meet the thresholds for merger control notification, the acquisition should nevertheless be halted as it would amount to an abuse of dominance by ABI. According to AM, ABI's acquisition of BB, including its 'Karmeliet' brand, would reinforce ABI's dominant position and thereby constitute an abuse of this dominant position. At EU level, concentrations are only reviewed under merger control rules and excluded from procedures for restrictive practices, pursuant to Article 21(1) of the Merger Regulation.[15] In this decision, the College decided that Article IV.2 of the CEL may still be applied to concentrations that do not meet the thresholds under the relevant legislation. However, owing to the potential significant harm of interim measures on concentrations, such measures could be imposed in case of 'strong indications' of an abuse of dominance, which require (1) *prima facie* adverse effects on competition distinct from the mere effect of the concentration and (2) *prima facie* evidence that these adverse effects may be qualified as an abuse of dominance. In the case at hand, the College concluded that there was insufficient evidence of restrictions on competition, distinct from the mere effect of the concentration, that could by themselves *prima facie* be qualified as an abuse of a dominant position. AM has introduced an appeal before the Brussels Court of Appeal.

ii Courts

On 10 March 2016, the Constitutional Court ruled on the question of the impact of BCA investigations on the limitation period to bring civil damages actions.[16] In 2006, several plaintiffs had filed an action for damages flowing from an abuse of dominance by Honda. The BCA had previously investigated Honda's conduct and found an abuse in a 1999 decision that became final only in 2011 (after multiple appeals). Honda argued that the plaintiffs' claims were time-barred pursuant to Article 2262 bis of the Belgian Civil Code. Under this provision, the limitation period for tort-based damages claims is five years from the day following that on which the injured person becomes aware of the loss or its aggravation, and of the identity of the person responsible. In other words, the applicable statute of limitation may mean that plaintiffs have to pre-emptively file a damages action as a precautionary measure, even though there may not be a final (non-appealable) decision finding a competition infringement. In the Honda case, more than five years had passed between the 1999 original BCA decision and the filing of the 2006 damages action. The Constitutional Court held that such a reading of Article 2262 *bis* violated the Constitution because it undermined plaintiffs' right to compensation as victims of competition infringements. The court also referred to the EU damages directive (EU Damages Directive)[17] and its requirement that, in case of investigation by a competition authority, a limitation period cannot expire before a final decision of the authority (or the end of the investigation by other means). As a result of the Constitutional Court's ruling, damages action should not be time-barred where a decision of the BCA is not yet final.

15 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ, 29 January 2004, L 24/1.

16 Constitutional Court, 10 March 2016, *Honda* (case 38/206).

17 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ, 5 December 2014, L 349/1.

On 10 November 2016, the Brussels Court of Appeal annulled a BCA decision against bpost, Belgium's incumbent postal services provider.[18] Bpost had applied a per sender rebate model, where quantity rebates are based on the volume of mail supplied by senders. This model does not consider consolidators, which provide collection and sorting services to senders before forwarding the mail to bpost for distribution, as single senders. In 2011, the Belgian Institute for Postal services and Telecommunications (BIPT), the sectorial regulator, found the rebate scheme to be discriminatory and fined bpost. In a separate decision in 2012, the BCA found the rebate scheme to be abusive because of its loyalty-inducing effect and fined bpost (but deducted the BIPT fine from the initial fine amount). On 10 March 2016, the BIPT decision was annulled by the Brussels Court of Appeal. Then, on 10 November 2016, the Brussels Court of Appeal annulled the Competition Council's decision, for breach of the *ne bis in idem* principle. The court considered that the facts underlying the Competition Council's decision had already been subject to scrutiny by the BIPT and the sanctions that both authorities could impose were of a criminal nature under the European Convention of Human Rights, so that the conditions for *ne bis in idem* were met even though the two authorities operate under different legal regimes. The court did not rule on the merits of the abuse of dominance arguments against bpost. The BCA has brought an appeal before the Court of Cassation.

On two separate occasions, the Brussels Court of Appeal upheld BCA decisions granting interim measures – discussed in the previous edition of this chapter.[19] First, the court upheld BCA interim measures provisionally suspending a clause in the General Regulations of the Fédération Equestre Internationale (FEI), the governing body for equestrian sports.[20] The clause at issue prohibited athletes and horses from participating in non-FEI accredited events for six months prior to any FEI accredited event (the latter being the only type of events taken into account for ranking purposes). Because of the timing of FEI competitions, athletes were effectively barred from participating in non-FEI recognised competitions, the BCA found, thereby impeding the organisation of a new non-FEI accredited equestrian competition, the Global Champions League (GCL). The Brussels Court of Appeal considered that the BCA had not made any manifest error of assessment in considering that the effect of the exclusivity clause in itself, combined with the lack of transparency of the accreditation procedure, aimed to strengthen the FEI's dominant position, so that it was not manifestly unreasonable to consider that the clause constituted a *prima facie* abuse of dominance.

Second, on 7 September 2016, the Brussels Court of Appeal upheld the interim measures imposed by the College on Telenet NV (Telenet) and Verenigde Veldritorganisatoren (VV) regarding the licensing rights for the Superprestige Cyclocross competition (i.e., bicycle races).[21] The court held that the BCA rightly found that Telenet may *prima facie* have acquired

18 Court of Appeal of Brussels, 10 November 2016, *bpost/Spring, LINK2BIZ International, Publimail*, in the presence of the BCA (case 2013/MR/2). To be specific, the judgment annulled a decision of the Competition Council, the agency that preceded the BCA.

19 Interim measures are adopted at the level of the College.

20 Court of Appeal of Brussels, 28 April 2016, *FEI/ABC* (case 2015/MR/1), TBH/RDC, 2016/8, page 761, upholding the interim measures decision of the College of 27 July 2015, Decision No. ABC-2015-V/M-23, *Interim measures against FEI* (case CONC-V/M-15/0016). On 22 October 2015, the court had already dismissed a request to suspend the interim measures.

21 Court of Appeal of Brussels, 7 September 2016, *Telenet/BMA* (cases 2015/MR/2 and 2016/MR/1), upholding the interim measures decision of the College of 5 November 2015, Decision No. BMA-2015-V/M-65, *Interim measures against Telenet* (case MEDE-V/M-15/0024).

a dominant position on the market for the acquisition of cyclocross races broadcasting rights in Flanders (Telenet's catchment area) since it had already acquired rights for the UCI Worldcup cyclocross races for seasons 2016–2017 to 2019–2020. Because of the popularity of Cyclocross races in Belgium and the resulting attractiveness of such broadcasting rights, it was not manifestly unreasonable, as the court confirmed, to consider that entering into the Superprestige Cyclocross licensing agreement with VV, which granted Telenet five years' exclusivity, entailed a strengthening of Telenet's dominant position on the downstream retail market for television services, in breach of Telenet's special responsibility as a dominant player.

These two judgments show that Belgian courts are ready to support the BCA's willingness to resort to interim measures. This trend by the BCA is in contrast with neighbouring jurisdictions and the EU level, and in spite of the risk that such measures may disrupt commercial activities for a long period with the risk of a decision on the merits eventually not supporting the initial assessment.

Finally, Belgian courts also considered two abuse of dominance allegations, specifically refusals to deal, brought forward as unfair trade practices claims. Both cases concerned appeals of judgments denying cease-and-desist orders against the alleged unfair trade practices (such orders are granted or denied by presidents of Commercial Courts). In a first case, the Ghent Court of Appeal dismissed an appeal against a judgment of the president of the Dendermonde Commercial Court and confirmed that the claimant had not provided evidence to support any dominant position on the part of SEB Belgium (SEB), a supplier of a variety of household brands.[22] Therefore, SEB's refusal to supply 20 types of appliances (out of 600 in its portfolio) could not constitute an abuse of dominance. In a second case, the Antwerp Court of Appeal came to a similar conclusion in rejecting an appeal against a judgment of the president of the Mechelen Commercial Court.[23] The court confirmed that a finding that Duvel Moortgat (DM) held a dominant position on the Belgian on-trade beer market could not be made, *inter alia* because the claimant had brought no evidence regarding DM's market shares, and in light of AB-InBev's significant market position in this market. The two judgments illustrate the application of the reflex effect discussed above.

BCA significant decisions

Sector	Conduct	Decision	Auditorate or College	Case opened
Real estate	MFN clause in agreements between real estate websites and software developers	Dismissal decision (commitments)	Auditorate	January 2015
Beer	Non-reportable acquisition allegedly leading to abuse of dominance	Rejection of interim measures	College	September 2016

BCA active cases

Sector	Conduct	Case opened
Show-jumping competitions	Exclusivity clause in federation regulations	June 2015
Broadcasting of cycling competitions	Acquisition of long-term exclusive licensing rights without bidding procedure	September 2015

22 Court of Appeal of Ghent, 7 March 2016, BIT Marketing/SEB (case 2015/AR/1594), *TBM/RCB*, 2016/4, page 403.

23 Court of Appeal of Antwerp, 27 October 2016, *Bierhalle Demeyer NV/Duvel Moortgat* (case 2015/AR/2657), TBM/RCB, 2016/4, page 442.

III MARKET DEFINITION AND MARKET POWER

When it comes to market definition and the assessment of dominance, the BCA and the Belgian courts can be generally expected to use the same criteria as the European Commission, the General Court, and the European Court of Justice. As noted above, the definition of 'dominance' provided by Article I.6 of the CEL is directly derived from the well-known formula expressed by the European Court of Justice in *Hoffmann-La Roche*. Likewise, as under EU law, it is essential under Belgian law to first define the relevant markets before assessing whether or not an undertaking holds a dominant position.

Unsurprisingly, the main criterion used to define the relevant product and geographic markets is that of 'substitutability', which is first of all assessed on the demand side. Products and services are considered part of the same market if they are regarded as substitutable for users or consumers, by reason of their characteristics, prices and intended use. The assessment of substitutability should also reflect any sources of potential competition (new products, potential entry of a new competitor on the geographical market, etc.), and any relevant constraint that may affect the demand structure, such as the existence of a specific regulatory framework. In addition, the substitutability does not need to be perfect if it is effective for a part of the goods or services at issue that is significant enough to materially affect factors driving competition, in particular prices.

Practically, decisions by the BCA and judgments by the Belgian courts typically describe, first of all, the contentious commercial practice, to ascertain the competitive environment affecting the supply and demand of the affected products or services. Then market definitions previously adopted at European or Belgian level (but also by the competition authorities of neighbouring countries) are generally considered a useful, if not decisive, starting point.[24] Potentially converging arguments of the parties involved are further likely to influence the market definition.[25] It is also common to consider several possible definitions and to test whether the defendant can be deemed to hold a dominant position under any of them. If this is not the case or is not such as to affect the outcome of the competitive analysis, it is also common practice to leave open the question of the exact definition of the relevant markets. Generally, even though somewhat dated, the Commission's guidance on the definition of relevant markets is frequently relied upon before both the BCA and the Belgian courts, so that arguments relying on such guidance will often carry particular weight.[26]

In line with practices at EU level, the assessment of dominance requires consideration of various factors, which, taken separately, are not necessarily determinative.[27] Among these factors, considerable importance is given to market shares. Although the CEL does not provide for a market-share threshold above which an undertaking would be deemed dominant, the BCA has considered in the past that a market share exceeding 50 per cent

24 See, for example, Decision No. 2010-P/K-42-AUD, Freedom *CVBA/InBev Belgium NV*, paragraph 75. See also the 2014 judgments of Belgian courts summarised in Section II, *supra*.

25 For example, in *Base/Belgacom Mobile*, the Council found that, with regard to the geographical scope, all parties seemed to agree that the relevant market was the Belgian territory, and the Council subsequently adopted such a decision (Decision No. 2009-P/K-10, *Base/BMB*, paragraph 130).

26 Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJC 372/5.

27 Decision No. 2008-P/K-10-AUD, *FEGE/Idelux*, page 6; Decision No. 2009-P/K-10, *Base/BMB*, paragraph 139.

entailed a presumption of dominance.[28] Likewise, a market share exceeding 40 per cent, while not decisive in itself, has been viewed as a very important indication of the existence of a dominant position.[29] Conversely, the BCA has also proved that it is open to more sophisticated approaches whereby 'a considerable market share is not automatically considered as equivalent to a dominant position'.[30] Overall, Belgian practice recognises the need to assess the position of the allegedly dominant company in comparison with the position of its competitors and, in particular, to consider the differences in market shares,[31] the evolution in time of market shares, the concentration index of the relevant markets, the existence of barriers to entry, the significance of potential competition, the existence of network effects, the vertically integrated structure of competing firms, their respective economic and financial power, and the nature of the contentious practices as a proxy for the ability to circumvent competitive constraints and as evidence of a possibility to behave independently of competition.[32] The BCA has also relied on earlier findings of dominance in its own decisions.[33]

Finally, there are only a couple of precedents in which the BCA has had recourse to the concept of collective dominance. The main one to date is the 2014 decision dismissing a complaint brought against various movie studios.[34] The complaint against the studios involved digital screening fees paid by major record companies (the majors) to certain theatre

28 For a recent case, see decision ABC-2015-P/K-09-AUD of the Auditorate of 26 March 2015 in case CONC-P/K-09/0002, *Lampiris/Electrabel*, paragraphs 101–118.

29 In *Unie der Belgische Ambulancediensten/Belgische Rode Kruis* (Decision No. 2001-V/M-22), the BCA considered that a market share of above 40 per cent gives a 'strong indication' of dominance, whereas a market share below 30 per cent, in the absence of additional factors, is 'not indicative' of dominance. For a discussion relying on the Commission Dominance Paper, see also Decision No. BMA-2014-P/K-23-AUD of the Auditorate of 2 December 2014 in case MEDE-P/K-11/0027, *NV Handling CO/Sony Pictures, The Walt Disney Company (Benelux), Universal Pictures International Belgium, Twentieth Century Fox Film Belge and Warner Bros. Studios Leavesden Limited*. For a discussion by a Belgian Court, see, e.g., Court of Appeal of Brussels, Bureau d'Assurances *Desert/AXA Belgium*, 27 February 2014 (Case 2013/AR/1783), *TBM/RCB*, 2014/4, page 352.

30 Decision No. 2009-P/K-10, *Base/BMB*, paragraphs 150 and 154.

31 For example, the BCA has considered that a difference of 40 per cent between the market share of a dominant undertaking and its largest competitor constitutes in itself an indication of dominance (see Decision No. 2007-V/M-25-AUD, *Merck Generics Belgium BVBA, Generics UK/Merck Sharp & Dohme BV* and *MSD Overseas Manufacturing Company*, paragraph 21).

32 Decision No. 2009-P/K-10, *Base/BMB*, paragraph 155 et seq.; Decision No. 2009-P/K-26-AUD, *vzw Federatie HoReCa Wallonie/Vlaanderen et al/InBev NV*, paragraphs 62–64; Decision No.2008-I/O-41-AUD, Electrabel NV, paragraphs 77–78 and Decision No. 2007-V/M-25-AUD, *Merck Generics Belgium BVBA, Generics UK/Merck Sharp & Dohme BV and MSD Overseas Manufacturing Company*, paragraph 21.

33 In its decision of 26 March 2015 in case CONC-P/K-09/0002, *Lampiris/Electrabel*, paragraph 106, the Auditorate relied on a decision of the College of 18 July 2014, which had found Electrabel to be dominant on the wholesale electricity market, in case CONC-I/O-09-0015, *Electrabel/Wholesale Electricity Market* (Decision No. ABC-2014-I/O-15).

34 Auditorate, 2 December 2014, Decision No. BMA-2014-P/K-23-AUD, *NV Handling CO/Sony Pictures, The Walt Disney Company (Benelux), Universal Pictures International Belgium, Twentieth Century Fox Film Belge and Warner Bros Studios Leavesden Limited* (case MEDE-P/K-11/0027). In a recent case, the BCA closed an investigation into potential collective dominance by cargo handling companies at Brussels airport, see Auditorate 17 February 2015, Decision No. BMA-2015-I/O-02-AUD, Cargo handling at Brussels National Airport (case MEDE-I/O-10/0009). For a case mixing concerted practices and collective dominance considerations, see judgment of the Court of Appeal of Liège of 5 February 2009 in case *AGIM/Oxycure*, TBM/RCB, 2009, page 60.

owners and 'incubators', but not to the complainant. The Auditorate summarily referred to the Sony/BMG criteria and found that they were inapplicable to the case at hand and thus rejected the allegation of collective dominance on the part of the majors. Moreover, it noted that the European Commission had already investigated the substance of the companies' contracts involving digital screening fees and had closed its investigation after the contracts in question were amended.

IV ABUSE

Although the assessment of the abusive character of a specific commercial practice is inherently fact-specific, the BCA and the Belgian courts can generally be expected to use criteria or tests similar to those developed to that effect by the European Commission and the European Court of Justice, even though courts are more unpredictable in this respect. As noted, Article IV.2 of the CEL was modelled after Article 102 of the TFEU and accordingly contains a non-exhaustive list of practices that may be considered abusive depending on the circumstances. Moreover, as at EU level, the BCA and courts take as a starting point that holding a dominant position is not problematic *per se*,[35] and that 'the existence of a dominant position does not deprive an undertaking in this position from the right to protect its own interests when they are jeopardised',[36] but that it may not abuse its position to exploit consumers or foreclose competition. With respect to exclusionary conduct, the 'as efficient competitor test' is also used as a baseline.[37]

i Overview

Generally, the abusive character of a commercial practice implemented by a dominant company depends on its actual or likely effects on competition. To assess the materiality or likelihood of such effects, the BCA and courts typically rely on specific tests designed for certain categories of practices, which are then applied to the facts of each case. These tests tend to create presumptions that are rebuttable in view of the circumstances prevailing on the relevant markets and the actual effects observed (or lack thereof). Similarly, a practice is only regarded as abusive after consideration has been given to possible objective justifications, if any, put forward by the dominant company. Unfortunately, Belgian courts sometimes tend to adopt a formalistic approach to the notion of abuse, occasionally driven by underlying 'fairness' considerations.

ii Exclusionary abuses

Exclusionary pricing

The leading precedent on predation is *Electrabel*.[38] The case involved allegations of predatory pricing on the part of the incumbent gas operator, Electrabel, at the time of the liberalisation of the sector. The allegations were dismissed for two main reasons: (1) the short duration of the alleged predation (six months), which was considered too short to implement a credible

35 Court of Appeal of Ghent, 1 October 2014, *Ducati/DDBikes* (case 2010/AR/3351).

36 See, for example, Court of Appeal of Brussels, 3 November 2005, *SABAM v. Productions & Marketing*, TBM/RCB, 2006, No. 4, p. 320.

37 See, for example, Decision No. 2009-P/K-10, Base/BMB, paragraphs 190 and 275 et seq.

38 Decision No. 2008-I/0-41-AUD, *Electrabel NV*.

predatory strategy; and (2) the fact that no alternative operator had exited the market during that period. This case is interesting in three respects. First, it seems to require evidence of actual foreclosure effects, whereas the Commission does not consider that 'it is necessary to show that competitors have exited the market to show that there has been anticompetitive foreclosure.'[39] Second, much like the US antitrust framework, it suggests that predation implies the possibility to recoup losses at a later stage, whereas the Commission and the European Court of Justice recently reiterated that the prospect of such a recoupment was not a prerequisite for the establishment of an exclusionary strategy. Third, the BCA did not perform a cost analysis in this case but focused on the materiality of the foreclosure effects. Otherwise, it is generally acknowledged under Belgian law that temporary below-cost prices associated with the launch of a new product or the liquidation of stocks, is not abusive.[40]

With regard to margin squeeze, the BCA's practice is generally in line with the EU case law. In the *Lampiris/Electrabel* case discussed in last year's edition of this chapter, the BCA dismissed a margin squeeze allegation, among other claims of price-related abuses of dominance by Electrabel.[41] The BCA found no margin squeeze; applying the 'as efficient competitor test' on the basis of Electrabel's long-run average incremental costs (LRAIC), the BCA found that Electrabel's margins would have remained positive on the retail market, even when paying the prices charged to customers on the wholesale market. The BCA further noted that during the relevant period Lampiris' prices had been equal to or lower than Electrabel's prices, with positive margins, and that Lampiris had grown its market share. Otherwise, the leading precedent is Base/Belgacom Mobile (BMB) in which the BCA established a margin squeeze on the basis of a comparison between the wholesale prices charged by BMB on the upstream market for call termination on its network (as charged to competitors) and the retail prices charged by BMB on the downstream market for mobile telephony services to business customers.[42] Considering that BMB is 'a vertically integrated undertaking offering termination services on the upstream market and telephony services on the downstream market' and that 'termination services are an essential input for BMB's competitors', the BCA endeavoured to 'verify whether BMB would be able to make a normal profit on its on-net calls if it had to bear the termination cost charged to its competitors'. Having found that this was not the case during the relevant period, it subsequently referred to EU case law to support the conclusion that: '[a] margin squeeze may, by its very nature, restrict competition.'[43]

Exclusive dealing

The offering of rebates characterised as exclusive tends to be treated somewhat strictly by the BCA and courts. Thus, on 27 September 2013, the Brussels Court of Appeal upheld the BCA's decision of 30 July 2012 imposing a €245,530 fine on Presstalis,[44] a French media distributor, for providing French publishers an extra 2.5 per cent discount (BSC)

39 Commission Guidance Paper, paragraph 69.

40 See, for example, Commercial Court of Brussels, 20 November 2006, *Docpharma/Eli Lilly Benelux*, TBM/RCB, 20007, No. 1, page 90.

41 Auditorate, 26 March 2015, Decision No. ABC-2015-P/K-09-AUD, *Lampiris/Electrabel* (case CONC-P/K-09/0002).

42 Decision No. 2009-P/K-10, *Base/BMB*, paragraph 260.

43 Ibid., *Base/BMB*, paragraph 313, which refers to Case COMP/38.734, *Telefónica*, paragraph 543, Case T-271/03, *Deutsche Telekom/Commission*, Section 236 and Case T-203/01, *Michelin*, paragraphs 239 and 241.

44 Competition Council, 30 July 2012, Decision No. 2012-P/K-20, *Tondeur Diffusion/AMP & Presstalis*.

on top of other volume-based discounts in exchange for the exclusive right to export their magazines to the Belgian, Swiss and Canadian markets for a period of 12 months.[45] The BCA found that the BSC discount had had a 'strong fidelity effect' and enabled Presstalis to foreclose competitors both on the market for the export of French magazines and, through its privileged relationship with Belgian distributor AMP, on the market for the distribution of those magazines in Belgium. While confirming that the proof of likely (and not actual) foreclosure effects on competitors that are at least as efficient as the dominant company was sufficient to establish an abuse, the Court adopted a strict view, holding that loyalty discounts provided in exchange for exclusivity are as such in violation of Article 102 of the TFEU. The court concluded that the BCA correctly qualified the BSC discount as a loyalty discount and ruled that it was sufficient that the BSC discount placed competitors in a less favourable economic position than Presstalis.

With regard to loyalty rebates (not tied to an exclusivity requirement), the BCA adopted an effects-based approach in the *Base/BMB* case, which also involved individualised conditional rebates in the form of free subscriptions, reimbursements proportionate to spending, a reduction on certain types of calls or free calls and text messages. The BCA dismissed the existence of an abuse on the grounds that it was unclear: (1) how said rebates were 'likely to have a real influence on the customer's choice'; and (2) how 'the offers from the dominant undertaking on the one hand, and the competitors on the other hand' compared with each other.[46] Otherwise, volume rebates are generally unproblematic under Belgian law. The Brussels Court of Appeal has considered, for instance, that 'the existence of a dominant position does not deprive such an undertaking of its right to grant volume-based rebates to its customers depending on the customer's volume of purchases, if there are objective reasons to believe that the conferral of a financial benefit to certain customers is justified by the business volume realised by these customers and the economies of scale to which they give rise'.[47]

Leveraging

Leveraging allegations have occasionally been made in Belgium. In the National Lottery case, the National Lottery acknowledged forms of leveraging in a BCA settlement decision in 2015.[48] Following complaints, the Auditorate had investigated the National Lottery's conduct at the time of its launch of Scooore!, a new sports betting product. The Auditorate found that the National Lottery had abused its dominant position through a one-off use of customers' contact details in order to promote Scooore!. The contact details had been collected through its legal monopoly, where competitors were unable to collect data of a similar scope and nature at reasonable cost and within a reasonable period of time. In addition, the National Lottery had obtained commercially sensitive information about competitors, both before and after the launch of Scooore!, from some of its retailers, for which the sale of lottery products represented a significant share of their turnover.

45 Court of Appeal of Brussels, 27 September 2013, *Presstalis SAS*.

46 Ibid., paragraphs 192–199.

47 Court of Appeal of Brussels, 3 November 2005, *SABAM v. Productions & Marketing*, TBM/RCB, 2006, No. 4, p. 320.

48 Auditorate, 22 September 2015, Decision No. BMA-2015-P/K-27-AUD and Decision No. BMA-2015-P/K-28-AUD, *Stanleybet Belgium NV/Stanley International Betting Ltd and Sagevas SA/World Football Association SPRL/Samenwerkende Nevenmaatschappij Belgische PMU SCRL* (cases MEDE-P/K-13/0012 and CONC-P/K-13/0013).

Otherwise, Belgian case law does not contain other recent discussions of the principles applicable to tying and bundling practices so that reference can be made to the ones developed at EU level.[49]

Refusal to deal

The *Bofar* case, involving a company specialised in the export of pharmaceutical products, has enabled the BCA to provide some guidance regarding refusal to deal practices. As is the case at EU level, the starting point of the analysis is the basic free trade principle according to which 'each undertaking, irrespective of whether or not it holds a dominant position, should have the right to choose its business partners'.[50] Subsequently, the BCA appears to condition a finding of abuse on: (1) evidence of a clear intent to foreclose actual or potential competition; (2) the strengthening of the company's dominant position; and (3) the absence of objective justification. In this case, the BCA dismissed the existence of an abusive refusal to deal, relied heavily on the Commission Guidance Paper and modelled its decision on the *GlaxoSmithKline* case law of the European Court of Justice.[51]

While the principle according to which dominant players should remain free to choose their trading partners is well understood by the Belgian courts, exceptions to this principle are sometimes found on the basis of *ad hoc* tests that are applied quite flexibly. This is well illustrated by the *Ducati/DD Bikes* case, in which the Ghent Court of Appeal upheld a lower court judgment finding Ducati guilty of abusive refusal to supply spare parts and other repair equipment to a former dealer-repairer, following the (otherwise lawful) termination of the dealership agreement.[52] After finding that Ducati, through its official dealers, was dominant on a Ducati brand-specific market for maintenance and repair, it laid down its own test to appreciate the abusive character of the refusal to supply without any reference to EU or other precedent (very uncommon in Belgian case law) and dismissed, for example, free-riding arguments or the relevance of the fact that the repairer sold and serviced other brands of motorbikes. In addition to holding Ducati's refusal to supply as abusive, the court imposed on it a number of obligations aimed at ensuring that DD Bikes could effectively offer aftersales services for Ducati motorbikes in the future. This case should be understood in the context of long-term dealership agreements in Belgium and testifies to a historical tendency on the part of Belgian courts to protect the interests of dealership holders.

iii Discrimination

Price discrimination under Article IV.2(2)(3) of the CEL is generally considered to require evidence of a difference in treatment, applied to equivalent transactions, with the effect of causing a material competitive disadvantage. In *Lampiris/Electrabel*, the BCA considered that the services offered on the electricity wholesale market and on the retail market were not

49 In the *Cargo handling* case, the Auditorate closed an investigation (for lack of evidence) into practices that would have entailed a review of potential bundling practices by Aviapartner and Flightcare on the reserved market for airside freight handling and the downstream non-reserved market for landside freight handling services, see Decision No. BMA-2015-I/O-02-AUD of 17 February 2015, *Cargo handling at Brussels National Airport* (case MEDE-I/O-10/0009).

50 Decision No. 2009-V/M-04, *Bofar NV*, paragraph 103.

51 Joined Cases C-468 to 478/06, *GlaxoSmithKline AEVE* [2008] I-7139.

52 Court of Appeal of Ghent, 1 October 2014, *Ducati/DDBikes* (case 2010/AR/3351).

equivalent, and hence dismissed the discriminatory pricing claims.[53] In *InBev*, the on-trade (catering) and off-trade (wholesalers and retailers) segments for the distribution of beers and beverages were considered as separate markets, thereby justifying differences in pricing.[54] In the *bpost* case,[55] however, the BCA referred to a breach of equal treatment in relation to the grant of rebates, without reaching a formal finding of discrimination, thereby creating uncertainty as to the applicable standards. The Brussels Court of Appeal annulled this decision, as discussed in Section II, *supra*, on *ne bis in idem* grounds and, therefore, did not review the finding of breach of equal treatment.

Likewise, Belgian courts sometimes fail to inquire into the existence of an actual competitive disadvantage resulting from the allegedly discriminatory practice, in contradiction with the principles prevailing at EU level since *Post Danmark*.[56] In *SABAM*, for example, the Brussels Court of Appeal found that services offered to 'major customers' were equivalent to those offered to other customers and that the application of different prices was, therefore, discriminatory, without inquiring into the actual existence of a competitive disadvantage resulting from that difference of treatment on the downstream market.[57]

iv Exploitative abuses

As is well known, there is no clear standard to assess what is or makes a price 'excessive' and the comparative test proposed in some EU precedents leaves room for a significant margin of discretion. Excessive pricing claims are relatively frequent in Belgium but seldom established, with the notable – though quite specific – exception of the 2014 *Electrabel* electricity wholesale market case. In the 2014 *Electrabel* case, the BCA found the former incumbent electricity producer and supplier guilty of an abuse of dominance revolving around Electrabel's tertiary production reserve policy,[58] which was presented as an unjustified limitation of production.[59] Relying on EU precedents, the BCA defined the relevant markets as the production and wholesale trade of electricity in Belgium, on the one hand, and the supply of the tertiary reserve in Belgium, on the other hand, and found that Electrabel held a dominant position on both. The BCA then narrowed down the scope of the abuse to Electrabel's marketing of reserve capacities by means of the application of an excessive margin scale (qualified as a form of 'economic withholding'). Electrabel's scale governing the release of reserve capacity implied the realisation of margins 50 to 200 per cent above the average wholesale price per MWh achieved on the Beplex trading platform in 2008, which was found 'excessively disproportionate compared to the marginal cost of production'.[60]

53 Auditorate, 26 March 2015, Decision No. ABC-2015-P/K-09-AUD, *Lampiris/Electrabel* (case CONC-P/K-09/0002), paragraph 142.

54 Decision No. 210-P/K-42-AUD, *Freedom CVBA/InBev Belgium NV*, paragraph 80.

55 Decision No. 2012-P/K-32, *Publimail, Link2Biz International and G3 Worldwide Belgium/bpost*.

56 Case C-209/10, *Post Danmark* [2012] ECLI:EU:C:2012:172.

57 Court of Appeal of Brussels, 3 November 2005, *SABAM v. Productions & Marketing*, TBM/RCB, 2006, page 319.

58 The management of reserve capacities on the Belpex electricity exchange, for the electricity wholesale market.

59 College, 18 July 2014, Decision No. ABC-2014-I/O-15, *Electrabel/Wholesale Electricity Market* (case CONC-I/O-09-0015). As part of its reasoning, the College also repeated that, as a matter of principle, competition law is applicable to practices otherwise regulated by sector-specific rules.

60 College, 18 July 2014, Decision No. ABC-2014-I/O-15, *Electrabel/Wholesale Electricity Market* (case CONC-I/O-09-0015), paragraph 147.

Other cases involving Electrabel were dismissed. In the *Lampiris/Electrabel* and *NMBS/Electrabel* cases, the BCA and the Brussels Court of Appeal both dismissed similar excessive pricing claims.[61] Both found that Electrabel's incorporation into its wholesale prices of the value of emission allowances obtained for free was economically justifiable, since the allowances could otherwise be traded. Beforehand, the leading precedent involved the allegedly excessive character of an increase in Electrabel's natural gas prices.[62] After comparing Electrabel's prices with a number of competitive price benchmarks, for example, prices of alternative operators, regulated prices and prices applied in other EU Member States, the BCA was not able to reach a finding of infringement.

Loose findings of excessive prices are sometimes encountered in judgments of Belgian courts, however. This was the case in the AMP judgment,[63] where the Brussels Court of Appeal considered excessive an increase in AMP's minimum distribution fee because of its lack of costs-based justification, as established by an expert report. Likewise, the Commercial Court of Antwerp is reported to have held Belgacom guilty of charging excessive prices as it failed to pass on to consumers a reduction in the mobile termination charges of competing operator Base, as mandated by the telecommunications regulator. By holding that prices 'were higher than those that should normally be applied', the court essentially sanctioned Belgacom's failure to comply with a regulatory decision and gave the concept of excessive pricing an interpretation driven by fairness considerations.[64]

In addition, it should be noted that the CEL grants the BCA the power to issue interim orders in case of 'price or margin problems', 'abnormal evolution in prices' or 'structural market failures' established by a report of the 'Price Observatory', with the view to preventing serious, actual and irreparable harm to companies, consumers or the general economic interest.[65] These orders, which can last for a maximum of six months, are adopted pursuant to summary proceedings during which parties are only heard orally and benefit from a mere five-day period for reviewing any submissions and supporting evidence. Orders are then notified to the Minister for Economic Affairs who shall submit a plan to the government within six months proposing a 'structural modification of the functioning of the market concerned'.[66] No such reports or orders have yet been issued. Thus, the scope of the causes of action, as well as the possible reach of these orders, remain largely unclear and therefore

61 Court of Appeal of Brussels, 14 January 2015, *NMBS/Electrabel* (case 2010/AR/3112), TBM/RCB, 2016/1, page 33, and Auditorate, 26 March 2015, Decision No. ABC-2015-P/K-09-AUD, *Lampiris/Electrabel* (case CONC-P/K-09/0002).

62 Decision No. 2008-I/O-41-AUD, *Electrabel NV*.

63 Court of Appeal of Brussels, 29 May 2012, *Standaard Boekhandel, Prodipresse, VFP and Buurtsuper v. AMP*.

64 N Petit, 'L'application du droit de la concurrence par les juridictions belges – Une analyse tendancielle de la jurisprudence récente', in JF Bellis (ed.), *Concurrence en droit belge et européen*, Brussel, Larcier, pages 33–34.

65 Articles V.3–V.4 of the CEL.

66 Article V.6 of the CEL.

constitutes a source of concern for the business community.[67] This peculiar regime finds its origin in a frustration of political actors with the perceived limitations of dominance principles (notably with notions such as 'excessive prices') and of available remedies.[68]

V REMEDIES AND SANCTIONS

Article IV.48(1) of the CEL entitles the BCA to find an infringement of the rules on dominance and to order the termination of the commercial practice in question. In turn, Article IV.70(1) of the CEL provides for the possibility of imposing a fine to sanction the abusive character thereof. As at EU level,[69] it is in a dominance case that the BCA imposed its highest individual penalty ever, of an amount of €66.3 million levied against Belgacom (now Proximus) in a margin-squeeze decision dated 26 May 2009.[70]

The Belgian remedial practice differs from the one observed at EU level in two notable respects. First, whereas the Commission relies heavily on commitment procedures to deal with dominance cases, the BCA has adopted very few commitment decisions to date.[71] Even though not formally a commitment decision but a dismissal, the *Immoweb* case, summarised in Section II, *supra*, recently set a precedent in Belgium for *de facto* commitment decisions at the level of the Auditorate. As illustrated by the National Lottery case, the BCA may also adopt settlement decisions in dominance cases. Second, whereas this is extremely rare at EU level, the BCA commonly adopts interim measures in the course of dominance proceedings.

i Sanctions

Fines are capped at 10 per cent of the turnover realised on the Belgian market (including the sale of goods for export) in the last full year preceding the adoption of the decision. Below that limit, fines are calculated according to new Fining Guidelines issued in 2014.[72] These Guidelines provide that the BCA applies the same methodology as the European Commission, with a limited number of exceptions.[73] Most importantly, the starting amount of the fine is based on Belgian sales (i.e., sales realised on the Belgian territory and for exports). Moreover, the Guidelines provide for specific rules in relation to the assessment of the aggravating factor of repeated infringement. The CEL also foresees the possibility of the BCA imposing administrative fines on individuals but that provision is not applicable to dominance cases (only to specific types of horizontal infringements).[74]

67 In a decision closing an investigation into alleged unfair prices (in light of available resources and priorities), the Auditorate mentioned that the Price Observatory may be better placed to investigate the price evolution identified by the complainant, see Decision No. BMA-2015-P/K-10-AUD of 31 March 2015, *[x]/Omega Pharma* (case MEDE-P/K-02/0073), paragraph 53.

68 Articles V.3–V.4 of the CEL.

69 See the €1.06 billion fine imposed in Case COMP/C-3/37.990, *Intel* (13 May 2009).

70 Decision No. 2009-P/K-10, *BASE/Belgacom & Belgacom Mobile*.

71 The BCA has adopted commitment decisions in only two instances so far; see Decision No. 2005-I/O-52, *NV Distri-One/BVBA Coca-Cola Enterprises Belgium* and Decision No. 2006-I/O-12, *Banksys SA/FNUCM / Banksys SA*; *UNIZO/Banksys*). Both decisions ended seven-year investigations into alleged abusive conducts.

72 The Guidelines are available on the website of the BCA at: http://economie.fgov.be/fr/binaries/140826_lignes_directrices_amendes_tcm326-254555.pdf.

73 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Council Regulation (EC) No. 1/2003, OJ, 2006/C 210/02).

74 Article IV.70(2) of the CEL.

ii Behavioural remedies

As noted, the BCA (and Belgian courts) typically issues a cease-and-desist order when finding an abuse of dominance. In contrast, behavioural remedies are uncommon, notably because commitment procedures have only been scarcely used to date. Over the years, however, the BCA has developed an important practice of imposing positive obligations on an interim basis pending the completion of investigations into alleged abuses of dominance. That practice is rooted in Article IV.64(1) of the CEL, whereby the College may 'adopt interim measures intended to suspend the anticompetitive practices under investigation, if there is an urgent need to avoid a situation likely to cause serious, imminent harm that would be difficult to remedy [*ex post*]'.

The powers of the BCA to impose interim measures in pending proceedings have been strengthened since the entry into force of the CEL. First, establishing a risk of 'irreparable harm' is no longer required.[75] Second, interim proceedings are subject to strict deadlines. In particular, the CEL provides that an oral hearing preceded by the submission of written briefs will be held within one month of the filing of the request for interim measures.[76] Subsequently, the BCA will have to render its decision within one month of the oral hearing, failure to do so amounting to a rejection of the request.[77]

In 2016, the BCA's willingness to make use of interim measures was sustained by the Brussels Court of Appeal, as discussed in Section II, *supra*. In the *FEI* case, the BCA ordered the suspension of FEI's exclusivity clause, prohibited the FEI from suspending or otherwise sanctioning athletes or horses for participating in GCL competitions and requested the FEI to inform its members (national federations), athletes, officials and organisers, of these measures by 31 August 2015.[78] After finding that the FEI had not properly communicated the measures, the BCA actually determined the content of the messages to be published on the FEI's website and to be sent to national federations and other associations by 30 November 2015, subject to penalty payments.[79] This decision was upheld by the Brussels Court of Appeal on 28 April 2016. In the *Telenet* case, the BCA's interim measures, equally confirmed by the Brussels Court of Appeal (on 7 September 2016), ordered Telenet and VV to either suspend the exclusivity clause in their agreement and offer the broadcasting rights to interested parties on reasonable and non-discriminatory terms and conditions, or suspend the full exclusive agreement from the end of season 2015–2016 and reallocate the VV broadcasting rights, on an exclusive basis or not, on the basis of a transparent and non-discriminatory tender procedure.[80]

75 Article IV.64(1) of the CEL.

76 Article IV.64(3) of the CEL.

77 Article IV.64(6) of the CEL.

78 College, 27 July 2015, Decision No. ABC-2015-V/M-23, *Interim measures against FEI* (case CONC-V/M-15/0016), paragraphs 97–115. The FEI's appeal to suspend the interim measures was dismissed by the Court of Appeal of Brussels in a first judgment of 22 October 2015, *FEI/BCA* (case 2015/MR/1, Official Gazette, 17 November 2015, pages 69 and 141), and confirmed by judgment on the merits of 28 April 2016, *FEI/BCA* (case 2015/MR/1), TBH/RDC, 2016/8, page 761.

79 College, 24 November 2015, Decision No. ABC-2015-V/M-68, *Interim measures against FEI* (case CONC-V/M-15/0016), pages 29–31.

80 College, 5 November 2015, Decision No. BMA-2015-V/M-65, *Interim measures against Telenet* (case MEDE-V/M-15/0024), paragraphs 72–81, upheld by Court of Appeal of Brussels, 7 September 2016, *Telenet/BMA* (cases 2015/MR/2 and 2016/MR/1).

iii Structural remedies

There is no recent reported case of structural measures (such as split-up or divestitures) imposed or ordered at Belgian level to remedy an abuse of dominance.

VI PROCEDURE

The structure of the BCA, and the procedure applicable to dominance cases, was entirely redesigned upon the entry into force of the CEL in 2013.

In a nutshell, a single BCA composed of two functionally distinct entities, namely the College in charge of deciding cases and the Auditorate in charge of investigations, replaced the dual structure previously in place. The Auditorate carries out investigations either on an *ex officio* basis, upon a complaint, at the request or injunction of the competent minister. Upon completion of its investigation, the Auditorate has the choice between closing the case and issuing a formal statement of objections to which the parties are entitled to reply prior to the transmission of the case to the College for decision.[81] That transmission occurs by means of the issuance of a non-binding draft decision reflecting the replies to the statement of objections.[82] The College then hears the parties both in writing and orally before rendering its decision,[83] which can then be appealed before the Brussels Court of Appeal. The procedure is controversial, however, primarily because it prevents the parties from submitting new factual evidence before the College (unless the draft decision raises points that were not addressed in the statement of objections). Moreover, the CEL sets strict time limits for the submission of written briefs by the parties, namely one month to reply to the statement of objections and two months to comment on the draft decision and review the case file.[84]

As far as complainants are concerned, they are entitled to appeal to the College any decision by the Auditorate dismissing their complaint and to review the evidence referred to in the Auditorate's decision. If the Auditorate acts upon their complaint, they may have access to a non-confidential version of the draft decision 'if the College deems it necessary'.[85] As a rule, they do not have access to the case file, unless the president decides otherwise and then only to a reduced version of the file containing only the evidence referred to in the draft decision (i.e., not to the entire case file).[86] Upon request, complainants can be heard orally by the College.[87]

The CEL provides for the possibility of closing cases by means of a commitment decision adopted by the College.[88] In addition, it contains formal and informal settlement procedures that are also applicable in dominance cases (i.e., not only in collusive cases). The formal settlement procedure can be initiated at any time prior to the issuance of the draft

81 Article IV.42(4) of the CEL.

82 Article IV.42(5) of the CEL.

83 Article IV.45(5) of the CEL.

84 These time limits can be extended if the president of the BCA 'deems it necessary'. The CEL also provides for various deadlines applicable to the Auditorate and the College but these are considered indicative. For example, the College is supposed to hold an oral hearing at the latest two months after the filing by the parties of their written comments on the draft decision, and to issue its decision within one month of the oral hearing (see Article IV.42(5) and Articles IV.45(3),(4) and (6) of the CEL).

85 Article IV.45(1) of the CEL.

86 Article IV.45(2) of the CEL.

87 Article IV.45(5) of the CEL.

88 Article IV.49 of the CEL.

decision.[89] If the allegedly dominant company indicates its willingness to engage in formal settlement discussions, the Auditorate will provide it with a summary of the objections and of the relevant pieces of evidence, as well as a range of possible fines. The company in question is then required to recognise its liability and to accept the fine estimate. On that basis, the Auditorate will then issue a draft settlement decision proposing a fine, on which it 'may' (in practice, 'does') apply a 10 per cent reduction. Similarly, it 'may' reflect in the proposed fine commitments to compensate third parties for any harm suffered. Upon acceptance of the proposed fine, the Auditorate then issues a final settlement decision, which cannot be appealed. As is the case at EU level, the settlement discussions can be interrupted at any time. The settlement discussions between the Auditorate and the relevant company are considered confidential. Uncertainty remains as to the rights of complainants and other interested parties in commitment and settlement procedures. The National Lottery case represents the first settlement decision adopted in a dominance case. The Auditorate applied the 10 per cent reduction after having already reduced the fine for mitigating circumstances based on the absence of a proven anticompetitive effect of the practices in question and the National Lottery's full cooperation.[90]

The president of the BCA can also make use of an informal settlement procedure to resolve questions and disputes.[91] The informal settlement procedure does not entail the imposition of sanctions or binding conditions. In general, the president will only engage in an informal settlement procedure when the practice in question has not yet been implemented and raises a novel question, and when it is clear that the Auditorate does not have the intention to open a formal investigation.[92]

Generally, legal advice (and associated correspondence), as rendered by in-house counsel who are members of the Belgian Institute for Company Lawyers, benefits from a protection equivalent to legal privilege and therefore cannot be seized by the BCA during inspections (or by any other public authority).[93] However, a provision of the CEL unduly limits the effectiveness of that protection, for it allows parties to bring an appeal against the seizure of documents during inspections only after the issuance by the Auditorate of the statement of objections and 'only to the extent that the documents in question are invoked in support of the said objections'.[94]

Decisions of the BCA may be appealed before the Brussels Court of Appeal. The court has shown willingness to rule against the BCA, in particular with respect to companies' rights

89 Articles IV.51–IV.57 of the CEL.

90 Decision No. BMA-2015-P/K-27-AUD of 22 September 2015; the Auditorate adopted a second decision on the same day, dismissing the complainants other allegations, see Decision No. BMA-2015-P/K-28-AUD, *Stanleybet Belgium NV/Stanley International Betting Ltd* and *Sagevas SA/World Football Association SPRL/Samenwerkende Nevenmaatschappij Belgische PMU* (cases MEDE-P/K-13/0012 and CONC-P/K-13/0013).

91 Article IV.20(2) of the CEL.

92 The applicable procedure has been spelled out in a BCA communication of 27 January 2015.

93 Court of Appeal of Brussels, 5 March 2013, Belgacom (case 2011/MR/3) as upheld by the Belgian Supreme Court in Cass. (Belgian Supreme Court), 22 January 2015, *Auditorate/Belgacom-HG* (case C.13.0532.F).

94 Article IV.79(1) of the CEL. The compliance of that provision with the Belgian Constitution was confirmed by the Belgian Constitutional Court, subject to conditions, by a judgment of 10 December 2014 (Joined Cases 5733 and 5740).

in the context of inspections. Recent developments show that the court is ready to endorse the BCA's practice as regards interim measures decisions. It should be noted that settlements decisions may not be appealed by the settling parties under Belgian law.

Finally, the CEL contains an antitrust blocking statute, subject to exceptions to be set forth by Royal Decree.[95] The principle of primacy of EU law makes that provision unenforceable against requests from the Commission or from the competition authorities of other EU Member States addressed, pursuant to Regulation 1/2003.

VII PRIVATE ENFORCEMENT

As noted, claims for abuse of dominance are also brought before Belgian courts. One avenue for such claims involves reliance on the rules on Unfair Trade Practices. It is settled case law that claimants alleging breaches of Article IV.2 of the CEL can also obtain redress pursuant to the CEL's unfair trade practices provisions (replacing the previous Belgian Act on Unfair Trade Practices).[96] The CEL, in particular, provides for a special and particularly effective procedure to obtain a cease-and-desist order at short notice from the president of the competent Commercial Court.[97] That procedure constitutes a credible alternative to proceedings before the BCA in those cases where plaintiffs have sufficient elements at their disposal to discharge the applicable burden of proof (or can readily identify the relevant pieces of evidence and request their production in court). However, at present, the Belgian Code of Civil Procedure does not contain discovery rules comparable to those existing in the United States or the United Kingdom. In the *BIT Marketing/SEB* and *Bierhalle Demeyer NV/Duvel Moortgat* cases, discussed in Section II, *supra*, the claimants appealed judgments denying cease-and-desist orders. Their appeals were dismissed because the claimants had not provided sufficient evidence to find that either SEB or DM were dominant in their respective markets.

Damage claims can also be filed to obtain compensation for the harm suffered as a result of an (alleged) abuse of dominant position, either on a stand-alone basis or as a follow-on action. As the law currently stands, the CEL does not include a specific statutory basis for that purpose, so that general tort law principles apply and require plaintiffs to establish: a fault imputable to the defendant; an injury suffered by the plaintiff; and a causal link between the fault and the injury.[98] The Belgian legislator is, however, expected to implement the EU Damages Directive in the first half of 2017, and thereby provide a specific regime for damage claims based on Articles IV.1 and IV.2 of the CEL and/or Articles 101 and 102 of the TFEU. Whereas the damages directive provides for a presumption that cartels cause harm, it does not include such presumption for abuses of dominance. Under Belgian tort law, damages are awarded according to the restitutio in integrum principle, whereby the victim must be compensated for the entire harm suffered (i.e., to restore the status quo

95 Article IV.13 of the CEL.

96 Further, infringements of Chapter IV of the CEL are considered to fall within the scope of the notion of 'unfair trade practices' pursuant to Article VI.104 of the CEL.

97 Article XVII.10 et seq. of the CEL. That procedure is dealt with according to the rules applicable to interim proceedings but is not subject to the requirement of urgency.

98 These principles are rooted in Article 1382 of the Belgian Civil Code. In theory, contractual liability can also be invoked to obtain damages or even the nullity of the contract, depending on the terms of the contract in question and the circumstances of the case.

ante) but only the actual harm suffered. Hence, Belgian law allows for the recovery of any direct losses and profits forgone (including losses of business opportunities) but does not know of treble or punitive damages. In spite of the lack of clear precedent in the antitrust field, commentators have commonly admitted that the passing-on defence can be invoked by defendants, a position that should be formalised in the implementation of the Damages Directive. Upon request, damage awards can also include (simple, not compound) interest from the date the injury occurred and be complemented by a fixed (and relatively modest) indemnity of procedure supposed to cover attorneys' fees and other costs and disbursements.

The *Belgacom/Base & Mobistar* case, discussed in the 2016 edition of this chapter, addressed the question of an undertaking's fault in cases of abuse of dominance.[99] The former incumbent telecommunications operator, Belgacom, and mobile competitors Mobistar and Base had been involved in a long-running damages litigation for alleged pricing abuses. The abuses revolved around the different mobile termination rates (MTRs) charged by Belgacom depending on whether the calls were initiated and terminated on its network (on-net) or initiated from other networks and terminated on its network (off-net). While the parties settled the litigation in October 2016, the Brussels Court of Appeal held before that that Belgacom should have known, in light of established EU precedents, that its alleged practices would constitute breaches of Article 102 TFEU and therefore a fault on its part (if they were confirmed by experts). With respect to network effects in particular, the court noted that the fact that EU courts had not yet expressly decided on such practices did not mean that these could not amount to an anticompetitive conduct. In particular, the court held, the language of Article 102(a) TFEU,[100] existing EU case law and decisions, and Commission guidance made it reasonably predictable that an unjustified difference between the costs of on-net and off-net calls would not be defensible in courts.

The *Honda* case, discussed in Section II, *supra*, addressed the question of statute of limitations. The Constitutional Court's judgment means that damages actions should not be time-barred where a decision of the BCA is not yet final.

In fact, but for a couple of unsuccessful cases,[101] recent practice appears extremely limited as one single case has been reported since 2004 of damages awarded based on a finding of abuse of dominance.[102] The case was peculiar for the abuse was found to arise from meritless actions brought by Kinepolis, an (allegedly dominant) operator of movie theatres, to stop or delay the anticipated construction of a new theatre complex in the Liège region by rival UGC, as well as from the pre-emptive purchase of land constraining the development of such project. By a judgment of 17 June 2010, the Brussels Commercial Court awarded damages compensating UGC for the legal fees incurred as a result of Kinepolis' abusive practices, as well as for the consultancy fees and costs associated with a bank guarantee contracted by UGC in association with its project. In contrast, the court refused to consider the loss of operating income that would have resulted from the construction of the complex

99 Court of Appeal of Brussels, 26 February 2015, *Belgacom/Base & Mobistar* (case 2012/AR/1).

100 Prohibiting 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions'.

101 See, for example, Court of Appeal of Brussels, 25 January 2005, Ann. prat. 2005, page 743 and Commercial Court of Brussels, 15 November 2006, RG 8069/02.

102 Brussels Commercial Court, 17 June 2010, *UGC Belgium v Kinepolis Group, SA Compagnie de Promotion Liégeoise, SA Compagnie de promotion Charlemagne and SA Wilhelm & Co.*

for it was deemed too speculative. Interestingly, the court also clarified that damages claims can proceed (and do not have to be stayed) in spite of parallel proceedings pending before the BCA.

Finally, Belgian law permits plaintiffs to seek collective redress. Interestingly, the Collective Actions Act provides that only consumers and other organisations satisfying certain legal conditions, as well as the Federal Ombudsman for Consumers, are entitled to file a claim on behalf of a group for collective recovery, and that they may do so only before the Brussels courts.[103] It is up to the court to decide whether to apply an opt-in or opt-out system. Likewise, the court must systematically require the parties to first explore the possibility of negotiating a settlement. It is only in the case of failure of such settlement that the court may hear and decide on the merits of the damages claim.

VIII FUTURE DEVELOPMENTS

In its priority policy statement for 2017, the BCA identified among the priority areas for enforcement the sectors of liberalised and network industries (and the telecommunications landscape in particular), distribution, pharmaceuticals and logistics.[104]

The Belgian parliament is considering a proposal on a prohibition of abuses of a significant market position.[105] While the BCA has indicated its support for measures to fight against abuses of market power beyond Articles 102 of the TFEU and IV.2 of the CEL, it has informed Parliament that competition authorities in France and Germany rarely enforce such provisions and that the proposal could lead to a large increase in the number of complaints to the BCA.[106]

103 Articles XVII.35–XVII.69 of the CEL.

104 BCA, Priority Policy for 2017, 21 February 2017.

105 House of Representatives, 13 November 2015, Proposal to amend the Economic Law Code regarding the abuse of a considerable dominant position, 54K1451001.

106 BCA, Annual Report for 2016, 21 February 2017.

Chapter 8

EUROPEAN UNION

Thomas Graf and Henry Mostyn[1]

I INTRODUCTION

The statutory provision that governs abuses of dominance in the European Union (EU) is Article 102 of the Treaty of the Functioning of the EU (TFEU).[2] The regulatory body with the power to investigate and sanction abuses is the Competition Directorate-General of the European Commission (the Commission). National competition authorities of individual Member States (NCAs) are competent to apply Article 102 TFEU as long as the Commission has not opened a formal investigation on the same matter.

The procedure for the Commission's enforcement and application of EU competition rules is set out in Regulation 1/2003.[3] There are a series of implementing regulations, notices and guidance papers, the most important of which for Article 102 TFEU is the Commission's Guidance Paper on the Commission's enforcement priorities in applying Article 82 of the EC Treaty (the Article 102 Guidance Paper) to abusive exclusionary conduct by dominant undertakings.[4]

In broad terms, four conditions must be met for Article 102 TFEU to apply:

a the entity under investigation must qualify as an 'undertaking';[5]

b the undertaking must hold a dominant position on a relevant market;

c the conduct at issue must qualify as an abuse; and

d the conduct must affect trade between Member States.

In most cases, the debate focuses on whether a company holds a dominant position and whether there has been an abuse. This is discussed below.

1 Thomas Graf is a partner and Henry Mostyn is an associate at Cleary Gottlieb Steen & Hamilton LLP. The authors express their gratitude to their colleague Conor Opdebeeck-Wilson for his assistance with writing this chapter.

2 With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty became Article 101 and Article 102 TFEU. The two sets of provisions are, in substance, identical, and references in this paper to Article 102 TFEU should be understood as a reference to Article 82 of the EC Treaty.

3 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (Regulation 1/2003), OJ L 1, 04.01.2003.

4 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (the Guidance Paper), OJ 2009 C 45/7.

5 The concept of 'undertaking' has been interpreted widely by the European Courts. See Case C-41/90, *Höfner and Elser v. Macroton GmbH*, judgment of 23 April 1991, ECLI:EU:C:1991:161, paragraph 21: 'The concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.'

II YEAR IN REVIEW

In 2016, for the first time in over a decade, the Commission closed no cases through Article 9 commitments or traditional Article 7 infringement decisions.

Instead, the Commission closed one case – the *ARA* waste management decision – where for the first time it employed the settlement mechanism traditionally used for cartel cases. ARA admitted liability for refusing to supply its rivals with access to its essential household waste management infrastructure, in return for a 30 per cent fine reduction.[6]

The Commission's most high-profile open cases remain *Gazprom*, *Qualcomm* and its three Google investigations (*Google Search*, *Google Android* and *Google (AdSense)*).

In the *Gazprom* case, the Commission has raised a preliminary concern that Gazprom is hindering competition in gas supply markets in Eastern Europe by restricting cross-border sales and imposing unfair prices. In March 2017, the Commission market tested commitments from Gazprom that it considered capable of resolving its preliminary concerns. The proposed commitments remove restrictions on reselling gas cross-border; introduce certain price-review mechanisms based on competitive price benchmarks; and remove demands relating to gas infrastructure that Gazprom obtained through its alleged dominance.[7] The *Qualcomm* case concerns Qualcomm's alleged exclusivity payments and predatory practices for its chipsets. The Commission served a statement of objections on Qualcomm shortly after Commissioner Vestager took office; Qualcomm argued its case at an oral hearing in November 2016.[8] The outcome is pending.

In the *Google Search* case, the Commission issued a supplementary statement of objections in July 2016 relating to how Google shows groups of ads for product offers compared to free results for comparison shopping services. The Commission is investigating whether the different way that Google ranks and displays product ads compared to free generic results amounts to unlawful favouring. Google argues that the product ads at issue are an enhanced advert format that helps users find relevant products, and offers advertisers better conversion rates. In Google's view, showing ads in clearly marked ad space separate from free results is not favouring; it is how Google monetises the free search service it offers to users. Just before this book went to press, the Commission announced that it was fining Google €2.42 billion for showing product ads.

The *Google Android* case concerns the agreements that Google enters into with mobile phone manufacturers for the distribution of its apps on mobile phones running the open-source Android operating system. In April 2016, the Commission served a statement of objections provisionally finding that Android is dominant in a relevant market that excludes Apple's iOS, and that Google commits an abuse by asking phone manufactures to preinstall certain Google apps (for example, Google Search). According to the Commission, preinstallion may foreclose rival services because user downloads of apps is not a viable distribution channel. The Commission also served a statement of objections in the *Google AdSense* case, which relates to the agreements that Google enters into with website owners to show adverts on their pages.

6 Case AT.39759 – *ARA foreclosure*, Commission decision of 20 September 2016.

7 See Antitrust: Commission invites comments on Gazprom commitments concerning Central an Eastern European gas markets, 13 March 2017.

8 See 'Qualcomm to fight EU antitrust charge at November 10 hearing: sources', www.reuters.com/article/us-eu-qualcomm-antitrust-idUSKCN12025T.

As well as continuing its ongoing cases, the Commission opened two new Article 102 investigations;[9] issued a statement of objections addressed to the International Skating Union;[10] and conducted unannounced inspections in the Romanian gas market.[11]

At the court level, the General Court issued judgments in *Orange Polska*,[12] and *Morningstar*.[13] It upheld a Commission rejection decision in *Trajektna luka Split*, where it noted that the Commission had rejected a complaint after asking, 'how the alleged abuse of a dominant position could have lasted for several years without having led to [the complainants'] exit from the market.'[14]

Finally, 2016 was notable for Advocate General Wahl's Opinion in *Intel*. In short, the advocate general advised that exclusivity rebates should not be treated as a separate category of rebates for which no competitive analysis is necessary to find an abuse. Instead, like loyalty-inducing rebates, they require an assessment of all the circumstances. The advocate general affirmed the general proposition that competition law analysis should not be purely abstract and should not deal with mere possibilities.[15] This is because, ultimately, 'EU competition rules seek to capture behaviour that has anticompetitive effects.'[16]

The advocate general's opinion also advises that the Commission must record the substance of all meetings with third parties in relation to a matter it is investigating, and must disclose the record to a company under investigation as part of access to file. The record must 'spell out the substance' of the meeting; disclosing only a 'succinct summary' is insufficient.[17] The Court of Justice's judgment is expected to be delivered on 6 September 2017.

III MARKET DEFINITION AND MARKET POWER

i Market definition

Market definition serves as an analytical framework to assess market power and competitive effects. A relevant market for the purpose of EU competition law circumscribes the sources of competitive constraint faced by the company under investigation.[18] The Commission's Market Definition Notice provides guidance on the Commission's approach to market definition for all areas of EU competition law, including the application of Article 102 TFEU, as the Guidance Paper is silent on the topic. The relevant product market comprises all those

9 Case AT.40134 – *Limes*, Commission press release IP/16/2361 (investigation focusses on AB InBev's restrictions of parallel trade by hindering imports of its beer from neighboring countries); and *České Dráhy*, Commission press release IP/16/3656 (investigation focuses on the Czech railway incumbent's practice of predatory pricing).

10 Case AT.40208 – *International Skating Union's Eligibility rules*, Commission press release IP/16/3201.

11 Case AT.40.335 – *Romanian gas market*, Commission STATEMENT/16/2133 (inspections related to behavior aimed at hindering natural gas exports from Romania to other Member States).

12 Case T-486/66, *Orange Polska S.A., formerly Telekomunikacja Polska S.A. v. Commission*, judgment of 17 December 2015, ECLI:EU:T:2015:1002.

13 Case T-76/14, *Morningstar, Inc. v. Commission*, judgment of 15 September 2016, ECLI:EU:T:2016:481.

14 Case T-70/15, *Trajektna luka Split v. Commission*, judgment of 30 September 2016, ECLI:EU:T:2016:592.

15 Case C-413/14, *Intel*, opinion of Advocate General Wahl delivered on 20 October 2016, ECLI:EU:C:2016:788 (*Intel*), paragraphs 73, 113, 145.

16 *Intel*, paragraph 43.

17 *Intel*, paragraphs 237, 247, 264.

18 Commission Notice on the definition of the relevant market for the purposes of community competition law (the Market Definition Notice), OJ 1997 C 372/5, paragraph 2.

products or services 'which are regarded as interchangeable or substitutable by the consumer, by virtue of the products' characteristics, their prices and their intended use'.[19] This definition draws on the principles established by the Court of Justice in *Michelin*, holding that:[20]

> *[…] for the purposes of investigating the possibly dominant position of an undertaking on a given market, the possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products.*

The Commission acknowledges that qualitative differences only allow it as a first step to limit the field of possible substitutes.[21] Actual interchangeability is assessed by the hypothetical monopolist (SSNIP)[22] test. This asks whether a hypothetical monopolist could profitably impose a 5 to 10 per cent permanent price increase over the candidate products without a sufficient number of consumers at the margin switching to other products to render the price increase unprofitable.[23]

A number of EU Court judgments have discussed basic principles of market definition in the context of Article 102 TFEU cases.[24] But some of these cases are relatively old and remain quite general.[25] The Commission's decisional practice and court case law in other areas of EU competition law, including merger control, provides additional insight that is also relevant for Article 102 TFEU cases.[26]

ii Dominance

The application of Article 102 TFEU requires the company under investigation to have a high degree of market power that is referred to as 'dominance'. The ECJ has described dominance

19 Market Definition Notice, paragraph 7. Either 'demand-side substitutability' (the ability of consumers to switch their consumption to alternative products in the case of a small change in relative price) or 'supply-side substitutability' (the ability of suppliers to switch production to the products under consideration and market them in the short term without incurring significant additional costs or risks in response to small change in relative price) can provide effective competitive constraints, and when either is present the relevant market ought to be widened; although the Commission considers that 'demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product'. See the Market Definition Notice, paragraph 13. The same basic principles apply to geographic market definition (in geographic market definition, barriers to trade such as language, import tariffs or regulatory features may be specific additional considerations).

20 Case 322/81 *Nederlandsche Banden-Industrie Michelin v. Commission*, judgment of 9 November 1983, ECLI:EU:C:1983:313 (*Michelin*), paragraph 37.

21 Market Definition Notice, paragraph 36.

22 Small but significant non-transitory increase in price.

23 Market Definition Notice, paragraph 17.

24 For example, Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission*, judgment of 21 February 1973, ECLI:EU:C:1973:22 (*Continental Can*); and Case 85/76, *Hoffmann-La Roche v. Commission*, judgment of 13 February 1979, ECLI:EU:C:1979:36 (Hoffmann-La Roche).

25 For an example that engages in a detailed discussion of market definition principles in the pharmaceutical sector, see the judgment of the General Court in Case T-321/05, *AstraZeneca*, judgment of 1 July 2010, ECLI:EU:T:2010:266; confirmed in Case C-457/10 P, *AstraZeneca v. Commission*, judgment of 6 December 2012, ECLI:EU:C:2012:770 (*AstraZeneca*).

26 See Nicholas Levy, *European Merger Control Law: A Guide to the Merger Regulation* (Twelfth edition, Matthew Bender & Co, 2015), Chapter 8, for a discussion of market definition in EU merger control.

as 'a position of economic strength' that provides a company with 'the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers'.[27]

Despite the ubiquitous nature of this dictum (it is cited in virtually every Article 102 TFEU decision and judgment), it provides only limited guidance for companies to understand whether they hold a dominant position. It does not explain, for example, how 'independently' an undertaking must be able to behave[28] or when the threshold of 'appreciable extent' is crossed.[29] What is clear is that no single factor is determinative in assessing a company's dominance.[30] Nor does dominance require that there is no competition on the relevant market.[31]

The Guidance Paper equates the concept of competitive independence with the ability to profitably raise prices above the competitive level.[32] Unlike in the context of merger control, where the question is whether the merged entity will prospectively gain power to raise prices, in Article 102 TFEU cases the question is whether the company under investigation already has such power. This does not require regulators to show that the company could raise prices beyond the level that it currently charges (the 'cellophane fallacy').[33] If the company has market power it will already charge above the competitive level at the profit maximising point. Direct proof of dominance would therefore involve comparing the company's prices with what is expected to be the competitive price level. Because determining the competitive price level as a review benchmark is hard, if not impossible, case law has developed indicators for the existence of dominance. The Guidance Paper classifies these broadly into criteria relating to:

a constraints imposed by competitors (i.e., an assessment of market structure and market shares);

b constraints imposed by the threat of expansion and entry; and

c constraints imposed by the bargaining strength of customers.[34]

---

27 *United Brands*, paragraph 65 and *Hoffmann-La Roche*, paragraph 38. The Commission's Guidance Paper relies on the same definition, Guidance Paper, paragraph 10.

28 Of course, no undertaking can literally act 'independently' of its customers: even a monopolist is constrained by the demand curve for its product, which is affected by extra-market constraints, and the reduction in demand from customers as price increases.

29 See Bo Vesterdorf, 'Article 102 of the TFEU and sanctions: appropriate when?', ECLR 2011, 32(11), 573–579.

30 *United Brands*, paragraph 66.

31 *United Brands*, paragraph 113.

32 Guidance Paper, paragraph 10. See also Case COMP/39.525 *Telekomunikacja Polska*, Commission Decision of 22 June 2011, not yet published, paragraph 641.

33 For further discussion of the cellophane fallacy, see S Bishop and M Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (third edition, London, Sweet & Maxwell, 2010).

34 Guidance Paper, paragraph 12.

Market shares

In the *Akzo* judgment, the ECJ established a (rebuttable) market share presumption for dominance pursuant to which a company is assumed to be dominant, if it holds a market share of 50 per cent or more in the relevant market.[35] The insight underpinning this is that shares of sales indicate whether a company can 'more easily pursue a pricing policy independent of competitive conditions' and therefore is 'able to control prices'.[36] The Guidance Paper notes that dominance is 'not likely if the undertaking's market share is below 40 per cent'.[37]

That said, even above the 50 per cent threshold it is necessary to consider the particular nature and competitive dynamics of the relevant market when assessing market shares. For example, in bidding markets that are characterised by a limited number of large orders, temporary large shares are not indicative of market power.[38] Similarly, in markets subject to a high degree of innovation or where services are offered for free, market shares may not be a good proxy for market power.[39]

Expansion and entry

Any presumption of market power that might accompany a high market share is inapplicable in markets where competitors are able to meet rapidly the demand from customers who want to switch away from the firm with the largest share.[40] As recognised in the Guidance Paper, 'an undertaking can be deterred from increasing prices if expansion or entry is likely, timely and sufficient'.[41] In assessing this likelihood, the Commission considers barriers that prevent

35 Case C-62/86, *Akzo Chemie v. Commission*, judgment of 3 July 1991, ECLI:EU:C:1991:286 (*AKZO*), paragraph 60: 'With regard to market shares the Court has held that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. That is the situation where there is a market share of 50 per cent such as that found to exist in this case.'

36 Case C-62/86, *Akzo Chemie v. Commission*, opinion of Advocate General Lenz delivered on 19 April 1989, ECLI:EU:C:1991:286, paragraphs 111, 114.

37 Guidance Paper, paragraph 14.

38 For this reason, the Guidance Paper notes that 'the higher the market share and the longer the period over which it is held, the more likely it is that it constitutes an important preliminary indication of the existence of a dominant position', Guidance Paper, paragraph 15.

39 Thus, in *IBM/Telelogic*, the Commission held that market share data did not represent a 'direct proxy for market power' in markets characterised by competition on quality and innovation, in particular because 'competitors who do not regularly upgrade their products, or who do not introduce new products meeting increasing customers' requirements, will rapidly lose out', Case COMP/M.47447, *IBM/Telelogic*, Commission decision of 5 March 2008, paragraph 151. See also Case T-79/12, *Cisco Systems and Messagenet v. Commission*, judgment of 11 December 2013, ECLI:EU:T:2013:635 where the General Court confirmed that because of the high degree of innovation and the fact that services are provided for free (so that any attempt to increase prices 'would encourage consumers to switch supplier'), market shares of 80–90 per cent were not indicative of market power.

40 *Hoffmann-La Roche*, paragraph 41.

41 Guidance Paper, paragraph 16.

timely entry or expansion. These can take the forms of legal barriers (such as legislation conferring a statutory monopoly,[42] or intellectual property rights),[43] or barriers such as economies of scale or scope,[44] technological advantages[45] or network effects.[46]

Buyer power

Customers with sufficient countervailing bargaining strength can prevent a company from exercising market power. Buyer power, however, will not necessarily negate a finding of dominance where a strong buyer is only able to protect itself, but not the entire market.[47]

Generally, exercising buyer power will require that the buyer has viable competitive alternatives or the ability to develop such alternatives.[48] Even a large buyer will have little or no power if it has no alternative supply options to which it can realistically turn.[49] That said, in some instances, buyer power may also come from the ability of the buyer to retaliate against the seller. For example, in the case of patent licensing, a patent owner may be constrained by the patent portfolios of licensees if it is vulnerable to countersuits in the event of overcharging for its own patents. In the case of a multi-product firm that serves the same buyers in different product markets, buyers may constrain the firm's ability to charge supracompetitive prices in a dominant market by threatening to switch their purchases in non-dominant markets.

IV ABUSE

i Overview

Holding or acquiring a dominant position is not in itself unlawful under EU competition law. A dominant company only infringes Article 102 TFEU if it abuses its dominant position to restrict or distort competition.

The classic formulation of an abuse is from *Hoffmann-La Roche*:

> *The concept of an abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through*

42 See, for example, Case 89/113/EEC *Decca Navigator Systems*, Commission decision of 21 December 1988.

43 See, for example, Case COMP/35.141 *Deutsche Post*, Commission decision of 20 March 2001, OJ 2001 L 125/27.

44 *United Brands*, paragraph 122. The extensive investments that a new entrant to the banana market would need to make were held to be 'particular barriers to competitors entering the market' since they generated 'economies of scale from which newcomers to the market cannot derive any immediate benefit and […] the costs of which are irrecoverable if the [entry] attempt fails'.

45 See, for example, *Hoffmann-La Roche*, paragraph 48.

46 This refers to the phenomenon whereby a product or service becomes more valuable to each user when more people use it. See, for example, Case COMP/39.530 *Microsoft (Tying)*, Commission Decision of 16 December 2009, paragraph 420.

47 Guidance Paper, paragraph 18.

48 Guidance Paper, paragraph 18.

49 See, for example, Case COMP/37.990, *Intel*, paragraphs 886, 889: 'Throughout its argumentation on buyer power, Intel ignores the fundamental element in its relationship with OEMs, namely the fact that it is an unavoidable trading partner for them: OEMs depend on Intel for what is the most important single hardware component in their computers. As such, Intel is a must-stock brand.'

recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operator, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[50]

ii Exclusionary abuses

An exclusionary abuse takes place if a dominant company forecloses competitors in an anticompetitive manner. Not every foreclosure of competitors is anticompetitive. It is a normal (and desirable) part of the competitive process that competitors that have less to offer to customers may leave the market. This has been recognised in the Guidance Paper and has now been affirmed by the ECJ in *Post Danmark I*. As the ECJ noted:

Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, inter alia, price, choice, quality or innovation.[51]

The key task in an abuse analysis is therefore to distinguish between anticompetitive conduct and competition on the merits.

Article 102 TFEU lists a number of abusive practices. But these are not exhaustive: sui generis abuses can be identified in individual cases.[52] The Guidance Paper discusses legal criteria for categories of exclusionary abuses that have been identified in past cases. These legal criteria serve as successive filters to distinguish between abusive behaviour and legitimate pro-competitive conduct.

Outside the abuse categories discussed in the Guidance Paper, conduct must be assessed based on general principles. New abuses cannot be postulated without limitation: if a type of conduct falls within an existing category of abuse (such as refusal to supply or tying), the legal conditions necessary to establish that abuse need to be satisfied.

The case law qualifies certain categories of conduct as 'by nature' abuses (for example, discounts conditioned on exclusivity, discussed below): 'by nature' abuses do not require a full analysis of anticompetitive effects. Outside the 'by nature' exceptions, a 'fully-fledged effects analysis has to be performed'.[53]

This fully-fledged analysis requires proving at least the following five elements:

a the dominant company's abusive conduct must hamper or eliminate rivals' access to supplies or markets.[54] That is, the abusive conduct must create barriers to independent competition;[55]

50 *Hoffmann-La Roche*, paragraph 121.

51 Case C-209/10, *Post Danmark A/S v. Konkurrencerådet*, judgment of 27 March 2012, ECLI:EU:C:2012:172 (*Post Danmark I*), paragraph 22.

52 See *Continental Can*, paragraph 26. *AstraZeneca*, with its regulatory-type abuses, represents a recent example.

53 *Intel*, paragraph 120.

54 Guidance Paper, paragraph 19.

55 Case 262/81, *Coditel v. Ciné-Vog Films*, judgment of 6 October 1982, ECLI:EU:C:1982:334, paragraph 19.

b the abusive conduct must cause the anticompetitive effects.[56] Proving causation requires comparing prevailing competitive conditions with an appropriate counterfactual where the conduct does not occur;[57]

c the anticompetitive effects must be reasonably likely.[58] If conduct has been ongoing for some time without observable anticompetitive effects, that suggests the conduct is not likely to cause anticompetitive effects in the first place;[59]

d anticompetitive foreclosure must be determined by reference to equally efficient competitors.[60] Any possible foreclosure of competitors can only be anticompetitive if it is liable to exclude competitors that are at least as efficient as the dominant company;[61] and

e the anticompetitive effects must be sufficiently significant to create or reinforce market power.[62]

Even if a company abuses its dominance, it retains the possibility to justify its conduct – even for 'by nature' abuses (referred to as 'objective justification'). To do so, the company must show that the conduct is either objectively necessary or produces efficiencies that outweigh restrictive effects on consumers.[63] If a dominant company raises evidence of objective justification, it 'falls to the Commission [...] to show that [...] the justification put forward cannot be accepted'.[64]

These general principles are discussed in relation to various different types of abuse below.

Predatory pricing

Predatory pricing arises where a dominant company prices its products below costs such that even equally efficient competitors cannot viably remain on the market. In *Akzo*, the ECJ established a two-test rule for the assessment of predatory pricing conduct under Article

56 Case C-23/14, *Post Danmark II*, judgment of 6 October 2015, ECLI:EU:C:2015:651, paragraph 47.

57 Guidance Paper, paragraph 21.

58 Case T-201/04, *Microsoft v. Commission*, judgment of 17 September 2007, ECLI:EU:T:2007:289 (*Microsoft*), paragraph 1089.

59 Case T-70/15, *Trajektna luka Split v. Commission*, ECLI:EU:T:2016:592, judgment of 30 September 2016, paragraph 24.

60 *Post Danmark I*, paragraphs 21–22; and Guidance Paper, paragraphs 25–27.

61 Although the exclusion of equally efficient competitors is the usual litmus test for abusive conduct, in limited, specific circumstances, a finding of abuse is possible without relying on the test. In *Post Danmark II*, the ECJ held that the Commission's Guidance Paper was a statement of the Commission's priorities but was not binding on the Union's courts. The ECJ found that, with respect to rebate schemes, there is no legal obligation that the effects of the scheme applied by a statutory monopoly must be measured against an as-efficient competitor (paragraph 57). In cases where the extent of an undertaking's dominance or where rigidities in the market's structure precluded the entry of an as-efficient competitor, the test was 'of no relevance' (paragraph 59).

62 Guidance Paper, paragraphs 11 and 19.

63 *Post Danmark I*, paragraph 41; Guidance Paper, paragraph 28.

64 *Microsoft*, paragraph 688.

102 TFEU:[65] (1) pricing below average variable cost (AVC) is presumptively abusive;[66] (2) pricing below average total cost (ATC) but above AVC is abusive if it is shown that this is part of a plan to eliminate a competitor.[67] The principle set out in the Guidance Paper in assessing predatory pricing conduct is that of a profit sacrifice (i.e., the dominant company deliberately foregoes profits in the short term so as to foreclose competitors with a view to strengthening market power).[68] There may be cases where alternative benchmarks, such as average incremental costs, are more appropriate, where, for example, an industry is characterised by high fixed costs and very low variable costs.[69]

Margin squeeze

A margin squeeze occurs when a vertically integrated company sells an input to its downstream competitors at a high price and at the same time prices its own downstream product at a low price such that its competitors are left with insufficient margin to compete viably in the downstream market. This is abusive in EU law when 'the difference between the retail price charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market'.[70]

Until recently, margin squeeze cases have generally been viewed as instances of a constructive refusal to supply. But the EU Court's judgments in *TeliaSonera* and *Telefonica* have held that it is not necessary to establish the legal conditions for an abusive refusal to supply in such cases. These judgments therefore treat margin squeeze practices as being more akin to predatory pricing behaviour, particularly as they analyse the margin squeeze under Article 102(a) TFEU.

Exclusive dealing

The Guidance Paper describes exclusive dealing as an action by a dominant undertaking 'to foreclose its competitors by hindering them from selling to customers through use of

65 Confirmed in Case C-333/94 P, *Tetra Pak v. Commission*, decision of 14 November 1996, ECLI:EU:C:1996:436; and Case C-202/07 P, *France Telecom SA v. Commission*, judgment of 2 April 2009, ECLI:EU:C:2009:214.

66 See *Akzo*, paragraph 71: 'A dominant undertaking has no interest in applying such prices except that of eliminating a competitor so as to enable it to subsequently raise its prices by taking advantage of its monopolist position.'

67 Ibid., paragraph 72: 'Such practices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.'

68 See Guidance Paper, paragraphs 64–66. The Guidance Paper in fact refers to cost benchmarks of average avoidable cost (AAC) and long-run average incremental cost (LRAIC), but recognises that these are likely to be the good proxies for AVC and ATC respectively. See Guidance paper, paragraphs 26–27.

69 See, for example, *Post Danmark I* (*supra*), paragraph 33. The ECJ in *Post Danmark I* (at paragraphs 39–40) also appeared to suggest that proof of anticompetitive effects can substitute for proof of intent in the second *Akzo* scenario (i.e., where a dominant firm's price is between AVC and ATC).

70 Case COMP/C-1/37.451 *Deutsche Telekom*, Commission decision of 21 May 2003, paragraph 107, upheld on appeal by the General Court. Confirmed in TeliaSonera, paragraphs 31–34. A test for a margin squeeze formulated in the Guidance Paper at paragraph 80 is as follows: 'Finally, instead of refusing to supply, a dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis (a 'margin squeeze).'

exclusive purchasing obligations or rebates'. Both Articles 101 TFEU[71] and 102 TFEU can apply to exclusive dealing, although traditionally the approach under Article 101 TFEU has been more economic, while under Article 102 TFEU it has historically been treated more as a *per se* abuse.[72]

Exclusive purchasing

An exclusive purchasing obligation requires a customer to purchase all or a large majority of its needs for a specific product from one supplier. The current approach of the Commission and the courts is to look closely at the actual or likely effects of a particular agreement on the relevant market and assess whether it harms consumers.[73] Factors the Commission will take into account include the duration of the obligation, customers' switching costs, and whether the dominant undertaking is an unavoidable trading partner.[74]

Exclusionary discounts

While the grant of discounts (also known as rebates) is generally pro-competitive, certain forms of discounts may constitute an abuse if applied by a dominant company. The concern is that the dominant company leverages its larger base of sales for calculating discounts in ways that preclude smaller (but equally efficient) competitors from competing for the contestable portion of a customer's demand. While the discount remains above costs for the dominant company because it can spread the discount across a larger base of sales, smaller competitors would be forced to price below costs to match the discounts since they would have to amortise it over a smaller base.

The case law generally distinguishes between three categories of rebates:

a volume-based rebates that pay out based on the volume of a customer's purchases: Reflecting gains in efficiency and economies of scale, volume-based rebates are presumptively lawful;[75]

b rebates conditioned on exclusivity, which require a customer to obtain all or most of its requirements from the dominant company in order to get the rebate: Exclusivity rebates have been condemned in a number of past cases, including *Hoffmann-La Roche*, *Michelin*, *British Airways*,[76] *Intel*[77] and *Tomra*, following a relatively abstract, form-based analysis. These cases have treated exclusivity rebates as restrictive of competition by their very nature, so do not require proof of anticompetitive effects; and

71 In many cases the block exemption regulation on vertical agreements will apply to exempt such agreements from Article 101 TFEU, provided that: (1) the supplier has a market share of no more than 30 per cent; (2) the exclusive purchasing contract contains no hard-core restrictions; and (3) the exclusivity lasts for less than five years. See Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102/1.

72 See, for example, *Hoffmann-La Roche*. This approach was partially questioned in Case T-65/98, *Van den Bergh Foods v. Commission*, judgment of 23 October 2003, ECLI:EU:T:2003:281 (*Van den Bergh Foods*) and has been fully challenged by Advocate General Wahl's Opinion in *Intel*.

73 See *Van den Bergh Foods*, paragraph 160.

74 Guidance Paper, paragraph 36.

75 *Hoffmann-La Roche*, paragraph 90; Case T-203/01, *Michelin v. Commission*, judgment of 30 September 2003, ECLI:EU:T:2003:250, paragraph 58.

76 Case C-95/04 P, *British Airways plc v. Commission*, judgment of 15 March 2007, ECLI:EU:C:2007:166.

77 *Intel*.

c loyalty-inducing rebates that possess a loyalty-building mechanism without being directly linked to exclusive or quasi-exclusive supply: These require an assessment of all the circumstances to determine whether the rebate is likely to foreclose equally efficient competitors.[78] The relevant circumstances include whether the rebates are individualised or standardised, the length of the reference period, the conditions of competition prevailing on the relevant market, the proportion of customers covered by the rebate and whether a rebate is retroactive or incremental.[79]

In his recent *Intel* opinion, however, Advocate General Wahl advised that exclusivity rebates 'should not be regarded as a separate and unique category of rebates'.[80] Instead, they form part of the third category and require an assessment of 'all the circumstances' before they can be classified as abusive. It is yet to be seen how the ECJ will decide the issue.

Tying

Tying occurs when a supplier sells one product, the 'tying product', only together with another product, the 'tied product'. The seminal case on tying involved Microsoft's tying of its Windows operating system with its Windows Media Player.[81] The Court found that Microsoft's tying of Windows Media Player (a qualitatively inferior product) to Windows, the ubiquitous operating system, foreclosed OEMs as a distribution channel for rival media players. Rival means of distribution, notably internet downloads, were not viable because they were slow, difficult and prone to failure. The Commission, upheld by the General Court, identified five conditions for an abusive tying:

a the tying and tied good are two separate products;
b the undertaking concerned is dominant in the tying product market;
c customers have no choice but to obtain both products together;
d the tying forecloses competition; and
e there is no objective and proportionate justification for the tie.[82]

78 *Post Danmark I*, paragraphs 31–32.

79 *Post Danmark II*. Post Danmark held a market share of 95 per cent in bulk mail. It calculated its retroactive rebates across customers' total demand for bulk mail, covering both non-contestable demand protected by the statutory monopoly and contestable demand. In this way, the retroactive rebates enabled Post Danmark to tie contestable demand to its non-contestable share, which represented around 70 per cent of total demand. Customers switching contestable demand to competitors would lose discounts on their large portion of non-contestable demand. This protected Post Danmark's position in bulk mail, where competition was already limited by the partial statutory monopoly. The ECJ held that for determining whether the discount system was abusive, it was necessary to consider 'all the circumstances' of the case. Unsurprisingly, in the circumstances, the ECJ concluded that Post Danmark's retroactive rebate system infringed Article 102 TFEU.

80 *Intel*, paragraph 160.

81 Prohibition decisions have been adopted in a number of other cases involving tying allegations, including Case T-30/89, *Hilti A G v. Commission*, judgment of 12 December 1991, ECLI:EU:T:1991:70; and Case C-193/83, *Windsurfing International Inc v. Commission*, judgment of 25 February 1986, ECLI:EU:C:1986:75.

82 See Case COMP/C-3/37.792, *Microsoft*, Commission decision of 24 March 2004, paragraph 794. The Court of First Instance confirmed that the five conditions were 'consistent both with Article 82 EC and with the case law' and followed from 'the very concept of bundling'. See *Microsoft*, paragraph 859. See also Guidance Paper, paragraphs 47–74.

A central element of a tying analysis is to establish whether two components constitute separate products or an integrated whole. In *Microsoft*, the General Court held that such an assessment must be based on 'a series of factors', including 'the nature and technical features of the products concerned, the facts observed on the market, the history of the development of the products concerned and […] commercial practice'.[83]

A dominant company may achieve the same effect as tying by ostensibly offering a stand-alone version of the dominant tying product alongside a bundled version, but at a price that renders it commercially unrealistic for customers to take the stand-alone version. Past cases have condemned the grant of discounts on dominant products that are conditioned on customers also taking non-dominant products.[84] In the Guidance Paper, the Commission takes the position that such bundled discounts must be assessed by allocating the discounts fully to the price of the non-dominant 'tied' product. If that calculation results in a price below the dominant company's long run average incremental costs of supplying the 'tied' product, the discount is anticompetitive (unless rivals are able to replicate the bundle).[85]

Refusal to deal

As a general rule, companies, including dominant companies, are free to decide whether to deal with a counterparty. As Advocate General Jacobs confirmed in *Bronner*, it is 'generally pro-competitive 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'.[86] A refusal by a dominant undertaking to supply its products can therefore amount to an abuse under Article 102 TFEU only in exceptional circumstances. According to established case law, the following general conditions must be met for such an abusive refusal:

a the requested input must be indispensable to compete viably;
b the refusal is likely to eliminate all competition in the downstream market; and
c there is no objective justification for the refusal.[87]

The indispensability requirement is a high threshold: the input must be essential for a commercially viable business to compete on the downstream market. The test is whether there are 'technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult' to create alternatives, or to create them within a reasonable timeframe.[88] If there are 'less advantageous' alternatives, that means the input is not indispensable. For example, in *Bronner*, access to Mediaprint's (a newspaper distributor's) delivery network was not indispensable because Bronner could have used kiosks, shops and post. Mediaprint's refusal to grant access was, therefore, not abusive.

83 See *Microsoft*, paragraph 925.

84 See for example, *Hoffmann-La Roche*, paragraphs 110–111; Case COMP/37.859 *Hays/La Poste Belge & Key Mail*, Commission Decision of 5 December 2001, OJ 2002 L 61/32.

85 Guidance Paper, paragraph 60.

86 Case C-7/97, *Bronner*, opinion of Advocate General Jacobs delivered on 28 May 1998, ECLI:EU:C:1998:264 (*Bronner opinion*), paragraph 57.

87 *Bronner opinion*, paragraph 41; Case T-374/94, *European Night Services and Others v. Commission*, judgment of 15 September 1998, ECLI:EU:T:1998:198; Case T-504/93, *Tiercé Ladbroke v. Commission*, judgment of 12 June 1997, ECLI:EU:T:1997:84.

88 Case C-7/97, *Bronner*, judgment of 26 November 1998, ECLI:EU:C:1998:569, paragraph 44.

If the refusal involves intellectual property rights (i.e., a refusal to license) it is moreover necessary to demonstrate that the refusal would prevent the emergence of a new product or would hinder technical development and innovation more generally.[89]

iii Discrimination

Unlawful discrimination pursuant to Article 102(c) TFEU may arise if a dominant company applies different terms to different customers for equivalent transactions. But such abusive 'price discrimination' requires proof that: (1) similar situations are being treated in a dissimilar manner without legitimate commercial reasons; and (2) that some customers are placed at a 'competitive disadvantage' relative to other customers to such a degree that it creates a risk of foreclosing equally efficient competitors.

Not every different treatment is discriminatory. As a general matter, the EU courts have recognised that differences arising from individual negotiations of terms can be explained by legitimate commercial reasons.[90] Other considerations that may be taken into account include, for example, whether the transactions involve similar products,[91] costs[92] or timing.[93] Moreover, even if there is 'discrimination', the ECJ's *Post Danmark* judgment has made clear that such discrimination is only abusive if it is liable to foreclose equally efficient companies.[94] 'Pure' discrimination cases are rare.[95] In past cases, discrimination-type concerns have typically been raised as an 'added' consideration in connection with abusive exclusionary pricing practices, such as retroactive volume rebates.

iv Exploitative abuses

Article 102(a) TFEU provides that an abuse may consist of 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions'. But the difficulty in determining a benchmark by which prices can be assessed as being unfair has led to a dearth

89 *Microsoft*, paragraph 332; Case C-418/01 *IMS Health v. NDC Health*, judgment of 29 April 2004, ECLI:EU:C:2004:257, paragraph 52; and Case C-241/91 P, *RTE and ITP v. Commission*, judgment of 6 April 1995, ECLI:EU:C:1995:98 (*Magill*), paragraphs 50–56.

90 *Michelin*, paragraph 90.

91 See, for example, Case COMP/38.096 *Clearstream*, Commission decision of 2 June 2004; Case T-301/04, *Clearstream v. Commission*, judgment of 9 September 2009, ECLI:EU:T:2009:317; and see Case COMP/36.568 *Scandlines Sverige v. Port of Helsingborg*, Commission decision of 23 July 2004.

92 See, for example, Case 95/364/EC *Brussels National Airport*, Commission decision of 28 June 1995, OJ 1995 L 216/8 (Brussels National Airport).

93 See, for example, Case IV/28.841 *ABG/Oil Companies*, Commission decision of 19 April 1977, OJ 1977 L 117/1.

94 *Post Danmark I*, paragraph 30: 'The fact that the practice of a dominant undertaking may, like the pricing policy in issue in the main proceedings, be described as 'price discrimination', that is to say, charging different customers or different classes of customers different prices for goods or services whose costs are the same or, conversely, charging a single price to customers for whom supply costs differ, cannot of itself suggest that there exists an exclusionary abuse.'

95 See, for example, press release of 5 March 2014, 'Commission fines Romanian Power Exchange OPCOM for discriminating against EU electricity traders', IP/14/214. In that case, the Commission found that OPCOM had wrongfully discriminated against electricity traders from outside Romania by requiring them to have a Romanian VAT registration for accessing the spot electricity markets. Through this provision, OPCOM managed to impose a competitive disadvantage on electricity traders that were already registered for VAT in other EU Member States.

of decisional practice on this issue.[96] In *Scandlines Sverige*, the Commission set out what it considers the most appropriate methodology for assessing unfair prices. The questions to be determined are: (1) whether the difference between the costs actually incurred and the price actually charged is excessive; and, if the answer to that is yes, then (2) whether a price has been imposed that is either unfair in itself or when compared to the price of competing products.[97]

V REMEDIES AND SANCTIONS

Regulation 1/2003 provides the mechanism by which the Commission sanctions infringements of Article 102 TFEU. The Commission is entitled to impose structural or behavioural remedies, interim measures, fines and periodic penalty payments.[98] Alternatively, an undertaking can itself offer commitments to bring the infringement to an end, thereby avoiding a formal finding of an infringement and a fine.

i Sanctions

The Commission can impose a fine of up to 10 per cent of a company's total turnover of the preceding business year for infringements of Article 102 TFEU. The Commission has set out in detail the methodology by which it sets fines, which will take into account, *inter alia*, the nature, length and scope of the infringement, the value of sales of goods affected by the infringement, and whether there are aggravating or mitigating circumstances.[99]

Before 2004, the Commission had never imposed a fine for an infringement of Article 102 TFEU that exceeded 1 per cent of the turnover of the undertaking involved. But in recent years, the Commission has shown a tendency to impose increasingly high fines for abusive conduct, both in absolute and percentage terms, culminating in cases such as *Tomra*,[100] where the fine represented 7 per cent of annual turnover, and *Intel*,[101] where the Commission imposed a record fine of €1.06 billion.[102]

Fines can be imposed for a failure to abide by interim measures or commitment decisions. In 2013, the Commission fined Microsoft €561 million for failing to comply with its browser choice screen commitments. The Commission is also entitled to impose

96 See, for example, *United Brands*, paragraphs 248–268: the ECJ annulled the Commission's decision that unfair prices had been charged for Chiquita bananas in Germany, Denmark and Benelux since the difference in prices between branded Chiquita bananas and non-branded bananas was not deemed to be excessive.

97 Case COMP/36.568 *Scandlines Sverige v. Port of Helsingborg*, [2006] 4 CMLR 1298, paragraph 147.

98 Articles 7, 8, 23 and 24 of Regulation 1/2003 respectively. Interim measures can only be imposed where: (1) there is a *prima facie* infringement of Article 102 TFEU; (2) there is urgency due to the risks of serious and irreparable damage to competition; (3) damage is considered 'irreparable'; and (4) the balancing exercise between the public interest and the harm caused weighs in favour of the interim measure.

99 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (the Fining Guidelines), OJ C 210, 1 September 2006.

100 Case COMP/E-1/38.113 *Prokent-Tomra* [2008] OJ C219.

101 Case COMP/C-3 /37.990 *Intel*, Commission decision of 13 May 2009.

102 See also Frances Dethmers and Heleen Engelen, 'Fines under article 102 of the Treaty on the Functioning of the European Union', ECLR, 2011, issue 2, pp. 86 and 88; and Bo Vesterdorf, 'Article 102 TFEU and sanctions: appropriate when?' (*supra*) for criticism of the trend of higher fines, in particular considering the lack of legal certainty in the concepts of both abuse and dominance.

procedural fines of up to 1 per cent of an undertaking's annual turnover if an undertaking provides false or late answers to the Commission's requests for information.[103] Finally, the Commission is empowered to impose periodic penalty payments to compel companies to abide by remedies and commitments decisions.[104]

ii Remedies

Remedies, whether imposed by the Commission or offered voluntarily by an undertaking as commitments, must fulfil certain key objectives. They must: (1) bring the infringement to an end; (2) be proportionate in both scope and duration; (3) not be easily circumvented; and (4) address the competitive distortions resulting from the abuse.[105]

In addition, where an infringement can be brought to end in different ways, the Commission cannot 'impose […] its own choice from among all the various potential courses of actions which are in conformity with the treaty'.[106] This means that the Commission can only impose a specific behavioural remedy if it is 'the only way of bringing the infringement to an end'.

Behavioural remedies

Considerations of expediency and proportionality mean that behavioural remedies are preferred in Article 102 TFEU cases.[107] Structural remedies are only a means of last resort. Behavioural remedies may require the dominant undertaking either to engage in a positive action to bring the infringement to an end or to abstain from a certain type of conduct.[108] Positive obligations have included:

a the granting of a compulsory licence;[109]

b raising prices above an exclusionary level;[110] and

c other forms of compulsory dealing.[111]

103 Article 23(1) of Regulation 1/2003.

104 Article 24(1) of Regulation 1/2003. These can amount to 5 per cent of an undertaking's average daily turnover.

105 See Article 5(4) TFEU; and Case C-441/07 P, *Commission v. Alrosa*, judgment of 29 June 2010, ECLI:EU:C:2010:377 (*Alrosa*), paragraph 36; see also Commission Notice on Best Practices for the Conduct of Proceedings concerning Article 101 and 102 TFEU, paragraph 115: the Commission has undertaken to verify 'that the commitments address the identified competition concerns and that the commitments offered do not manifestly go beyond what is necessary to address these concerns'. The ECJ has confirmed that these principles apply both to remedies imposed under Article 7 and remedies voluntarily offered under Article 9. See Alrosa (*supra*), paragraph 36.

106 Case T-24/90, *Automec v. Commission*, judgment of 18 September 1992, ECLI:EU:T:1992:97, paragraph 52; Case T-167/08, *Microsoft v. Commission*, judgment of 27 June 2012, ECLI:EU:T:2012:323, paragraph 95; Case T-69/89, *RTE v. Commission*, judgment of 10 July 1991, ECLI:EU:T:1991:39, paragraph 98.

107 This is evident from the text of Article 7 of Regulation 1/2003: 'Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective remedy would be more burdensome for the undertaking concerned than the structural remedy.'

108 See Commercial Solvents, paragraph 45.

109 See Case 238/87, *Volvo v. Erik Veng (UK)*, judgment of 5 October 1988, ECLI:EU:C:1988:477.

110 See Case COMP/38.233 *Wanadoo*, Commission decision of 16 July 2003.

111 See, for example, *Magill*: certain broadcasting companies were forced to make available their TV listings and to permit their reproduction subject to payment of reasonable royalties.

Meanwhile, negative obligations have included unbundling products[112] and bringing rebates conditioned on exclusivity to an end.[113]

Structural remedies

Structural remedies are used to rectify effects or abuses that have caused a change in the structure of the market. They will only be proportionate where 'there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking'.[114] Structural remedies may be considered, for example, for foreclosure problems that arise from vertical integration.[115] Thus, in *ENI*, the Commission identified concerns with regard to conduct by ENI that result from its ownership of strategic natural gas pipeline infrastructure.[116] ENI offered to divest its stake in its international transport businesses and, consequently, the Commission held that 'ENI will no longer be subject to the inherent conflict of interest it faced operating both as a transmission system operator and as a company active on the Italian wholesale market'.[117]

VI PROCEDURE

The procedural rules for the conduct of Commission investigations are laid out in Regulation 1/2003 and the Commission's Implementing Regulation.[118] In 2012, the Commission published a version of its internal manual of procedure, which provides additional guidance on the Commission's handling of competition law proceedings.[119] A brief summary of the main procedural steps in a typical Article 102 TFEU investigation follows.

a The Commission can begin investigations both as a result of complaints by third parties and on its own initiative. Sector inquiries can also provide the impetus for investigations.

b The Commission's primary instrument of investigation is issuing requests for information. In the past few years, such requests have become increasingly detailed and may involve the production of large quantities of data and internal documents. The Commission may oblige companies to respond to requests for information through the adoption of formal decisions that are subject to penalty payments.

c The Commission may conduct unannounced inspections, or 'dawn raids', at a company's premises to obtain documents and information, although such dawn raids

112 See, for example, Case COMP/34.579 *MasterCard*, Commission decision of 19 December 2007, and Case COMP/36.518 EuroCommerce, Commission decision of 19 December 2007.

113 Case COMP/37.990 *Intel*, Commission decision of 13 May 2009.

114 Recital 12 of Regulation 1/2003.

115 See DG COMP Competition Policy Newsletter (2007), No. 1, pp. 23–34.

116 Case COMP/39.315 *ENI*, Commission decision of 29 September 2010.

117 Ibid., paragraph 89.

118 Commission Regulation EC No. 773/2004 of April 2004 on the conduct of proceedings pursuant to Articles 81 and 82 of the EC Treaty.

119 DG Competition Antitrust Manual of Procedures: Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU (the Procedure Manual), March 2012.

are relatively rare in Article 102 cases. Documents that contain advice from external counsel are protected by legal professional privilege, while in-house counsel documents do not benefit from such protection.[120]

d After considering the evidence, the Commission will decide whether to: close proceedings; enter settlement discussions; or issue an SO to the company concerned.

e The addressee of the SO is entitled to review the Commission's file and respond to the SO in writing. The Commission will also grant the company in question an oral hearing, if requested.

f Following the defendant's reply to the SO, and a possible oral hearing, the Commission will proceed to a decision (this may occur only after a number of supplementary statements of objections or letter of facts that seek to bolster the Commission's initial charges). An adverse decision can be appealed to the General Court on both points of fact and law, and from there to the ECJ on points of law only.

Commission proceedings can be resolved through the offer of commitments. Negotiation of commitments can take place both prior to adoption of an SO or following an SO and response. If the Commission considers the offered commitments to be acceptable, it will subject them to a public market test and, if confirmed, make them binding through adoption of a decision under Article 9 of Regulation 1/2003. Commitment decisions involve no finding of infringement and entail no fines.

The Commission can also settle cases with companies under investigation. This involves the company admitting liability in exchange for a 10 per cent fine reduction. Traditionally, this procedural mechanism has been limited to cartels, but in the *ARA* case, the Commission for the first time found an infringement, while rewarding ARA with a 30 per cent fine reduction for its cooperation.[121]

VII PRIVATE ENFORCEMENT

While public enforcement is the core of EU antitrust enforcement, actions brought by private claimants before national courts are an increasingly important complement to public enforcement activity.[122] The Commission aims to encourage and facilitate such actions. To this end, it published a proposal for a Directive on private damages actions in June 2013,[123] together with a practical guide on quantifying harm resulting from competition

120 Privilege applies only to independent external counsel; advice given by in-house lawyers is excluded from the scope of legal professional privilege. See Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission*, judgment of 14 September 2010, ECLI:EU:C:2010:512.

121 Case AT.39759 – *ARA foreclosure*, Commission decision of 20 September 2016.

122 Private enforcement is facilitated and encouraged by Recital 7, Article 6, and Article 15 of Regulation 1/2003. For commentary, see, for example, C Cook, 'Private Enforcement of Competition Law in Member State Courts: Experience to Date and the Path Ahead' (2008) 4(2) Competition Policy International; M Siragusa, EU Competition Law – Cartels and Horizontal Agreements, (Leuven Claeys & Casteels 2007), paragraph 4.226 et seq.; J Temple Lang, 'Commitment Decisions and Settlements with Antitrust Authorities and Private Parties Under European Antitrust Law', Fordham Antitrust Conference, September (2005).

123 Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European union, COM(2013) 404, 11 June 2013.

infringements,[124] and a recommendation for collective redress mechanisms in Member States.[125] The Directive's stated aim is to optimise the interaction between public and private enforcement of competition law; to minimise discrepancies between rules applicable to antitrust damages actions in Member States; and to ensure that victims of infringements of EU competition law can obtain full compensation for the harm they have suffered. Among other things, the Directive introduces rules on the disclosure of evidence in such cases, as well as on the standing of indirect customers, the length of limitation periods, joint and several liability of infringers, and the passing-on of damages as a possible defence.

VIII FUTURE DEVELOPMENTS

We highlight two areas to watch closely in the future.

First, Commissioner Vestager has spoken publicly of the need to address exploitative abuses – historically, an area of low priority for the Commission. The Commissioner noted possible exploitative abuses in the gas industry, in pharmaceuticals and with standard-essential patents. Consistent with this, the Commission in May 2017 opened a probe into Aspen Pharma's pricing of cancer drugs. The Commission appears to be following an EU-wide trend, with agencies in both the UK and Italy bringing recent cases alleging excessive pricing in the pharmaceutical sector.

Second, there is concern that increasing international protectionism in industrial policy may spill over into competition law enforcement. It is to be hoped that antitrust enforcement in Europe continues to be based on facts and the rule of law, not politics. European case law under Article 102 TFEU provides a sound framework for the application of antitrust principles in way that promotes consumer welfare through the competitive process without falling prey to unrelated political considerations. The EU Commission should follow that framework consistently and predictably.

124 Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, C(2013) 3440, 11 June 2013; and Commission Staff Working Document – Practical Guide on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, SWD(2013) 205, 11 June 2013.

125 Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C(2013) 3539/3, 11 June 2013; and Commission communication 'Towards a European Horizontal Framework for Collective Redress', COM(2013) 401/2, 11 June 2013.

Chapter 10

FRANCE

Antoine Winckler, Frédéric de Bure and Esther Bitton[1]

I INTRODUCTION

Article L.420-2 of the French Commercial Code provides for the prohibition of abuses of a dominant position and abuses of economic dependence. Article L.420-4 of the Commercial Code, however, provides for exemptions from the prohibition of Article L.420-2 when the practices at stake result from a regulation or if they have the effect of achieving economic progress – including creating and maintaining employment – while reserving for consumers a fair share of the resulting benefits and without allowing an undertaking to eliminate competition in respect of a substantial part of the products in question. The exemption is rarely applied in practice. Another relevant provision is Article L.420-5 of the Commercial Code, which prohibits abusively low prices to consumers. Abusively low pricing, as defined by Article L.420-5, can only be applied to products and services sold to final consumers, but may be found to exist even when the infringing company is not in a dominant position and the victim is not in a situation of economic dependence. Article L.420-5 has only been applied in rare cases.

The French Competition Authority (FCA) has jurisdiction over abuse of dominance practices. As an independent administrative body, the FCA may investigate abuse of dominance cases and impose fines of up to 10 per cent of the infringing companies' worldwide turnover. The FCA has not issued formal guidance on the way in which it applies Article L.420-2 of the Commercial Code. The European Commission's guidance on Article 102 TFEU (formerly Article 82 of the EC Treaty), however, provides useful indications as to how Article L.420-2 is applied in France.[2] French judges can also directly apply the relevant provisions of the Commercial Code concerning abuse of dominance in the context of civil or commercial litigation.

II YEAR IN REVIEW

In 2016, the FCA issued 11 decisions on the basis of Article L.420-2 of the Commercial Code. The FCA imposed fines in two decisions, amounting to a total of

1 Antoine Winckler is partner, Frédéric de Bure is counsel and Esther Bitton is an associate at Cleary Gottlieb Steen & Hamilton LLP. The authors gratefully acknowledge the contribution of Davy Nguyen of the Paris office of Cleary Gottlieb Steen & Hamilton LLP.

2 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C45 of 24 February 2009, page 7.

€89.8 million,[3] and granted interim measures in one case.[4] Eight claims were rejected at a preliminary stage for lack of evidence (including one case declared partly inadmissible because some of the reported practices were time-barred).[5] The FCA did not issue any commitment decisions in 2016.

In early 2017, the FCA issued two fining decisions in the supply of gas and electricity sector and in the petanque balls sector.[6] The FCA rejected one claim at a preliminary stage for lack of evidence.[7]

The most noteworthy decisions in the past year are the following.

In *DTT broadcasting*,[8] following a complaint by Itas Tim, a radio and TV broadcaster, the FCA imposed a fine of €20.6 million on TDF (the former incumbent audiovisual broadcasting operator). The FCA found that TDF abused its dominant position by disparaging its competitors *vis-à-vis* the local public authorities in charge of authorising the installation of competitors' infrastructures and by granting loyalty rebates intended to encourage channel controllers to opt for TDF's services for the majority of their broadcasting needs. The FCA found that TDF's anticompetitive conduct blocked market entry at a time when, with the transition to fully digital networks, alternative operators had a unique opportunity to gain market shares. The FCA also considered that the anticompetitive practices were particularly harmful as they perpetuated the confusion with regard to TDF's former status of incumbent state operator. The decision is subject to an appeal before the Paris Court of Appeals. TDF was already fined by the FCA in 1999[9] and twice in 2015[10] for abuse of dominance.

In *Zinc*,[11] following an investigation initiated by the Ministry of Economy, the FCA fined Umicore €69.2 million. The FCA found that Umicore, the leading supplier of rolled

3 FCA decisions No. 16-D-11 of 6 June 2016 concerning practices in the terrestrial Hertzian broadcasting sector, which imposed a €20.6 million fine on TDF; No. 16-D-14 of 23 June 2016 concerning practices in the zinc sector and manufactured zinc products dedicated to the building and civil engineering industry, which imposed a €69.2 million fine on Umicore.

4 FCA decision No. 16-MC-01 of 2 May 2016 concerning a demand from Direct Energie for interim measures in relation to Engie.

5 FCA decisions No. 16-D-03 of 10 February 2016 concerning practices implemented in the waste electrical and electronic equipment sector; No. 16-D-04 of 23 March 2016 concerning practices implemented during the sales of the French rugby championship television rights; No. 16-D-08 of 4 May 2016 concerning practices on the access to medical imagining equipment; No. 16-D-12 of 9 June 2016 concerning practices implemented by Carte Blanche Partenaires in the optical sector; No. 16-D-16 of 12 July 2016 concerning practices implemented in the social housing sector in Grenoble; No. 16-D-19 of 13 September 2016 concerning practices implemented in the installation and maintenance of portable fire extinguishers; No. 16-D-25 of 23 November 2016 concerning practices implemented in online advertising; No. 16-D-29 of 19 December 2016 concerning practices implemented in the aftermarket of photocopiers.

6 FCA decision No. 17-D-06 of 21 March 2017 concerning practices implemented in the gas and electricity supply; No. 17-D-02 of 10 February 2017 concerning practices implemented in the competitive petanque balls sector.

7 FCA decision No. 17-D-05 of 10 March 2017 concerning practices implemented by SACD.

8 FCA decision No. 16-D-11, mentioned above.

9 FCA decision No. 99-D-14 of 23 February 1999 concerning practices implemented by TDF.

10 FCA decisions No. 15-D-01 of 5 February 2015 concerning practices implemented in the sector of terrestrial Hertzian television broadcasting overseas (partially quashed by Paris Court of Appeals in a ruling dated 15 September 2016) and No. 15-D-10 of 11 June 2015 concerning practices implemented by TDF on the Eiffel Tower site.

11 FCA Decision No. 16-D-14, mentioned above.

zinc in France, had imposed abusive exclusivity obligations on its resellers. In particular, Umicore inserted in its distribution agreements for zinc roofing and rain gutters products: (1) promotion clauses pursuant to which the distributors committed to promote Umicore's products only; (2) stock clauses by which resellers had to keep the entirety of Umicore's VMZinc product range in their stocks at all times; and (3) review clauses that allowed Umicore to detect resellers selling competitors' products. Umicore monitored compliance with the exclusivity obligations, and took retaliatory measures when distributors deviated from the agreement (such as loss of discounts or loss of preferred reseller status). The decision is subject to an appeal before the Paris Court of Appeals.

In *Engie*,[12] the FCA imposed a fine of €100 million on Engie, the French incumbent gas operator, following a complaint by Direct Energie and consumer association UFC-Que Choisir alleging that Engie abused its dominant position in the gas markets to induce its customers to switch to its market-based gas and electricity contracts. The FCA found in particular that Engie had used its historical data file, as well as other means of leveraging its incumbent operator's status and resources, in order to convert its customers on regulated gas tariffs to market-based contracts for gas and electricity. Engie did not challenge the objections and settled the case.

III MARKET DEFINITION AND MARKET POWER

Under French law, as under EU law, regulators and judges must typically start their analysis by defining the relevant markets where the alleged practices took place. Then they analyse whether a situation of dominance (single or collective dominance) or of 'economic dependence' can be established in the relevant market before assessing the existence of an abuse.

i Market definition

The FCA mostly relies on qualitative criteria, although it may also rely on an econometric analysis to define relevant markets. To assess demand-side substitutability, the FCA takes into account the nature and use of the product, the price differences between similar products, consumer preferences, the legal environment, the brand image of the products and the distribution channels. For instance in *Petanque balls*, the FCA found that the market for petanque balls used for sporting events is distinct from the market for petanque balls used for leisure since petanque balls for sporting events have different technical requirements and must be certified by the relevant sports event organiser.[13] If the data are available, the FCA may also use quantitative techniques such as cross-elasticity of demand to delineate product markets. In *Zinc*,[14] the FCA used the small but significant and non-transitory increase in price (SSNIP) test to determine the demand-side substitutability. The FCA relied on the SSNIP test to confirm that zinc was not substitutable for other construction materials.

In situations where there are complementary products (e.g., hardware and consumables or maintenance services), the FCA determines, based on a combination of qualitative and quantitative criteria, whether a single market exists for both or whether the products form

12 FCA Decision No. 17-D-06, mentioned above.

13 FCA decision No. 17-D-02, mentioned above; see also FCA decision No. 10-D-17 of 25 May 2010 concerning practices implemented in the market for petanque balls made for competitions.

14 FCA decision No. 16-D-14, mentioned above.

distinct product markets. In *Nespresso*,[15] the FCA defined a 'primary' market for espresso-pod coffee machines and a distinct 'secondary' market composed only of coffee capsules compatible with Nespresso coffee machines. The FCA found that espresso-pod coffee machines and coffee capsules did not belong to the same product market because:

a coffee machines and coffee capsules are not:
- bought simultaneously;
- necessarily bought at the same shops; and
- manufactured and marketed by the same firms; and

b an internal document of Nespresso considered that the two products were separate.

The FCA also found that the secondary market should be narrowly defined as only including coffee capsules compatible with Nespresso machines, because users of Nespresso machines were not in a position to use any other kind of capsule. On the contrary, in *Photocopiers*,[16] the FCA refused to define a separate secondary market for the maintenance of photocopiers because when buying photocopiers, purchasers also take into account the price of maintenance services. The FCA also found that the intense competition at the primary level and the short lifecycle of photocopiers (three to five years) exerted a sufficient competitive constraint on the conditions of maintenance services at the secondary level.

Supply-side substitutability also constitutes a relevant criterion for market definition. In *Mobile telephony*,[17] the FCA found that each operator held a monopoly on the wholesale market for the termination of voice calls on its own network because (*inter alia*) of the lack of supply-side substitutability, as only the terminating operator is capable of localising the recipient of the call. The Court of Appeal followed the same reasoning.[18]

As regards the geographic dimension of the market, the FCA typically determines the area where the conditions of competition are homogeneous. It analyses, for example, the specific geographical features and transportation costs to delineate geographic markets. It also uses a SSNIP test approach (i.e., the relevant geographic market is defined as the area in which a company can use its market power or monopoly power, e.g., to raise prices profitably) without being constrained by other players located in other areas or from other product lines.[19]

ii Single dominance

Dominance is achieved when a company can independently determine its pricing policy in the relevant market, independently from its competitors and customers.[20] The FCA typically considers that market shares above 50 per cent are a strong indicator of market power.

To establish single dominance, the FCA also examines the following criteria in addition to market shares: (1) the countervailing market power of competitors; (2) the intensity of competition on the market; (3) the existence of potential new entrants; and (4) the specific

15 FCA decision No. 14-D-09 of 4 September 2014 concerning practices in the espresso coffee machines sector.

16 FCA decision No. 16-D-29, mentioned above.

17 FCA decision No. 12-D-24 of 13 December 2012 concerning practices in the mobile telephony sector.

18 Paris Court of Appeals, 19 May 2016, *Mobile telephony*.

19 FCA Annual Report for 2011, page 118.

20 FCA decision No. 04-D-48 of 14 October 2004 concerning practices implemented by France Telecom, SFR Cegetel and Bouygues Telecom.

advantages of the leading firm (e.g., brands, organisation, better products or services). In *Pet food*,[21] Royal Canin, which held a market share limited to 40 per cent, was considered to be a dominant player, because: the second and the third largest competitors respectively held a 12 per cent and 7 per cent market share; Royal Canin had a very good brand image bolstered by high advertising expenses and regular contact with prescribers; and the relevant market was characterised by high barriers to entry.

In *Zinc*,[22] the FCA considered that Umicore was dominant in the rolled zinc markets for roofing and rain gutters, since it held a 70 per cent market share in both markets and enjoyed strong brand recognition. The FCA's analysis was also confirmed by Umicore's internal documents, which indicated that Umicore was dominant in the zinc sector. In *Petanque balls*,[23] the FCA essentially relied on Obut's very high market share (more than 80 per cent) and its strong brand reputation in the sector to find that the operator was dominant.

iii Collective dominance

Collective dominance may result from structural links between undertakings, whether capitalistic or contractual, and from the market structure, or both. In the absence of structural links, the FCA applies the cumulative *Airtours* criteria (i.e., oligopolistic market, significant market transparency, possibility to engage in retaliation and absence of countervailing power from the fringe players).[24]

In *Saint-Pierre-et-Miquelon*,[25] the FCA imposed a total fine of €381,400 on companies active in the aggregates market in the archipelago of Saint Pierre and Miquelon for anticompetitive agreement and abuse of a collective dominant position. In particular, the FCA found that four undertakings held a collective dominant position as: (1) they together held an 86 and 88 per cent market share in the upstream and downstream markets for the production and sale of aggregates respectively; (2) they had structural links through the operation of a common quarry and had adopted a common strategy; (3) deviation would be unlikely given their historical links; (4) entry barriers were high; and (5) there were no alternative competitors.[26]

Although collective dominance cases are rare (there have been only three cases since 2000),[27] the FCA's decisional practice shows that it tends to resort to collective dominance when it lacks evidence to support a claim of explicit collusion.

21 FCA decision No. 05-D-32 of 22 June 2005 concerning practices in the pet food sector.

22 FCA decision No. 16-D-14, mentioned above.

23 FCA decision No. 17-D-02, mentioned above.

24 General Court decision of 6 June 2002, case No. T-342/99, *Airtours*.

25 FCA decision No. 12-D-06 of 26 January 2012 concerning practices implemented in the civil engineering sector in Saint-Pierre-et-Miquelon.

26 In addition to FCA decision No. 12-D-06 mentioned above, see FCA decision No. 05-D-49 of 28 July 2005 concerning practices in the sector of hiring maintenance for postage machines; and No. 02-D-44 of 17 July 2002 concerning the water market sector. See also FCA decision No. 07-D-08 of 12 March 2007 concerning practices in the supply and distribution sector of cement in Corsica, which was partially dismissed by the Paris Court of Appeals with respect to collective dominance.

27 See FCA decisions No. 12-D-06, mentioned above; No. 05-D-49, mentioned above; and No. 02-D-44, mentioned above. See also FCA decision No. 07-D-08, mentioned above.

iv Economic dependence

Economic dependence is a specific infringement under French competition law, which has no equivalent in EU competition law. Pursuant to Article L.420-2(2) of the Commercial Code, abuse of economic dependence of a customer or supplier is prohibited when it is likely to affect competition on the market. This provision was originally drafted to protect suppliers from large retail chains (i.e., supermarkets) but is in practice applied essentially when invoked by resellers confronted with situations of refusal to supply and discrimination.

According to established case law, economic dependence arises when a company is forced into a commercial relationship with another company because it cannot purchase substitutable products under similar terms and conditions, or sell its products to other customers. The FCA examines the following cumulative criteria:

a the commercial partner's brand notoriety;
b the commercial partner's market share;
c the commercial partner's share in the turnover of the dependent company; and
d the possibility for the dependent company to find an alternative commercial partner.[28]

IV ABUSE

i Overview

Article L.420-2 of the Commercial Code specifically mentions a number of abuses, including refusal to supply or deal, tying, discriminatory practices or abuse of economic dependence. However, the list of abuses is not exhaustive.

The FCA relies on a 'by object' approach to abuses of a dominant position or of economic dependence. It considers that abusive conduct may be found even in the absence of an actual effect on the market. Attempts to abuse a dominant position may, thus, in certain cases also be challenged. In *SNCM*,[29] the court considered that a ferry line operator between Corsica and Marseille abused its dominant position by submitting a global and indivisible (i.e., island to continent) offer to the call for tenders launched by the Corsican Transport Office, while its competitors submitted point-to-point (i.e., harbour-to-harbour) bids as required by the request for proposals. By doing so, SNCM did not allow the tendering authority to compare bids on a point-to-point basis, and to allocate the contract between several ferry operators. Although the bidding procedure was ultimately declared void by administrative courts and therefore the practice did not have any effect, the FCA fined SNCM for its attempted abuse of a dominant position.

ii Exclusionary abuses

Predatory pricing

Predatory pricing is a pricing strategy whereby the dominant firm offers below-cost prices, thereby incurring losses or forgoing profits in the short term, in order to eliminate actual or potential competition. The FCA considers that the following two situations create a presumption of predatory pricing: (1) when the dominant company's prices are lower than

28 Paris Court of Appeals, 4 May 2004, *CNPA v. Honda Motor e.a*. See also FCA's decisions No. 14-D-07 of 23 July 2014; No. 10-D-08 of 3 March 2010; No. 04-D-26 of 30 June 2004; No. 02-D-77 of 27 December 2002 and No. 01-D-49 of 31 August 2001.

29 Paris Court of Appeals, 9 March 2010, *SNCM*.

the average variable costs (unless the company can convincingly explain that its behaviour did not result from a predatory strategy aimed at eliminating competitors); or (2) when the company's prices are between average variable costs and average total costs, and there is clear and convincing evidence that its behaviour is part of a predatory strategy aimed at eliminating competitors (the EU *Akzo* test). French authorities use a slightly stricter, economics-based test compared to the European Commission's approach: the presumption of predation is more easily rebuttable and the FCA has to show that there is a realistic possibility of the dominant player recouping its losses. This may explain why, to date, there has been no successful precedent of predatory pricing.

In *SNCF*,[30] the FCA held that the French rail operator pursued price-based exclusionary practices for its freight services activity by full-train-load because SNCF's prices, although higher than direct average variable costs, were lower than the costs that would be avoided over a three-year period if SNCF terminated its freight services activity by full-train-load. Although SNCF's pricing policy was not considered predatory, as the losses incurred by SNCF were sustainable and pre-existed the opening-up of the sector to competition, the FCA nevertheless considered that it was abusive. The Paris Court of Appeals, however, overturned this part of the decision, considering that charging prices superior to average variable costs but inferior to average total costs could only be considered abusive based on evidence that the dominant firm had made specific plans to exclude competitors from the market.[31] In this case, the FCA had not sufficiently established the existence of an exclusionary strategy.

More recently, in *Bottin Cartographes*,[32] following an opinion by the FCA, the Paris Court of Appeals dismissed a predatory pricing claim against Google. Bottin Cartographes, a competitor of Google, claimed that offering an enterprise mapping service free of charge constituted an abusive predatory strategy. In particular, Bottin Cartographes alleged that Google was not allowed to offer a free version of its software without monetising it with advertising or by revenues derived from a premium, paid-for version (a 'freemium' business model). In its opinion,[33] later confirmed by the court, the FCA reaffirmed that for multi-product companies, the predation test to be conducted is a modified *Akzo* test, where average variable costs are to be replaced by average incremental costs, and average total costs by long-run average incremental costs. In practice, the FCA found that the relevant costs were the costs borne by Google, rather than the costs borne by its less efficient competitors, and the costs specifically associated with the allegedly abusive activity to the exclusion of common costs supported by Google in its capacity as a multi-service firm (in particular, the costs associated with the acquisition of the underlying maps were not relevant because Google would bear them in any event). Conversely, the FCA and later the Court confirmed that where a product is offered in different versions (one basic, free version and one premium, paid-for version), the revenues to be taken into account are those associated with all versions of the product. On this basis, the FCA and the Court of Appeals dismissed Bottin Cartographes' claim by noting that the econometric studies submitted by the parties showed that Google's revenues exceeded the total relevant costs, and even if Google's revenues

30 FCA decision No. 12-D-25 of 18 December 2012 concerning practices implemented in the railway freight sector.

31 Paris Court of Appeals, 6 November 2014.

32 Paris Court of Appeals, 25 November 2015, *Bottin Cartographes v. Google*.

33 FCA opinion No. 14-A-18 of 16 December 2014 concerning a dispute opposing Bottin Cartographes to Google.

could have been exceptionally lower than the corresponding average total costs, there was no evidence of a predatory strategy. On this last point, the FCA and the Court emphasised that it may be economically rational for Google initially to offer products and services for free in order to increase its number of users, and in any case, strong competition remained in the market, with a number of competitors – in particular, free open source solutions and other multi-product companies – that could not be foreclosed by Google's behaviour. As a result, it would have been impossible for Google to recoup the potential losses, and as such no predatory strategy could be found.

In *Gas market*,[34] nevertheless, the FCA imposed interim measures on Engie (the former incumbent operator on the French market for gas distribution) at the request of Direct Energie, which alleged that Engie implemented a price-below-cost strategy on its commercial offers intended for both individual and business customers. In particular, Direct Energie argued that Engie charged predatory prices by attributing some of its marketing and commercial costs, which are common to its competitive and regulated offers, to its regulated activities only. Given the risk that Engie would implement a predatory pricing strategy, and pending the investigation on the merits, the FCA ordered Engie to set the prices of its offers in such a way as to take into account all of the related costs incurred in the short-term for the sale of these offers, including commercial costs.

In *Waste electric and electrical equipments*,[35] the FCA rejected a complaint by European Recycling Platform France, an eco-organisation active in the field of waste treatment of electrical and electronic equipment, which had claimed that its competitor Eco-systèmes had charged a predatory fee to its members for the treatment of screens. The FCA found, however, that it was impossible to make relevant comparisons between Eco-systèmes' prices and the costs it incurred for each category of equipment, as its business model relied on waste management of different equipment of different ages, brands and geographic areas (i.e., the revenues from goods sold today are used to finance the waste management costs of different products for different brands in different geographic areas). As a result, the FCA found that it was not possible to run a predatory pricing analysis limited to screens only and rejected the predatory pricing allegations.

Leveraging practices

Leveraging practices consist for a dominant firm of taking advantage of its superior market position on a 'dominated' market to expand its position in another related market.

In *PMU*,[36] the FCA expressed concerns that the French legal monopolist for offline horse racing betting leveraged its position to exclude competitors from the competitive market for online horse racing betting. In particular, the FCA was concerned that by pooling together its online and offline bets, PMU could attract more bettors, discourage potential new entrants and, in time, drive competitors out of the market, since a greater pool of bets allows for more complex and diversified bets. The winnings on successful bets can also be significantly higher because there would be a greater pool of debts. The FCA accepted commitments from PMU to stop pooling its online and offline bets, and that both online and offline activities would be kept separate. Although this could be interpreted as coming close to 'an efficiency

34 FCA decision No. 16-MC-01, mentioned above.

35 FCA decision No. 16-D-03, mentioned above.

36 FCA decision No. 14-D-04 of 25 February 2014 concerning certain practices in the online horse race bets sector.

offence', because horse racing bettors precisely look for the highest possible winnings (as in any lottery), the FCA justified its preliminary findings by stating that its decision was consistent with the public policy objective of limiting the risk of addiction to online betting.

More recently, in *Passenger transport*,[37] the FCA accepted the commitments offered by SNCF in order to prevent its subsidiary Keolis from leveraging SNCF's monopoly in the railway passenger transport market into the competitive market for the urban transport of passengers (i.e., bus, metro, tram). More specifically, the FCA was concerned that Keolis could rely on its parent company's railway expertise in order to submit bids that are not replicable by competitors for the supply of advice and technical assistance to urban transport operators. In order to alleviate the FCA's concerns, SNCF committed, in particular, that only its subsidiaries that are fully independent from its railway passenger transport activities would respond to calls for tender regarding technical assistance to urban transport operators.

In *Engie*,[38] the FCA found that Engie abused its dominant position by leveraging its position as the incumbent gas operator in order to obtain more contracts in the competitive gas and electricity markets. In particular, the FCA found that Engie: (1) used its historical customer database for regulated tariffs for gas to convert customers to market-based contracts for gas and electricity; (2) used the business infrastructure and resources developed for its regulated tariff activity in order to offer new market-based contracts and win former customers back; and (3) provided misleading sales arguments according to which Engie guaranteed a better security of gas supply than its competitors. The FCA considered that these practices were particularly harmful to competition as they were implemented at a time when the market was opening up to competition. Engie did not challenge the objections and settled the case.

Margin squeeze

Margin squeeze is a strategy whereby the dominant vertically integrated firm applies excessive prices on upstream products or services that make downstream customers' or rivals' activities unprofitable. French courts consider that margin squeezes restrict competition only if a potential as efficient competitor would be unable to enter the downstream market without incurring losses. Such restriction of competition may be presumed only when the products or services supplied to its competitors by the dominant firm are indispensable in order to enable them to compete on the downstream market.[39]

In *Eiffel Tower*,[40] the FCA found that TDF had implemented a margin-squeeze strategy in the market for the renewal of the national occupancy contract for audiovisual and radio broadcast from the Eiffel Tower site. Among other practices, the FCA found that the offers made by TDF to alternative operators for hosting services (which were indispensable to compete on the downstream market for the broadcasting of radio programmes from the Eiffel Tower) constituted a margin squeeze that did not allow alternative operators as efficient as TDF to submit competitive offers for the operation of the Eiffel Tower facilities. The FCA imposed a fine of €660,000 on TDF on these grounds.

37 FCA decision No. 15-D-05 of 15 April 2015 concerning certain practices in the passenger urban transport sector.

38 FCA decision No. 17-D-06, mentioned above.

39 French Supreme Court, 3 March 2009, No. 08-14.435.

40 FCA decision No. 15-D-10, mentioned above.

Exclusivity clauses

Exclusive dealings entered into by a dominant firm do not constitute a *per se* abuse under French law, provided that the dominant firm's behaviour does not result in additional foreclosure of its competitors. To assess whether exclusivity clauses may restrict competition, the FCA examines the clauses' scope, duration, the existence of a technical justification and the economic consideration granted to the customer.[41]

In *Mobile telephony equipment*,[42] the FCA was concerned about the duration (20 years) and the restrictive early termination terms of the agreements between mobile operators and TDF for the hosting of their antennae (in particular early termination was possible only for very few sites each year). To address these concerns, TDF offered commitments designed to allow mobile operators to obtain better conditions for the hosting of their antennae and in case they were to switch to alternative operators. TDF committed in particular to limit the duration of new hosting agreements to 10 years, to cap the penalties generated by early termination and to increase the number of sites (or quota) for which early termination was possible.

In *Zinc*,[43] the FCA found that Umicore had implemented *de facto* exclusivities in order to prevent its distributors from having relationships with competing suppliers. The FCA found that the following clauses in the distribution agreements constituted abusive exclusivities: (1) forcing distributors to promote Umicore's products and brands exclusively; (2) requiring distributors to keep Umicore's entire range of products in stock at all times; and (3) allowing Umicore to detect unusually a low level of sales or a decline in orders to distributors.

Loyalty rebates

Under French law, loyalty rebates granted by a dominant firm may be considered abusive when the discount tends to remove or restrict the buyer's freedom to choose its sources of supply absent a legitimate economic *quid pro quo*.[44] The FCA considers forward-looking quantitative rebates (as opposed to rebates based on historical sales) conditional upon individual orders, volumes or turnover as generally valid, because they tend to reflect efficiency gains and economies of scale. Other forms of loyalty rebates may be considered abusive.

In *DTT broadcasting*,[45] the FCA considered that TDF had abused its dominant position by granting loyalty rebates to channel editors that hired TDF for a substantial share of their broadcasting sites. The FCA found that TDF generally granted rebates only if channel editors assigned TDF at least 70 per cent of their sites, which prevented other competitors from developing their activity, even though they also offered rebates to channel editors.

Tying and bundling

Tying and bundling consist of tying or bundling two distinct products that typically belong to two different markets, either by forcing consumers to buy the tied products together or by

41 FCA decision No. 08-D-16 of 3 July 2000 concerning practices in the ID photos sector.

42 FCA decision No 15-D-09 of 4 June 2015 on practices implemented in the mobile telephony equipment sector.

43 FCA decision No. 16-D-14, mentioned above.

44 FCA decision No. 04-D-65 of 30 November 2004 concerning practices in the postal services sector. See also FCA's decision No. 05-D-32, mentioned above.

45 FCA decision No. 16-D-11, mentioned above.

providing them an incentive to buy the products together. The FCA considers that tying by a dominant firm may be abusive if the following two conditions are met: (1) the tying and tied products are distinct products; and (2) the tying practice is likely to lead to anticompetitive foreclosure.[46]

Since 2012, the FCA has issued only one decision in relation to tying in the golf insurance sector.[47] In *Golf insurance*, the FCA expressed concerns with respect to the inclusion of insurance products – which are theoretically optional – in the licence delivered by the French Golf Federation. The FCA was particularly concerned that the French Golf Federation used its legal monopoly on the delivery of licences to foreclose its rivals from the golf insurance market through tied selling. To address these concerns, the French Golf Federation accepted to take commitments to prevent tying practices. In 2015, the FCA adopted another decision, finding that these commitments were no longer justified given developments in the market.[48]

On the contrary, in *Engie*,[49] the FCA found that Engie did not abuse its dominant position by proposing a bundled offer for electricity and regulated-tariff gas to its customers. The FCA considered that customers were free to subscribe to a separate agreement for regulated tariff gas without subscribing to an electricity supply agreement with Engie, and that no specific discount was granted if both products were contracted jointly.

Refusal to deal

The concept of refusal to deal is regularly used by the FCA. It covers a broad range of practices, such as the refusal to grant access to an essential facility or network, the refusal to supply products to existing or new customers, and the refusal to license intellectual property rights. The FCA's test is similar to the test adopted by the European Commission. Refusal to grant access to an essential facility is abusive if the following five conditions are met:

a the facility belongs to a dominant firm;
b access to the facility is necessary to compete on a related market;
c competitors cannot duplicate the facility at reasonable costs;
d the dominant firm unduly refuses access to the facility (or imposes unduly restrictive conditions); and
e access to the facility is possible.[50]

The same principles apply *mutatis mutandis* for refusal to supply a product or service. Concerning intellectual property rights, French courts consider that software may constitute an essential facility only if it is proved that the software is indispensable to operate on a market, and a competitor could not develop an alternative software under economically reasonable conditions (even if such economic conditions were less favourable than those

46 FCA decision No. 11-MC-01 of 12 May 2011 concerning practices in the delivery of parcels to the collection points sector.

47 FCA decision No. 12-D-29 of 21 December 2012 concerning practices in the distribution of insurance products to the golfers sector.

48 FCA decision No. 15-D-16 of 27 November 2016 concerning the revision of the commitments of the French Federation of Golf.

49 FCA decision No. 17-D-06, mentioned above.

50 FCA interim measures decision No. 03-MC-04 of 22 December 2003 concerning a request for interim measures filed by Messageries Lyonnaises de Presse.

under which the dominant undertaking operates).[51] In practice, the following facilities have been considered essential under French law: transport facilities, the electricity network, the telephone network and certain databases or software.

In *SNCF*,[52] the FCA and the Paris Court of Appeal considered that SNCF abused its dominant position: (1) by delaying the release of information concerning access to freight yards, thereby preventing its competitors from accessing rail capacities essential to their business activity; (2) by retaining exclusive use of certain railway cars that are used for large tonnage transportation and constitute an essential part of the infrastructure; and (3) by pursuing a train path overbooking policy that prevented its rivals from participating in certain calls for tender or honouring certain contracts.

In *Cegedim*,[53] the FCA fined Cegedim, a company active both in the provision of healthcare databases and customer relation management (CRM) software, for refusing access to its database of medical information to pharmaceutical laboratories that used the CRM software of one of its competitors, Euris. The FCA considered that Cegedim's database was not an essential facility because there were alternative, albeit inferior, rival databases. However, such a refusal to deal nevertheless amounted to an abuse of a dominant position, since Cegedim was found to discriminate against customers using a competing CRM software, thus preventing the competing CRM software provider from gaining market shares (the FCA pointed out that the practice had caused the competitor to lose 70 per cent of its customers between 2008 and 2012). In 2015, the Paris Court of Appeal upheld the FCA's decision and considered in particular that the practices implemented by Cegedim had unjustifiably disadvantaged Euris in terms of costs and reputation.[54]

In *DTT broadcasting*,[55] Itas Tim claimed that TDF abusively refused to grant competitors access to the land it either owned or rented, in order to limit their ability to install broadcasting facilities. The FCA considered, however, that such access was not objectively necessary since TDF's competitors could install their broadcasting facilities elsewhere. Also, the FCA considered that some of TDF's land lacked available space for more installations and justified TDF's refusal to give access.

Disparagement

Under French law, disparagement consists of publicly discrediting an identified competitor or its identified products or services. The FCA considers that disparagement is distinct from criticism as it originates from an economic player seeking to benefit from an unjustified competitive advantage by discrediting its competitor or products, and may constitute an abuse of dominance (when disparagement originates from a dominant player).

In *Sanofi*[56] and *Schering-Plough*,[57] the FCA fined two pharmaceutical companies for disparagement that consisted of widely publicising differences between their originator drug

51 Paris Court of Appeals, 31 January 2006, *NMPP*.

52 FCA decision No. 12-D-25, mentioned above, upheld by Paris Court of Appeal, 6 November 2014, *SNCF*.

53 FCA decision No. 14-D-06 of 8 July 2014 concerning practices in the medical information database sector.

54 Paris Court of Appeals, 25 September 2015, *Cegedim*.

55 FCA decision No. 16-D-11, mentioned above.

56 FCA decision No. 13-D-11 of 14 May 2013 concerning practices in the medicinal products sector. Upheld by the Paris Court of Appeals on 18 December 2014 and by the French Supreme Court on 18 October 2016.

57 FCA decision No. 13-D-21 of 18 December 2013 regarding practices implemented on the French market for high-dosage Buprenorphine sold in private practices.

(or the generic manufactured by the producer of the originator drug) and generic drugs, at the time of the entry of generic drugs into the market. Irrespective of whether such differences were verified or not, the companies could not prove that they had therapeutic consequences. Though both Sanofi and Schering-Plough had not explicitly presented generic drugs as inferior but only pointed at factual differences, the very fact of shedding doubts without scientific supporting evidence was found to be abusive by the FCA. Sanofi was fined €40.6 million and Schering-Plough was fined €15.3 million.

In *DTT broadcasting*,[58] the FCA also found that TDF unlawfully disparaged its competitors by providing local public authorities with negative comments on the installation of competing broadcasting facilities next to TDF installations, or by asking public authorities to notify TDF of any request by a competitor to install broadcasting facilities. In particular, TDF claimed that the installation of pylons near its own installations presented radio disturbance risks, although such risks did not result from the installation of pylons and could be prevented by ordinary procedures. These practices were particularly harmful to competition as they were implemented at a time of transition to fully digital networks.

Most-favoured-nation clauses

In *Booking.com*,[59] the FCA accepted commitments addressing its preliminary concerns that the most-favoured-nation clauses imposed by Booking.com could have exclusionary effects. The decision was also based on the concern that the most-favoured-nation clauses could constitute a restrictive practice. MFN clauses prevented hotels from offering to rival reservation platforms or other distribution channels (including through their own sales channels) lower prices or better commercial conditions (i.e., availability, services) than to Booking.com. In particular, the FCA considered that these clauses could prevent smaller platforms and new entrants from gaining market shares by offering lower prices or better services to customers including by offering lower commission rates to hotels.

Other exclusionary tactics

The FCA may intervene under Article L.420-2 of the Commercial Code, where a dominant company's allegedly abusive conduct is likely to lead to anticompetitive foreclosure.

In *Overseas DDT*,[60] the FCA imposed a fine of €4.2 million on TDF, considering that TDF had abused its dominant position by failing to provide the technical and pricing information concerning access to its broadcasting infrastructures to competitors. In the context of a call for tender issued by France Télévisions in the overseas territories, access to such information was necessary for the bidders (that also included TDF) to prepare their offers. Separately, the FCA also found that TDF implemented a similar strategy in connection with the Eiffel Tower site.[61]

In *Petanque balls*,[62] the FCA imposed a fine of €320,000 on Obut for imposing resale prices on some of its distributors. The FCA considered that Obut was in a dominant position in the market for the production of petanque balls for competitions and abused its dominant

58 FCA decision No. 16-D-11, mentioned above.

59 FCA decision No. 15-D-06 of 21 April 2015 concerning practices implemented in the online hotel booking sector.

60 FCA decision No. 15-D-01, mentioned above.

61 FCA decision No. 15-D-10, mentioned above.

62 FCA decision No. 17-D-02, mentioned above.

position in the market for the distribution of petanque balls in which Obut was also active, by imposing resale prices so as to reduce price competition with other retailers. In addition, Obut's sales forces monitored compliance with the suggested list prices and threatened distributors with delayed deliveries, blocked orders and delisting in case of deviation. In its decision, the FCA noted that such practices are also prohibited under Article L.420-1 of the French Commercial Code. The FCA decided to rely on Article L.420-2 of the French commercial code exclusively though.

iii Exploitative abuses

Exploitative abuses consist of a dominant firm imposing 'unbalanced' conditions on its trading partners, and in particular imposing excessively high prices. Under specific circumstances, the FCA considers that dominant firms are deprived of the right to adopt a course of action or take measures that are not themselves abuses, and that would even be unobjectionable if adopted by non-dominant undertakings. In 2016, the FCA did not issue a single sanctioning decision concerning exploitative abuses. In 2009, however, the FCA fined Orange in the *Telecommunication in overseas départements* case.[63]

In this case, the FCA investigated the rates applied by Orange for connection services between the island of La Réunion and the mainland and found that 'there existed a clear disproportion between these rates and the value of the services', which resulted in the imposition of excessive pricing on consumers (residential and professional), and hindered the development of the high-speed market on the island of La Réunion, and the development of Orange's competitors.

iv Discrimination

Abusive discrimination basically consists of the application by a dominant company of dissimilar conditions to trading partners in equivalent transactions, thereby placing certain trading partners at a competitive disadvantage.[64] The FCA considers that discriminatory practices may restrict competition when such practices have as their object or the effect exclusion of a competitor from the market (first-line discrimination); or the dominant firm discriminates between its customers, thereby producing an adverse effect on a market in which the dominant firm is not active (secondary-line discrimination). While first-line discrimination is an exclusionary abuse, second-line discrimination is in the exploitative abuse category.

In *Electronic communications*,[65] the FCA found that Orange gave access to more comprehensive information regarding the operation of the copper local loop to its own commercial entities than to third-party operators. The FCA considered that the (first-line) discrimination in the access to information had artificially strengthened Orange's dominant position, and affected third-party operators by making them appear less reactive and less informed than Orange.

63 FCA decision No. 09-D-24 of 28 July 2009 concerning practices implemented in the telecommunications sector in overseas departments.

64 FCA decisions No. 06-D-23 of 21 July 2006 concerning practices in the map editing and tourist information sector; No. 07-D-28 of 13 September 2008 concerning practices implemented by the Havre Port authority; and No. 09-D-02 of 20 January 2009 concerning practices in the press distribution sector.

65 FCA decision No. 15-D-20 of 17 December 2015 concerning practices implemented in the telecommunications services sector.

In *NavX*, the FCA took a strict approach towards secondary-line discrimination, suggesting that dominant firms have an obligation to treat all of their customers equally, even when the dominant undertaking is not active in the downstream market.[66] In particular, the FCA found that the rules defined by Google for the operation of its AdWords advertising platform should be applied to all advertisers in an 'objective, transparent and non-discriminatory manner' and that discriminatory treatments could be considered abusive. The FCA ultimately accepted commitments from Google to clarify certain rules applicable to advertisers, in particular in respect of the conditions of suspension of their AdWords account. In 2015, the FCA also received a complaint and a request for interim measures against Google, essentially on the same grounds as NavX. According to the complainant Gibmedia, Google suspended Gibmedia's AdWords account in a manner that was not objective, transparent and non-discriminatory. The FCA refused to grant interim measures in the absence of proof of serious or immediate harm to consumers, the sector or the complainant but decided to continue the investigation on the merits.[67]

In 2016, in *Photocopiers*,[68] the FCA rejected a complaint alleging that Xerox abused its dominant position by applying discriminatory conditions between its mono-brand resellers, which must redirect customers to Xerox France for maintenance services, and its multi-brand authorised resellers, which are allowed to perform maintenance services on their own. The FCA considered, however, that such difference of treatment did not amount to abusive discrimination since the claimant did not show that the two distribution channels were in a similar situation. In particular, the FCA considered that mono-brand resellers, which decided to join Xerox exclusive distribution network voluntarily, were entitled to benefits that Xerox' authorised resellers did not enjoy (such as rebates on photocopiers), and did not have to bear costs associated with maintenance services as Xerox' authorised resellers did.

V REMEDIES AND SANCTIONS

Article L.464-2 of the French Commercial Code provides that the FCA can impose fines on infringing undertakings of up to 10 per cent of the firms' worldwide turnover. The FCA can also order undertakings to terminate anticompetitive practices within a specified time limit, impose remedies, or both. As an alternative to sanctions, the FCA may accept commitments offered by the dominant firms being investigated in response to the FCA's competition concerns. In the event that an undertaking does not comply with the FCA's decision to terminate anticompetitive practices or with the FCA's orders, or does not implement their commitments, the FCA may impose penalty payments of up to 5 per cent of the undertaking's average daily turnover.

i Sanctions

According to Article L.464-2 of the Commercial Code, fines should be proportionate to: the gravity of the infringement; the importance of the damage to the economy; the group or

66 FCA decision No. 10-MC-01 of 30 June 2010 concerning the practices of Google in the online advertising sector; No. 10-D-30 of 28 October 2010 concerning the practices of Google in the online advertising sector.

67 FCA decision No. 15-D-13 of 9 September 2015 on the request for interim measures by the company Gibmedia.

68 FCA decision No. 16-D-29, mentioned above.

company's individual situation; and recidivism. In any event, fines cannot exceed 10 per cent of the highest consolidated worldwide turnover achieved since the fiscal year preceding the starting date of the anticompetitive practices.

In 2011, the FCA issued guidelines on the methods for determining fines.[69] The basic amount of the fine is calculated as a proportion of the value of sales related to the infringement, taking into consideration the gravity of the infringement and the damage to the economy. The proportion of the value of sales is between zero and 30 per cent. The basic amount of the fine is then adjusted taking into account the duration of the infringement, the existence of aggravating circumstances (e.g., if the undertaking has a specific ability to influence), or mitigating circumstances (e.g., if the infringement was authorised or encouraged by public authorities). Other factors that might also be taken into account are the size and the economic power of the undertaking or its group, the fact that the undertaking is a single product company, and recidivism.

With respect to recidivism, the French Supreme Court recently ruled in the *SNCF* case that recidivism can be established even though the two infringements were implemented on two different markets.[70]

Since the issuance of the FCA's fining guidelines, only 19 abuse of dominance fining decisions have been issued: in the *Saint-Pierre-et-Miquelon*, *Mobile Telephony*, *Rail Freight*, *Ordre National des Experts Comptables*, *Sanofi*, *Schering-Plough*, *EDF*, *Amaury*, *Mobile telephony at La Réunion and Mayotte* (two cases), *Cegedim*, *Antilles dairy products*, *Overseas DDT deployment*, *Eiffel Tower, Electronic communications, DTT broadcasting, Zinc, Pétanque balls* and *Engie* cases.[71] In 2015, the FCA imposed a record-breaking fine of €350 million on Orange in the *Electronic communications* case (after settlement).[72]

ii Behavioural remedies

The FCA can impose behavioural remedies, either as an interim measure or as a sanction imposed in its decision on the merits.

Pursuant to Article L.464-1 of the Commercial Code, the FCA may grant interim measures and order behavioural remedies in the event that the reported practices cause serious and immediate damage to the general economy, the economy of a sector or the interests of

69 Notice of 16 May 2011 on the Method Relating to the Setting of Financial Penalties.

70 French Supreme Court, 22 November 2016, No 14-28.224 and M.14-28.862 (partially quashing Paris Court of Appeals, 6 November 2014, SNCF).

71 FCA decisions No. 12-D-06, mentioned above; No. 12-D-24, mentioned above; No. 12-D-25, mentioned above; No. 13-D-06 of 28 February 2013 on practices implemented in the sector of teletransmission of tax and accounting data in EDI format to the tax administration; No. 13-D-11, mentioned above; No. 13-D-20 of 17 December 2013 concerning the practices implemented by EDF in the photovoltaic solar power sector; No. 13-D-21, mentioned above; No. 14-D-02 of 20 February 2014 concerning the practices implemented in the sports press sector; No. 14-D-05 of 13 June 2014 on practices implemented in the mobile telephony sector for household customers in La Réunion and Mayotte; No. 14-D-06, mentioned above; No. 14-D-08 of 24 July 2014 regarding practices implemented in the sector for the sale of fresh dairy products in the French West Indies; 15-D-01, mentioned above; 15-D-10, mentioned above; No. 15-D-17 of 30 November 2015 on practices implemented on the mobile telephony market for non-residential customers in La Réunion and in Mayotte; No. 15-D-20, mentioned above; No. 16-D-11, mentioned above; No.16-D-14, mentioned above; No. 17-D-02, mentioned above; and No. 17-D-06, mentioned above.

72 FCA decision No. 15-D-20, mentioned above.

either the consumers or the complainant. Since 2010, interim measures have been granted in five abuse of dominance cases.[73] In 2016, the FCA granted interim measures in only one case.[74]

Pursuant to Article L.464-2 of the Commercial Code, the FCA may also order undertakings to terminate anticompetitive practices within a specific time frame or impose behavioural remedies in addition to fines in its decision on the merits.

In *Electronic communications*,[75] the FCA ordered Orange to provide competitors with an equal access to the information it collects as the operator of the local loop, and to put an end to the loyalty and exclusivity policy subject to the investigation.

In *Cegedim*,[76] the FCA ordered Cegedim to stop any form of discrimination among its customers based on the CRM software they were using (i.e., Cegedim's or competitors' CRM software).

iii Structural remedies

Pursuant to Article L.430-9 of the Commercial Code, the FCA can order an undertaking or a group of undertakings that abused either their dominant position or the state of economic dependence of a commercial partner to alter or terminate a transaction that gave rise to the underlying dominant position, even in cases where the transaction had been authorised by the FCA in the context of a merger review. This provision enables the FCA to undo a transaction or an agreement for abuse of dominance. The FCA has used this power on only one occasion. In the *Water Market* case,[77] the FCA found that the Compagnie Générale des Eaux and the Lyonnaise des Eaux, which had created several joint ventures, were abusing their collective dominance by deciding not to compete against their joint ventures for certain calls for tenders. The FCA found that the termination of the joint ventures was necessary to remedy the behaviour and, ultimately, the Compagnie Générale des Eaux and the Lyonnaise des Eaux voluntarily decided to terminate their joint venture agreements.

The FCA is also empowered to order structural remedies in case of abuse of dominance or of economic dependence in the retail sector (see Article L.752-26 of the Commercial Code).

iv Commitments

As an alternative to sanctions and remedies, the FCA may also accept commitments offered by undertakings pursuant to Article L.464-2 of the Commercial Code. The FCA can make such commitments binding in exchange for the closing of an investigation on the merits without making a finding of any infringement, provided the commitments are offered before the FCA issues a statement of objections. The FCA uses the commitments procedure in order to intervene more quickly and avoid the administrative costs and legal constraints of establishing an abuse of dominance. The FCA did not issue any commitment decision in

73 FCA decisions No. 10-MC-01, mentioned above; No. 11-MC-01, mentioned above; No. 14-MC-01 of 30 July 2014 concerning practices in the pay TV sector (partially quashed by Paris Court of Appeals, 9 October 2014); No. 14-MC-02 of 9 September 2014 in the gas and electricity sector (partially quashed by Paris Court of Appeals, 31 October 2014) and No. 16-MC-01, mentioned above.

74 FCA decision No. 16-MC-01, mentioned above.

75 FCA decision No. 15-D-20, mentioned above.

76 FCA decision No. 14-D-06, mentioned above.

77 FCA decision No. 02-D-44, mentioned above.

2016. Three market tests are, however, ongoing regarding proposed commitments offered in abuse of dominance cases, in relation to: (1) the French Institute for preventive archaeology; (2) Engie's pricing policy for its market-based gas contracts; and (3) the exclusivities imposed in the French sugar beet sector.

VI PROCEDURE

The French Minister of the Economy, certain other public entities and any company may refer practices falling within the scope of Article L.420-2 of the Commercial Code to the FCA. The FCA may also initiate investigations *ex officio* into alleged abuses of a dominant position. The FCA cannot investigate facts that took place more than five years ago unless a procedural act interrupts this statute of limitations (see Article L.462-7 of the Commercial Code). If the FCA considers that the complaint is unsubstantiated, it can issue a reasoned decision rejecting the complaint at a preliminary stage.

i Interim measures

The claimants may request interim relief. A request for interim relief must be filed concurrently with the action on the merits and lasts approximately six months. The FCA will order interim measures if the following cumulative criteria are met: (1) the FCA has jurisdiction over the relevant practices on the merits; (2) there is a reasonably strong *prima facie* case establishing that the alleged practices breach competition rules; and (3) the alleged practices may have serious and immediate effects on the consumers, the sector, or the interests of the plaintiff. In practice, interim measures are ordered mainly in situations where the defendant's actions threaten to foreclose a competitor from a market. The interim measure investigation is followed by a hearing and a decision whereby the FCA decides whether interim measures are justified and whether an investigation on the merits is required. The FCA generally issues a decision within one or two months of the hearing.

In 2016, the FCA ordered interim measures against Engie in the gas market to ensure that the price of some of its offers to business customers reflected its costs.[78] The FCA considered that Engie's practices could have serious and immediate anticompetitive effects on the sector and justified interim measures pending a decision on the merits.

In 2015, in *Gibmedia*, the FCA dismissed a request for interim measures against Google. According to the complainant, Gibmedia, Google suspended its AdWords account without prior notice and based on non-transparent and discriminatory grounds. Gibmedia thus requested that its account be reinstated as an interim measure pending the investigation on the merits. The FCA, however, refused to grant any interim measure, as it found that the legal standard for such an urgent procedure was not met. In particular, the FCA found that no serious or immediate harm to consumers, the sector or the complainant could be established.[79] Similarly, the FCA dismissed a request for interim measures by retailer Concurrence against Samsung.[80] Concurrence claimed that Samsung had implemented a number of anticompetitive practices and requested interim measures to force Samsung to supply the Elite product range and accept that its products be sold through marketplace

78 FCA decision No. 16-MC-01, mentioned above.

79 FCA decision No. 15-D-13, mentioned above.

80 FCA decision No. 15-D-11 of 24 June 2015 concerning a request for interim measures for practices in the distribution sector of brown goods, in particular television sets.

websites. The FCA found that Concurrence did not prove that the alleged practices caused it a serious and immediate harm, notably because Concurrence's financial difficulties dated back to 2008 (i.e., several years before the alleged anticompetitive practices took place) and Concurrence waited two-and-a-half years before requesting interim measures.

ii Investigation on the merits

If the FCA considers that the complaint is well grounded, it appoints case handlers in order to investigate the case. The case handlers have wide investigative powers and may conduct dawn raids if they are authorised to do so by a court, or request information from undertakings. The investigation period typically lasts from six months to three years (or sometimes more), until the FCA notifies the companies involved of its objections. The investigation procedure is partly adversarial (i.e., each interested party is given an opportunity to present its case during the investigation period). The exchange of written submissions, including two written reports issued by the case handlers, generally lasts one to two years, until a hearing is scheduled.

iii Hearing

The parties are invited to a hearing before the FCA Board, where the case handlers provide an oral presentation of their observations. The parties may also present their observations orally.

iv Decision

The FCA generally issues a decision within three months of the hearing. It may find that the alleged practices are not established, or impose a fine on the undertakings and order remedies. The parties may appeal the decision before the Paris Court of Appeals within a month. Paris Court of Appeal rulings may in turn be challenged before the French Supreme Court, which only has jurisdiction over matters of law.

v Commitments

If the FCA intends to implement the commitment procedure as an alternative to an infringement procedure, the case handlers inform the undertakings of the FCA's preliminary competition concerns at an early stage during the investigation (before a statement of objections has been issued) and invite them to offer commitments that adequately address the identified concerns.[81] Once the proposed commitments have been received, the case handlers carry out a market test, which is published on the FCA's website, to ensure that the proposed commitments are considered adequate by the main stakeholders. The FCA may either accept or reject the commitments. The FCA may also require amendments. If the FCA finally considers that the commitments offered address its competition concerns, it makes the commitments binding in its final decision.

vi Settlement

The settlement procedure was recently modified by Law No. 2015-990 of 6 August 2015. Under the new regime, companies that are willing to settle commit to not challenging the objections notified by the FCA, and in exchange, can negotiate a fine range with the

81 See Notice of 2 March 2009 on the commitment procedure (engagements).

Investigation Service. Companies may also offer compliance and behavioural commitments. The FCA board takes the ultimate decision but will comply with the fine range negotiated with the Investigation Service.

In *Electronic communications*,[82] although the new regime was not applicable yet, the FCA Investigation Service anticipated the reform of the settlement procedure and negotiated with Orange a €350 million cap for the fine in exchange for Orange's commitment not to challenge the objections and to implement behavioural remedies. The FCA Board eventually imposed the maximum fine on Orange.

The FCA adopted two settlement decisions in abuse of dominance cases since the entry into force of the new settlement regime. In *Petanque balls*, the FCA settled with Obut for a fine of €320,000 as well as a commitment to implement an antitrust compliance programme.[83] In *Engie*,[84] Engie did not challenge the FCA's objections, and the FCA imposed a €100 million fine following a settlement procedure.

VII PRIVATE ENFORCEMENT

Private enforcement claims may be brought under general tort law provisions (Article 1240 of the Civil Code) generally within five years of the day the victim becomes aware or should have become aware of the wrongdoing.

Private enforcement claims require the defendant to prove a fault, a damage and a causal link between the two. Since the implementation into French law of the EU Damages Actions Directive,[85] an FCA decision of sanction for anticompetitive practices creates an unrebuttable presumption of the existence of such anticompetitive practices before civil and commercial courts, provided that all appeals against the FCA's decision are exhausted. Establishing a fault is significantly more difficult in stand-alone actions. Proving the existence and the amount of the damage is also difficult in dominance cases, which explains why claimants often have to rely on expert economic and accounting reports. The principle of full compensation for the damage suffered applies (both material and non-material damage, but there are no punitive damages).

Antitrust class actions have been available in France since 2014 under the following conditions:

a the claim is a follow-on action after a sanction decision by the FCA or the European Commission;

b the action is brought within five years of the final sanction decision (no longer subject to an appeal);

c the claim is brought by a consumer association on behalf of consumers; and

d consumers have opted in to join the class action.

Private enforcement has been limited in France, as: there has not been any antitrust class action so far; the majority of cases are settled out of court; and there is no easy access to evidence for

82 FCA decision No. 15-D-20, mentioned above.

83 FCA decision No. 17-D-02, mentioned above.

84 FCA decision No. 17-D-06, mentioned above.

85 Law No. 2016-1691, 9 December 2016 (article 148); Order No. 2017-303, 9 March 2017 on damages actions relating to anticompetitive practices; and Decree No. 2017-305, 9 March 2017 on damages actions relating to anticompetitive practices.

claimants who bear the burden of proof (although the implementation of the EU Damages Actions Directive under French law will be helpful for claimants). Furthermore, although specific district courts and commercial courts have exclusive jurisdiction over antitrust claims, the judges are not specialised in antitrust matters and often do not have sufficient independent means to assess the existence of dominance and the effects of the alleged abuses on the markets. Private claimants in France, therefore, essentially rely on decisions issued by the FCA.

For instance, in *Outremer Telecom v. Orange*,[86] Outremer Telecom brought an action before the Paris Commercial Court based on a 2009 FCA decision.[87] Outremer Telecom alleged that Orange's abuses of its dominant position (and anticompetitive agreements) on the mobile telephone market in the Antilles and Guyana (French overseas territories), prevented it from expanding on this market. The Paris Commercial Court awarded Outremer Telecom €7.9 million to compensate for the damage resulting from Orange's abusive loyalty rebates and excessive prices policy on off-net calls. However, the Paris Court of Appeals recently cut the damages granted to Outremer Telecom to €2.6 million after reviewing the calculation of the damage estimate.[88]

Purely stand-alone actions (not based on a previous FCA decision) are rare. Nevertheless, in *Bottin Cartographes v. Google*,[89] the Paris Commercial Court granted Bottin Cartographes €500,000 in damages in the first instance, based on a stand-alone claim alleging that Google implemented predatory prices by offering its Google Maps API ('application programming interface') service, which enables third-party website operators to display a map on their website, free of charge. On appeal, however, the Paris Court of Appeal overruled the first instance decision and dismissed all the plaintiff's claims.[90] The Paris Court of Appeal decided to support its decision by asking the FCA for its opinion on the existence of a dominant position and the question of predation.[91] The FCA found that irrespective of Google's market position, Google's behaviour with regards to Google Maps API could not be deemed predatory because the economic analysis submitted to the FCA showed that Google always covered at least its average incremental costs, and, in any event, there was no evidence of a predatory strategy, especially as there were a significant number of competitors in the market, many of them offering their products for free or on a 'freemium' basis, like Google. On the basis of the FCA's opinion, the Court of Appeal found that Google's behaviour could not be deemed abusive and dismissed all claims.

In 2016, in *Aviscom v. La Montagne*,[92] the Paris Court of Appeals confirmed a decision of the Paris Commercial Court,[93] which found that a local journal had abused its dominant position by tying funeral notices in the journal with the services of an online condolence website (in particular La Montagne inserted a link towards the online condolence website, and refused to insert a link towards the competing website owned by Aviscom). The court found that this resulted in excluding Aviscom from the local market for online funeral notices.

86 Paris Commercial Court, 16 March 2015, *Outremer Telecom v. Orange*.

87 FCA decision No. 09-D-36 of 9 December 2009 concerning practices in the mobile telephony sector in the Antilles and Guyana.

88 Paris Court of Appeals, 10 May 2017, *Outremer Telecom v. Orange*.

89 Paris Commercial Court, 30 January 2012, *Bottin Cartographes v. Google*.

90 Paris Court of Appeals, 25 November 2015, *Bottin Cartographes v. Google*.

91 FCA opinion No. 14-A-18, mentioned above.

92 Paris Court of Appeals, 7 December 2016, *Aviscom v. La Montagne*.

93 Paris Commercial Court, 7 January 2014, *Aviscom v. La Montagne*.

However, the court reduced the amount of damages against the local journal from €50,000 to €5,000 to the extent that the anticompetitive practices had stopped since January 2014 and that the harm to the claimant resulted only in a loss of the chance of obtaining additional market shares on the local market for online funeral notices.

In *SFR v. Orange*,[94] the Paris Commercial Court granted €51.4 million of damages against Orange following a stand-alone claim made by SFR. SFR claimed that Orange had implemented a margin-squeeze strategy by allowing secondary residences owners to suspend their landlines while they were away from their secondary residence.[95] On this upstream market, Orange, however, refused to offer a suspendable telephone access to telecom operators. The Commercial Court found that this practice constituted a margin squeeze because as a result SFR was not in a position to propose to its downstream customers to have a suspendable landline access. On appeal, however, the Paris Court of Appeals annulled the Paris Commercial Court's judgment. The Court of Appeals found that the market for secondary residences was not a relevant product market because (1) from the demand-side perspective, 90 per cent of secondary residences owners considered that the suspendable line was substitutable with other telephone lines and (2) from the supply-side, the data used by SFR to demonstrate the cost difference as compared with other telephone lines was not sufficiently reliable.[96] In 2016, the French Supreme Court overturned the Court of Appeals' ruling.[97] On the demand-side substitutability, the Supreme Court found that the Court of Appeals should have conducted a more detailed analysis, notably by making a distinction between secondary residences owners that purchased a simple fixed line and those that purchased multi-service fixed lines and mobile lines. On the supply-side substitutability, the Supreme Court found that the Court of Appeals should have ignored the unreliability of the data and should have discussed the relevance of the criteria used by SFR. The Supreme Court referred the case back to the appellate court.

In *Petanque Longue v. Obut*,[98] the Paris Court of Appeals granted interim measures following a stand-alone complaint by Petanque Longue against Obut. Petanque Lonque is a reseller and engraver of petanque balls, and Obut is the main French manufacturer of petanque balls (and also provides petanque balls engraving services). Petanque Longue claimed that Obut had started to implement a new loyalty rebate system that discriminated against petanque ball engravers. French courts may grant interim measures when (1) the practice constitutes a manifestly unlawful disturbance or (2) there is a risk of imminent harm caused by such practice. The court found that the manufacturer's new loyalty rebates were discriminatory because the distinction between different categories of resellers was not made on the basis of objective criteria (e.g., turnover thresholds or nature of services offered by resellers). The court also found that the manufacturer's underlying goal was to undermine Petanque Longue's position as a petanque ball engraver, which therefore constituted a manifestly unlawful disturbance. Obut's practices led to a 40 per cent drop in Pentanque Longue's profit margin, which was sufficient to establish a risk of imminent harm. Consequently the court ordered Obut to stop implementing its new loyalty rebate policy until the FCA issues a substantive decision.

94 French Supreme Court, 12 April 2016, No. 14-26815.

95 Paris Commercial Court, 12 February 2014, *SFR v. Orange*.

96 Paris Court of Appeals, 4 October 2014, *SFR v. Orange*.

97 French Supreme Court, 12 April 2016, No. 14-26815.

98 Paris Court of Appeals, 7 December 2016, *Petanque Longue v. Obut*.

VIII FUTURE DEVELOPMENTS

Private enforcement is expected to continue developing as the EU Damages Actions Directive is now implemented under French law.[99]

At the FCA, the last year has seen the appointment of a new president in October 2016. The new president announced that ensuring effective competition in the digital sector would be a key priority. In that respect, the FCA has recently launched a new sector inquiry into the internet advertising sector, following its first opinion on the sector issued in 2010[100] and the publication in May 2016 of its joint paper with the Bundeskartellamt on the potential antitrust concerns raised by digital data collection.[101] In this new inquiry, the FCA is expected to review (1) the relevant market definitions in the sector, (2) the market power of some internet players such as Amazon, Google or Facebook and (3) the commercial practices used in the digital data markets. The opinion of the FCA is expected to be published during the second semester of 2017.

In relation to the *Booking* case,[102] the FCA also conducted the first intermediary assessment of Booking.com's commitments and published the results in February 2017, less than two years after its decision.[103] Following Booking.com's commitments not to implement its most-favoured-nations clauses to rival online platforms, the FCA found that some hotels have since been able to offer different prices depending on the online hotel booking platforms they used. However, the FCA did not note any significant change in the market structure or in the commission rates charged by online platforms since the FCA's decision. Although the Macron law now explicitly prohibits most-favoured-nations clauses, the FCA indicated that it would continue monitoring the state of competition in the sector and the evolution of digital platforms more generally.

99 Law No. 2016-1691, 9 December 2016 (article 148); Order No. 2017-303, 9 March 2017 on damages actions relating to anticompetitive practices; and Decree No. 2017-305, 9 March 2017 on damages actions relating to anticompetitive practices.

100 FCA opinion No. 10-A-29 of 14 December 2010 on the competitive operation of online advertising.

101 FCA and Bundeskartellamt joint Report of 10 May 2016, Competition Law and Data.

102 FCA decision No. 15-D-06, mentioned above.

103 FCA assessment of 7 February 2017 in relation to the commitments of Booking.com.

Chapter 11

GERMANY

Stephan Barthelmess and Tilman Kuhn[1]

I INTRODUCTION

Under German competition law, unilateral conduct by an enterprise with market power is governed by Sections 18, 19 and 20 of the German Act against Restraints of Competition (ARC),[2] which prohibit (1) the abuse of a (single or collective) dominant position, and (2) specific types of abusive behaviour by enterprises that have 'relative' market power in relation to small or medium-sized enterprises (as trading partners or competitors). Germany has, thus, used the possibility provided for under EU Regulation 1/2003 to enact national legislation on unilateral conduct that goes beyond the substance of the prohibition on the abuse of a dominant position laid down in Article 102 of the TFEU. Another distinct characteristic of German antitrust law on dominance is that there are (rebuttable) statutory market share-based presumptions of dominance.

Guidance on the application of the rules can be gathered from case law of the German Federal Cartel Office (FCO) and the German courts, notably the Federal Court. There is no formal general guidance on unilateral conduct available, apart from the FCO's somewhat dated notice on below-cost pricing,[3] which is currently being updated.

Guidance on the amount of fines for restrictive unilateral conduct can be gathered from the FCO's guidelines on the setting of fines, which apply to all areas of German antitrust law.[4]

No special rules apply in Germany to the public sector or state-owned enterprises. Section 130(1) of the ARC stipulates that the ARC will also apply to enterprises that are entirely or partially publicly owned or are managed or operated by public authorities.

Special rules apply to certain regulated industries, such as electricity, gas, telecommunications and post and railway. The Federal Network Agency monitors compliance with certain of these regulations in cooperation with the FCO.

1 Stephan Barthelmess is a partner and Tilman Kuhn is a counsel at Cleary Gottlieb Steen & Hamilton LLP. The authors express their gratitude to their colleague Tobias Rump and Stagiaire Laura Arnolds for their assistance with the update of this chapter.

2 An English version of the ARC is available at www.gesetze-im-internet.de/englisch_gwb/index.html.

3 The old version of the notice is available in German at www.bundeskartellamt.de/SharedDocs/Publikation/DE/Bekanntmachungen/Bekanntmachung%20-%20Angebot%20unter%20Einstandspreis.pdf?__blob=publicationFile&v=2.

4 An English version of the guidelines is available at www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidelines%20for%20the%20setting%20of%20fines.pdf?__blob=publicationFile&v=3.

II YEAR IN REVIEW

The enforcement activity by the FCO in the abuse of dominance area over the past couple of years has been quite limited. The FCO carried out several sectoral investigations in industries with arguably oligopolistic structures in which it suspected structural problems. These sector inquiries were often followed by individual investigations against specific companies with respect to specific conduct.[5]

Recently, the FCO has focused on the energy, fuel, food retail and district heating sectors. Since May 2011, the FCO has published eight reports on investigations into different sectors of which six specifically deal with (possible) abuses of market power (district heating, milk, fuel retail, wholesale fuel, food retail and the submetering and billing of heating and water consumption).[6] For instance, the FCO found in its most recent report (published on 4 May 2017) that the German market for submetering and billing of heating and water is not only highly concentrated, but basically dominated by only two major players.[7] In 2016, the FCO initiated new sector inquiries into two additional sectors – hospital services (in May 2016)[8] and household waste management (in December 2016).[9] However, as of now, it is not clear to what extent the FCO will focus on potential abuses of market power in these new sector inquiries.

In the past year, the FCO continued putting particular emphasis on the digital economy and online platforms[10] – notably in light of the recent rise in 'online cases', including a decision concerning Google. In early 2015, the FCO launched a new 'Task Force for Internet Platforms', which is charged with developing new concepts on how to deal with the digital economy. The FCO is also investigating CTS Eventim's conduct in the online ticket resale area. The FCO has, however, closed its recent proceedings concerning the activities of Amazon's Audible and Apple in the audiobooks sector.[11] The FCO prohibited a (modified) best-price clause that hotel platform Booking.com[12] had been using, after the

5 Arguably, this process limits the defence rights of companies subject to the subsequent antitrust proceedings, as they are obliged to respond to the sector inquiry without knowing the specific allegations that will be brought against them later on.

6 English summaries of some of the FCO's sector inquiry reports are available at www.bundeskartellamt.de/EN/AboutUs/Publications/Sectorinquiries/sectorinquiries_node.html.

7 According to the FCO's report, it found considerable evidence of an oligopoly with no internal competition consisting of, at least, the two market leaders in Germany, but probably also five other large suppliers, see the FCO's report of 5 May 2017, available in German only at: www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung%20Submetering.pdf?__blob=publicationFile&v=3; and the FCO's press release of the same day, available in English at: www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/04_05_2017_Sektoruntersuchung%20Submetering.html?nn=3591568.

8 FCO press release of 31 May 2016, available in English at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/31_05_2016_Sektoruntersuchung_Krankenhaeuser.html?nn=3591568.

9 FCO press release of 20 December 2016, available in English at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/20_12_2016_SU_Haushaltsabfaelle.html?nn=3591568.

10 See FCO's annual review of 2015, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/21_12_2015_Jahresr%C3%BCckblick.html?nn=3591286.

11 FCO press release of 19 January 2017, available in English at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_01_2017_audible.html?nn=3591568.

12 FCO press release of 23 December 2015, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23_12_2015_Booking.com.html?nn=3591286.

Düsseldorf Court of Appeal had already affirmed the FCO's prohibition of its rival HRS's best-price clauses.[13] In March 2016, the FCO commenced proceedings against Facebook to investigate whether Facebook engaged in abusive conduct by infringing data protection rules.[14] In May 2016, it published together with the French competition authority a study on 'big data', assessing market power and potential anticompetitive effects in this context.[15] Finally, in June 2016, the FCO published a working paper on the market power of platforms and networks.[16]

The following tables list significant cases and decisions dealing with abuse of a dominant position adopted by the FCO in 2016 and 2017 and important ongoing proceedings.[17]

2017 FCO decisions

Sector	Company	Conduct	Fine
District heating	innogy	Excessive pricing	No fine; case settled
District heating	Danpower	Excessive pricing	No fine; case settled
Audiobooks	Audible/ Amazon/Apple	Exclusive distribution agreement between Apple's iTunes Store and Audible	No fine

2016 FCO decisions

Sector	Company	Conduct	Fine
Ticket resale	Deutsche Bahn	Limitation of competitors' access to Deutsche Bahn's ticket sales channels	No fine; case settled
Lease of mounting surfaces for the installation of FM antennas	Deutsche Funkturm	Discriminating pricing structure	No fine; case closed*
* The FCO did not issue a settlement decision, but dropped its proceedings after Deutsche Funkturm had changed its allegedly problematic pricing and contractual terms. See the FCO's press release of 21 December, 2016, available in German only at: www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/21_12_2016_Deutsche%20 Funkturm.html?nn=3591568.			

13 Most online cases were dealt with under Article 101 of the TFEU and its German equivalent Section 1 of the ARC (prohibiting anticompetitive agreements). However, in the *HRS* hotel portal case, the FCO held that a best-price clause requested by HRS from hotels listed on its platform also violated Sections 19 and 20 of the ARC (abuse of dominance). Given the violation of Article 101 of the TFEU and Section 1 of the ARC, the Düsseldorf Court of Appeal ultimately left open whether the best-price clause also infringed Sections 19 and 20 ARC (judgment of 9 January 2015, case VI – Kart 1/14 (V)).

14 FCO press release of 2 March 2016, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html?nn=3591286.

15 The study is available at: www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20 Data%20Papier.html?nn=3591286.

16 The working paper is available in German at www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Think-Tank-Bericht.pdf?__blob=publicationFile&v=2.

17 A comprehensive list of the FCO's past dominance cases is available on the FCO's website in German only at: www.bundeskartellamt.de/SiteGlobals/Forms/Suche/Entscheidungssuche_Formular.html?nn=3589936&cl2Categories_Format=Entscheidungen&gtp=3598628_list%253D2&cl2Categories_Arbeitsbereich=Missbrauchsaufsicht&docId=3590026.

Ongoing cases

Sector	Company	Conduct	Case opened*
Online ticket resale	CTS Eventim	Not specified	November 2014
Social networks	Facebook	Potential abuse in social networks by infringing data protection rules	March 2016
Ticket sales	Deutscher Fußball-Bund	Bundling ticket sales for football matches (European football championship 2016) to membership of DFB fan club	March 2016
* 'Case opened' refers to the date on which the authority opened its investigation (where known) or announced that it had opened an investigation.			

In addition to the FCO's enforcement activities, the German legislator has recently passed a ninth amendment to the ARC (the Ninth Amendment), which entered into force on 9 June 2017. The amendment, includes – among other substantive changes of the ARC, in particular regarding the enforcement of cartel damage claims (as required by the EU Damages Directive (2014/104/EU)) – and also some changes and additions regarding the ARC Sections governing unilateral conduct. These largely editorial changes mostly seek to clarify unsettled legal questions. For instance, the Ninth Amendment has introduced new rules regarding the assessment of dominance on multi-sided markets.

Some of these legislative changes will be described in the following sections along with further important case law and other developments.

III MARKET DEFINITION AND MARKET POWER

There are two slightly different concepts of market power in German antitrust law. While the assessment of 'absolute' single or collective dominance typically requires a detailed market analysis (of market definition as well as of market power), the assessment of 'relative' market power focuses more on a comparison of market power between larger and small and medium-sized companies as trading partners or competitors. Generally, the FCO, and the German courts, continue to place considerable importance on market shares and have only slowly started to adopt the more sophisticated economic analyses used by the EU Commission.

i Market definition

In defining relevant product markets, the FCO primarily analyses the substitutability of goods and services from a demand-side perspective based on intended use, characteristics and price of the relevant products. In some cases, the FCO also referred to the 'small but significant and non-transitory increase in price' (SSNIP) test as an additional, but not the only or the principal, criterion for market definition.[18] The concept of supply-side substitution (i.e., other manufacturers being able and willing to adjust their production within a short time and without significant cost) is also relevant under appropriate circumstances.[19]

18 For example, FCO, decision of 12 December 2003, case B9-60211-Fa-91/03 – *ÖPNV-Hannover*; decision of 2 July 2008, case B2-359/07 – *Loose/Poelmeyer*; Federal Court, decision of 4 March 2008, case KVR 21/07 – *Soda-Club II*.

19 For example, Federal Court, decision of 16 January 2007, case KVR 12/06 – *National Geographic II*. Specifically with respect to retail markets, the usual product range of a retailer may constitute a single market ('portfolio market' or Sortimentsmarkt).

Demand-side substitutability is also the principal basis for defining the relevant geographic market. As under EU law, it comprises the area in which the enterprises concerned compete, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas because of appreciably different competitive conditions.[20]

In practice, *ex post* behavioural enforcement tends to take a somewhat narrower view on market definition than merger control, given that the perspective of specific customers or competitors potentially harmed by the conduct at issue can sometimes influence the assessment.

The Düsseldorf Court of Appeal held in its *HRS* decision that (at least in hotel searches) identifying a relevant antitrust market for a service required that it was rendered in return for payment, which was not the case with respect to an online hotel comparison service.[21] In its *Google* decision, the FCO expressed some doubt in this regard, but left the issue open.[22] The German legislator now clarified – as part of the Ninth Amendment – that a relevant market may be found even if the relevant services are rendered free of charge.[23]

ii Dominance

As noted, German antitrust rules on unilateral conduct apply to companies in a position of single or joint dominance, and to companies enjoying 'relative' market power over small and medium-sized companies. Section 18 of the ARC defines single and collective dominance.

Single dominance

According to Section 18(1) of the ARC, single dominance exists if a company is (1) without competitors, (2) not exposed to significant competition or (3) in a 'superior market position' as compared with its competitors (which can exist even if there is significant competition in the market). According to the FCO's merger control guidelines (the principles of which can also be applied in the antitrust area), single dominance exists where the market power of an enterprise enables it to act without sufficient constraints from its competitors (i.e., a situation in which an enterprise is able to act to an appreciable extent independently of its competitors, customers, suppliers and, ultimately, the final consumers).[24]

Section 18(3) of the ARC lists the following criteria that may in particular be taken into account for the assessment of whether a company is in a 'superior market position':

a the enterprise's market share;
b its financial resources;
c its access to input supplies or downstream markets;
d its affiliations with or links to other enterprises;
e legal or factual barriers to market entry;

20 Federal Court, decision of 5 October 2004, case KVR 14/03 – *Melitta/Schultink*.
21 Düsseldorf Court of Appeal, decision of 9 January 2015, case VI Kart 1/14 (V), para. 43 – *HRS*.
22 FCO, decision of 8 September 2015, case B6-126/14, para. 129 – *Google*.
23 See newly introduced Section 18(2a) ARC.
24 FCO, Guidance on Substantive Merger Control of 29 March 2012, para. 9. In its guidelines, the FCO refers to Federal Court, decision of 12 December 1978, case KVR 6/77 – *Erdgas Schwaben*, and ECJ, decision of 14 February 1978, case 27/76 – *United Brands*. An English version of the guidelines is available at www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidance%20-%20Substantive%20Merger%20Control.pdf?__blob=publicationFile&v=6.

f actual or potential competition by domestic or foreign enterprises;
g its ability to shift its supply or demand to other products; and
h the ability of the enterprise's customers or suppliers to switch to other enterprises.

In practice, the FCO and the German courts tend to focus on whether an enterprise has sufficient market power to determine the most important business parameters. A somewhat static appraisal of market shares (both in absolute and relative – compared to competitors – terms) is still the most important factor. The rebuttable market share-based presumption pursuant to Section 18(4) of the ARC provides an important first indication of possible dominance where the market share of a company exceeds 40 per cent.[25] While not impossible, it is often difficult in practice to rebut the presumption with economic arguments, especially in the case of high market shares substantially above the presumption threshold. This is notably because German law expressly stipulates that a dominant position can be based on a 'superior' market position, even if the company concerned faces significant competition from its rivals.

In the context of its focus on digital markets, the FCO published a working paper on the market power of platforms and networks, in which it explained its view on the assessment of dominance in such markets.[26]

Collective dominance

According to Section 18(5) of the ARC, collective dominance exists where there is no substantial competition between the two or more largest companies in a market and where they jointly are not constrained sufficiently by competition from third parties. Pursuant to the FCO's merger control guidelines, collective dominance is defined as a few companies in an oligopolistic setting engaging in tacit coordination or collusion with the result that they effectively do not compete with each other.[27]

Section 18(6) of the ARC also provides for market share-based legal presumptions for collective dominance. Thus, three or fewer companies are presumed to be collectively dominant if they have a market share of at least 50 per cent; and five or fewer companies are presumed to be collectively dominant if they have a market share of at least two-thirds. These presumptions are rebuttable and the companies can show that substantial competition exists between them individually, or that they are jointly sufficiently constrained by outsiders or customers.

The FCO and the German courts generally employ the criteria established by the EU General Court in *Airtours v. Commission*[28] in determining collective dominance (albeit

25 Dominance may also (exceptionally) be found to exist if the market share remains below the presumption threshold.

26 According to Section 18(3a) that has been introduced as part of the Ninth Amendment, the following conditions must be taken into account when assessing a company's market position on multi-sided and network markets: direct and indirect network effects; the parallel use of more than one service and the difficulties faced by users in switching services; economies of scale in connection with network effects; the company's access to data relevant for competition; and competitive pressure driven by innovation.

27 FCO, Guidance on Substantive Merger Control of 29 March 2012, para. 81.

28 Case T-342/99, 6 June 2002, [2002] ECR II-2585.

in a somewhat modified form).[29] However, until recently, there had not been a case where companies had been considered in a collective dominant position in the context of abuse proceedings.[30]

In June 2015, the German Federal Court dealt with the first case in which a possible abuse of a collective dominant position was at issue.[31] While the lower Stuttgart District Court found that the defendant, a public broadcasting company, did not hold a single dominant position, as it did not – by itself – have a superior market position compared with the private broadcasting companies,[32] it found the defendant to have a collective dominant position together with the remaining public broadcasting companies, because there was no competition between the public broadcasters because of their strong commonality of interests, and all public broadcasting companies would – together – hold a superior market position[33] compared with the private broadcasting companies. The court found that public broadcasting companies had a 'must-carry status' as input providers for broadband cable providers as turning to private broadcasters only was not a viable alternative. On appeal, the Stuttgart Court of Appeals left open whether the public broadcasting companies held a collective dominant position because it considered that there had not been an abuse in any event. The Federal Court, upon further appeal, simply referred to the defendant's must-carry status and thus considered it dominant on the market for input for cable television providers without elaborating on the distinction between single and joint dominance.[34]

'Relative' dominance

As noted above, going beyond the scope of Article 102 of the TFEU, the ARC prohibits exclusionary (and discriminatory) conduct not only by companies that are dominant in 'absolute' terms, but also by companies on which 'small or medium-sized companies depend' as suppliers or purchasers of certain kinds of goods or commercial services,[35] and by companies enjoying 'stronger market power in comparison to their small and medium-sized competitors'.[36] The prohibitions aim at protecting small and medium-sized companies against anticompetitive conduct by their larger competitors or trading partners.

The prohibition of discrimination or unreasonable obstruction for 'relatively' dominant enterprises towards dependent companies is primarily designed to address buyer power in the (food) retail trade. Thus, Section 20(1) 2nd sentence of the ARC establishes a presumption of dependency if a purchaser of goods frequently receives rebates or similar bonuses from its suppliers that go beyond customary rebates. The protection of small and medium-sized competitors against exclusionary conduct of competitors with 'stronger market power' is also principally targeted at retail markets (food, gas, etc.). An example of prohibited exclusionary

29 For example, Federal Court, decision of 11 November 2008, case KVR 60/07 – *E.ON/Stadtwerke Eschwege*; decision of 20 April 2010, case KVR 1/09 – *Phonak/GN Store*.

30 In contrast, collective dominant positions were held to exist in several merger control cases.

31 Stuttgart Court of Appeals, judgment of 21 November 2013, case 2 U 46/13.

32 Stuttgart District Court, judgment of 20 March 2013, case 11 O 215/12.

33 The term 'superior market position' is part of the legal definition of dominance pursuant to Section 18 of the ARC and must not be confused with the term 'stronger market power' pursuant to Section 20 of the ARC (see below).

34 Federal Court, judgment of 16 June 2015, case KZR 83/13, para. 46; see also judgment of 16 June 2015, case KZR 3/14, para. 45.

35 Section 20(1) of the ARC.

36 Section 20(3) of the ARC.

conduct is frequent pricing below cost.[37] In the food sector, pricing below cost (by food retailers) even in a single instance is prohibited. Note that the ARC does not precisely define the concept of small and medium-sized companies that enjoy protection under these rules. The concept is generally understood to be turnover-related, but there are no specific turnover 'thresholds', and the amounts can differ from industry to industry.[38]

IV ABUSE

i Overview

Section 19(1) of the ARC contains a general prohibition of the abuse of a dominant position. Sections 19 and 20 of the ARC contain non-exhaustive examples of specific types of abusive conduct. Section 20(2) of the ARC extends the prohibition of exclusionary and discriminatory conduct to companies on which small or medium-sized companies depend, and Section 20(3) of the ARC prohibits exclusionary conduct by companies that enjoy superior market power compared with their small and medium-sized competitors.

The most significant specific types of abuse are discussed below (see Section IV.ii–iv, *infra*). There are no *per se* abuses, as all relevant unilateral conduct may, at least in principle, be justified by means of a comprehensive analysis of all relevant circumstances and a balancing of the conflicting interests. As a practical matter, however, once the FCO has concluded that the type of conduct at issue is generally abusive, it will not conduct an in-depth economic effects analysis. Instead, it is – according to Section 20(4) of the ARC – up to the companies concerned to demonstrate an objective justification for their conduct (e.g., cost efficiencies as justification for rebates).

ii Exclusionary abuses

German antitrust law prohibits exclusionary conduct, including predatory pricing, and notably offers below cost. The (somewhat dated) FCO's notice on below-cost pricing provides some guidance on which costs are relevant for the assessment of exclusionary below-cost pricing.[39]

Another form of exclusionary abuse is exclusive dealing, including strategies such as exclusivity or loyalty rebates. As a general rule, dominant companies may not grant rebates that create an incentive for customers to purchase their entire, or almost entire, demand of products or services at issue from the dominant enterprise.

37 Section 20(3) of the ARC.

38 In 2014, the Frankfurt District Court (judgment of 18 June 2014, case 2-03 O 158/13) found that Deuter, a German manufacturer of outdoor backpacks, had a 'powerful market position' and therefore held a position of relative dominance pursuant Section 20(2) of the ARC, because Deuter had apparently claimed to be the 'European leader in functional backpacks' and had not contested the allegation of being dominant during the court proceedings. The judgment does not contain any further discussion of why Deuter was found to be dominant. Upon appeal, the Frankfurt Court of Appeals merely found that the fact that Deuter was 'relatively dominant' had not been disputed in the proceedings (judgment of 22 December 2015, case 11 U 84/14 (Kart).

39 See footnote 3.

In November 2015, the FCO initiated proceedings in this regard against Apple and Amazon's subsidiary Audible.com. They had entered into an exclusive long-term agreement regarding Apple's purchase of digital audiobooks from Audible for resale on the iTunes store.[40] The FCO has meanwhile closed these proceedings.[41]

German antitrust law also prohibits leveraging a dominant position, such as through contractual or economic tying and bundling. Case law is scarce here, and the German practice is similar to the EU practice.

An abuse may also occur if a dominant enterprise refuses to grant another enterprise access to its networks or other infrastructure for a reasonable fee if it is impossible for the other enterprise, for legal or practical reasons, to be active on the upstream or downstream market as a competitor of the dominant enterprise (essential facility).[42]

Upon referral from the Düsseldorf District Court, the ECJ has specified certain perceived discrepancies between German case law and the position that the European Commission took on the conditions under which the holders of standard essential patents may seek an injunction against users of their standard essential patents without committing an abuse (the underlying case is now again pending at the Düsseldorf District Court).[43]

In May 2016, the FCO closed its investigation into a potential abuse of a dominant position in the provision of train station services by state-owned railroad operator Deutsche Bahn AG (DB),[44] after DB had committed, *inter alia*, to sell competitors' tickets in DB shops and to permit competitors to install ticket machines in train stations.[45]

iii Discrimination

Section 19(2) No. 1 of the ARC prohibits discrimination (i.e., treating an undertaking, directly or indirectly, differently from other similar undertakings, without any objective justification).

After the German legislator had introduced an ancillary copyright for news publishers in 2013, the collecting society VG Media (representing several German news publishers) adopted a new tariff for the use of news publishers' online content and raised monetary claims against Google for the display by Google of small text excerpts ('snippets') from their websites. Google refused to pay and announced it would discontinue the display of snippets from VG Media members, unless they agreed to the display of their snippets without payment. VG Media filed a complaint with the FCO, arguing that Google abused its allegedly dominant position by refusing to pay for the display of snippets. The FCO informally rejected the

---

40 FCO press release of 16 November 2015, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/16_11_2015_Audible.html?nn=3591568.

41 FCO press release of 19 January 2017, available in English at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_01_2017_audible.html?nn=3591568.

42 See, in particular, Federal Court, decision of 11 December 2012, case KVR 7/12 – *Puttgarten/German ferry terminal* for further details. The case was referred back and remains pending before the Düsseldorf Court of Appeal.

43 ECJ, judgment of 16 July 2015, case C-170/13 – *Huawei/ZTE*.

44 The FCO in particular examined whether DB had abusively charged higher commissions to competitors than to its own subsidiaries for selling tickets.

45 FCO press release of 24 May 2016, available at: www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/24_05_2016_DB_Fahrkarten.html?nn=3591286.

complaint in August 2014,[46] and issued a formal rejection decision in September 2015[47] holding that Google did not engage in discriminatory conduct. In particular, the FCO considered Google's conduct justified by its interest to preserve its business model and to reduce the risk of liability for damages. These interests would outweigh those of VG Media.

iv Exploitative abuses

Section 19(2) No. 2 of the ARC prohibits exploitative abuses, notably 'imposing prices or other trading conditions that differ from those likely to exist on a market with effective competition'. To determine whether prices are excessive, the FCO and the German courts follow the EU law approach of comparing the dominant company's prices with prices charged on comparable markets with functioning competition, with its competitors' prices, and with the dominant company's costs. The FCO followed this approach, for instance, in its recently concluded proceedings against suppliers of district heating, where it compared the average revenues that several suppliers of district heating had generated throughout a certain period of time in different regions and found that the revenues of certain suppliers were significantly higher than those of suppliers in comparable markets. Based on this comparison, the FCO concluded, at least preliminarily,[48] that these suppliers had engaged in excessive pricing. These proceedings were initiated based on the FCO's earlier sector inquiry into the district heating sector in which the FCO had identified significant differences in revenues of district heating.[49]

In another recent abuse case concerning the food retailer EDEKA, the Düsseldorf Court of Appeal annulled the FCO's decision, in which it had found that EDEKA had abused its dominant position by urging its suppliers to grant EDEKA certain commercial benefits (sometimes called 'wedding rebates') after its acquisition of retailer PLUS.[50] In contrast to the FCO, the Düsseldorf Court of Appeal considered these rebates to have resulted from negotiations between parties with approximately equal negotiation power.[51]

46 FCO press release of 22 August 2014, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/22_08_2014_VG_Media.html?nn=3591568.

47 FCO, decision of 9 September 2015, case B6-126/14. A press release in English is available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_09_2015_VG_Media_Google.html?nn=3591568.

48 In most cases, the FCO adopted commitment decisions (and in some cases, the FCO closed the proceedings without a decision, as it did not find its initial suspicions confirmed by the results of its investigations). As there were therefore no final non-commitment decisions in this case, the FCO was able to leave several legal questions ultimately open.

49 The FCO in particular found that this conduct did not only have negative effects on the suppliers, but also on smaller competing retailers from whom the suppliers might try to recover the rebates ('waterbed effect'). See FCO, decision of 13 February 2017, case B8-30/13, paragraphs 28 et seq. – *innogy*; decision of 13 February 2017, case B8-31/13, paragraphs 33 et seq. – *Danpower*. A press release concerning both cases is available in English at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/14_02_2017_Fernw%C3%A4rme.html?nn=3591568.

50 FCO press release of 3 July 2014, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/03_07_2014_edeka.html?nn=3591568 and FCO, decision of 3 July 2014, case B2-58/09.

51 Düsseldorf Court of Appeal, decision of 18 November 2015, case VI-Kart 6/14 (V).

V REMEDIES AND SANCTIONS

i Sanctions

Persons or entities that participated in an infringement of antitrust law or violated an FCO decision can be fined within the framework of an administrative offence procedure. German antitrust law is different from EU law in this respect, insofar as the FCO in principle needs to identify one or more individuals (who will likely also be fined, albeit more moderate amounts) who have committed the infringement and then attribute their behaviour to the legal entity they represented to impose a fine also on that entity.

Parental liability

As a consequence, it was difficult for the FCO to fine a parent company for infringements committed by employees of its subsidiaries, as it needed to find either that employees of the parent company were involved in the misconduct or that parent company employees neglected their supervisory duties. However, Section 81 paragraphs 3a–3e that were introduced by the German legislator as part of the Ninth Amendment to the ARC, now establish a principle of parental liability that is – eventually – similar to EU competition law, as it introduces a strict liability for controlling group companies. Accordingly, the FCO may now hold a parent company (jointly and severally) liable for fines that were imposed because of a subsidiary's infringement, even if the parent company did not participate in the infringement or violate any supervisory duties with respect to the subsidiary.[52]

Legal successor liability

According to Section 30(2a) of the Administrative Offences Act, legal successor entities (i.e., entities resulting from corporate transformations) are liable for their predecessor's fines. This regulation was introduced in 2013 to close an important enforcement gap under the previous rules.[53] In addition, the German legislator now introduced a provision regarding legal successor liability (outside of the universal succession addressed by the Administrative Offences Act) also in the ARC in order to close the 'sausage gap'.[54] According to the newly introduced Section 81a (covering the singular succession), cartel fines may be imposed on an enterprise taking over the business of an enterprise that committed an infringement (provided that the infringing enterprise has ceased to exist (legally or economically) and the purchaser continued the business).

52 Several German commentators have severely criticised this new rule. They argue that the new rule violates the constitutional principle of fault, as a legal entity may be held liable without any culpable behaviour of its own or its bodies. Therefore, litigation on this issue may be expected over the following years.

53 Under the old rules, liability for fines was – in principle – limited to the specific legal entity that had committed the infringement and did not extend to new legal entities resulting from corporate transformations, such as corporate mergers. This gap had been used by several companies to avoid fines through corporate restructurings. However, according to the Federal Court's case law, a legal successor can also be held liable under the old rules (which remain applicable to conduct that occurred prior to the change in law) if – from an economic perspective – the legal successor's assets were (nearly) identical with those of the legal entity that committed the infringement. In this context, the Düsseldorf Court of Appeal recently confirmed a fine imposed by the FCO on a German coffee roaster (judgment of 10 February 2014, case V-4 Kart 5/11 (*OWi*).

54 German sausage producer Tönnies had effectively used remaining legal loopholes to avoid fines for its participation in the sausage cartel by conducting internal restructuring measures.

Maximum fine

The maximum fines amount to €1 million for an individual and 10 per cent of the consolidated group turnover for a legal entity.[55]

In June 2013, the FCO published its current fining guidelines. Contrary to the previous guidelines, which were fairly similar to the European Commission's 2006 guidelines,[56] the new guidelines deviate significantly from the Commission's guidelines.[57]

According to the current guidelines, the 10 per cent maximum for a fine on a company should not be considered a cap limiting a fine calculated independently of the relevant company's turnover that could otherwise be higher (as is the case under EU law), but rather the upper limit of the fining scale, which should, thus, be applied only in cases of the most extreme hard-core infringements.

Pursuant to the its fining guidelines, the FCO first determines a basic amount of the fine, which is 10 per cent of the group's relevant turnover achieved with the products or services related to the infringement for the period during which the infringement was ongoing. In a second step, this initial amount is multiplied depending on the size of the group by a factor between two and six, or even higher in cases where the group's turnover exceeds €100 billion. The resulting basic amount may then be adjusted in a third step for mitigating or aggravating circumstances.

To date, the FCO imposed fines applying the new guidelines in several cartel proceedings[58] as well as concerning vertical proceedings against mattress manufacturers.[59] In addition, the FCO also based a (relatively small) fine in a dominance case concerning a producer of carbon dioxide cartridges for soda water preparation on the new guidelines.[60] The FCO stated that the new guidelines would also apply to infringements that took place prior to the adoption of the new guidelines.[61]

55 Section 81(4) of the ARC.

56 According to the previous guidelines, the FCO first determined a basic amount of the fine, taking into account the gravity as well as the duration of the infringement and then adjusted the basic amount by a deterrence factor, reflecting aggravating and mitigating circumstances.

57 This was in particular because of a decision of the Federal Court of Justice (judgment of 26 February 2013, case KRB 20/12 – *Zementkartell*). The current FCO fining guidelines are available at www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidelines%20for%20the%20setting%20of%20fines.pdf?__blob=publicationFile&v=3.

58 The proceedings concerned rail manufacturers, breweries, sausage manufacturers, manufacturers of concrete paving stones, providers of specialist mining services, automotive parts producers, providers of container transport services, manufacturers of prefabricated garages, and in a customer allocation proceeding concerning certain services provided in power plants.

59 FCO press release of 22 August 2014, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/22_08_2014_Matratzen.html?nn=3591568 and FCO press release of 6 February 2015, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/06_02_2015_Matratze.html?nn=3591568.

60 FCO press release of 22 January 2015, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/22_01_2015_SodaStream.html?nn=3591286; see also FCO, decision of 22 January 2015, case B3-164/14 (*Commitments SodaStream*).

61 FCO press release of 31 July 2013, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/31_07_2013_Wala.html – *Wala Heilmittel*.

Collecting benefits of infringement

German administrative offence law allows the FCO also to collect proceeds derived from an infringement, either in separate administrative proceedings or by determining a fine that reflects such proceeds (in which case the total fine may exceed the 10 per cent maximum).

ii Behavioural remedies

Sections 32 to 34 of the ARC allow for behavioural remedies. Thus, the FCO may impose all measures necessary to bring an infringement effectively to an end and that are proportionate to the infringement. This includes the right to impose measures that require action by the infringer. Section 32a of the ARC allows the FCO to impose interim measures in cases of urgency if there is a risk of serious and irreparable damage to competition. Such measures should, however, not last longer than one year.

For instance, the FCO has ordered hotel online booking platforms HRS[62] and Booking.com[63] to delete best-price clauses from their contracts with hotel partners.[64]

iii Structural remedies

Section 32(2) of the ARC provides for the possibility of structural remedies, including divestitures (unbundling) of companies; however, structural remedies are subject to a strict proportionality test and may only be applied where behavioural remedies would be insufficient to remedy the infringement. To date, the FCO has not imposed any structural remedies in abuse cases.

VI PROCEDURE

In the administrative proceedings, the FCO carries out investigations in order to decide whether to issue a prohibition decision and, if appropriate, a fine. Such decisions can be taken simultaneously or consecutively, and both are subject to judicial review of the facts and the law by the Düsseldorf Court of Appeal. The Court's decisions can be further appealed – on points of law only – to the Federal Court. In practice, the courts indeed carry out an independent review of the cases brought before them. While they often side with the FCO, it is by no means rare that FCO decisions are overturned based on factual or legal errors of the FCO.

i Commencement of investigations and investigative powers

The FCO may commence investigations *ex officio* or, in practice more frequently, following complaints of third parties (e.g., competitors, customers or suppliers).[65] The FCO may carry

62 FCO, decision of 20 December 2013, case B9-66/10. A press release is available in English at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/20_12_2013_HRS.html?nn=3591568.

63 FCO, press release of 23 December 2015, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23_12_2015_Booking.com.html?nn=3591568.

64 The FCO's proceedings against Expedia are still ongoing.

65 There is no formal complaint procedure though, which means notably that complainants do not have a legal remedy against a rejection of their complaint.

out informal discussions or send informal questionnaires. It can, however, also take formal measures such as information requests or, subject to a prior court order, surprise inspections (dawn raids) in the course of which it can seize documents and electronic files.

ii Right to be heard

During all stages of an investigation, the enterprises investigated have the right to be heard. The FCO will usually serve a statement of objections before it issues a decision to which the company concerned may respond. The party concerned also has the right of access to the file, including digitally stored data and media.

iii Guidance

There is no formal procedure for obtaining guidance on individual cases, but the FCO is open to informal contacts and may provide informal guidance in this context.

iv Settlements

The FCO often ends proceedings by adopting commitment decisions, that is, by declaring remedies offered by the party concerned as binding.[66] In light of the increasing importance of such settlements in German antitrust proceedings over the past few years, the FCO published a guidance paper on its settlement practice on 23 December 2013.[67] Settlements have frequently been reached in hard-core cartel and vertical restraints cases (resale price maintenance, online impediments). In its guidance paper, the FCO notes that there is no regulatory framework for settlements, but that its power to conclude settlements derives from its discretion to pursue cases. A party to an investigation has no right to a settlement but can of course suggest it to the FCO. A settlement does not require parties to commit not to appeal any fining decision included in the settlement; however, there are no cases where an enterprise would have actually appealed an administrative fine on which it had previously settled.

v Cooperation with other authorities

Cooperation between the FCO, the other national competition authorities and the European Commission takes place via the European Competition Network (ECN). This cooperation may involve exchanging information about cases and decisions, exchanging evidence, and mutually assisting each other with investigations. For example, the FCO and ECN jointly published a monitoring report on developments in the German electricity and gas markets in

66 See, for instance the FCO's recent commitment decisions regarding several operators of district heating networks that were alleged to have abused a dominant market position by charging excessive prices: decision of 13 February, 2017, case B8-30/13 – innogy; decision of 13 February, 2017, case B8-31/13 – Danpower; and decision of 15 October 2015, case B8-34/13 – Stadtwerke Leipzig. The FCO's press releases regarding these cases are available in English at: www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/14_02_2017_Fernw%C3%A4rme.html?nn=3591568; and www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/16_10_2015_Stadtwerke_Leipzig.html?nn=3591568.

67 The guidance paper is available in German at www.bundeskartellamt.de/SharedDocs/Publikation/DE/Merkbl%C3%A4tter/Merkblatt-Settlement.pdf?__blob=publicationFile&v=2. In contrast to the EU settlement programme, under German law settlements can also be concluded in cases other than those involving cartels, including dominance cases.

2015. The FCO has set up an internal coordination unit to represent the authority within the ECN. The FCO is also an active member of the International Competition Network (ICN). FCO President, Andreas Mundt, has chaired the ICN's Steering Group since 2013.

VII PRIVATE ENFORCEMENT

Section 33 of the ARC provides an express legal basis for damage claims based on infringements of antitrust law. Following a significant increase in cartel-related follow-on damage litigation over recent years, damage actions or other types of litigation (e.g., requesting the termination of discriminatory conduct, access to a network or infrastructure, etc.) based on alleged restrictive unilateral conduct have also become fairly frequent. Unlike cartel damage cases, these actions often do not follow an investigation and decision by the FCO (or other competition authorities), but are brought on a stand-alone basis.

German law currently does not provide for class actions seeking damages.[68] A practical way to consolidate damages claims of various victims of anticompetitive behaviour is to assign the claims to one party or institution, which then brings the lawsuit. In a case in which claims had been assigned to the company Cartel Damages Claims (CDC), the Düsseldorf District Court dismissed CDC's collective damage claims against various German cement manufacturers, holding that the assignments of the claims to CDC for the purpose of enforcing them in court were null and void in violation of public policy.[69] Under German procedural rules, the defeated party in a court case has to pay the court fees and must reimburse the winning side for its costs. As CDC's special purpose vehicle for the enforcement of the claims was only minimally funded, it would not have been able to cover such costs had it lost the case. The fact that CDC did not bear any of the risks of losing the case was considered a violation of public policy. The Düsseldorf Court of Appeals affirmed the judgment.[70] However, if properly funded, a company to which damage claims were assigned should be able to bring consolidated lawsuits. Of course, the decision means that entities bringing such claims must assume considerable financial risk (or have the assignors of the claims share such risk), which reduces the attractiveness of the scheme. In order to limit this financial risk, the Ninth Amendment provides for a capped value of the claims resulting in limited fees (see new Section 89a(3)).[71]

In addition, consumer associations may bring actions on behalf of consumers, but only for injunctions, not for damages. Where a company has derived benefits from abusive or predatory conduct, the FCO and, if the FCO has not done so, consumer associations may in principle seek to collect such benefits on behalf of the German state (private damage claims and fines imposed by the FCO already reducing such benefits are taken into account). In practice, however, such actions are very rare.

In the context of follow-on suits, German courts are legally bound by any (final) decision of the European Commission, the FCO, or any other national competition authority

68 In December 2014, the EU Directive on Antitrust Damages Actions (2014/104/EU) came into effect. The Member States have to implement the Directive in their national law by the end of 2016. In Germany, this directive is being implemented by the Ninth Amendment.

69 Düsseldorf District Court, judgment of 17 December 2013, case 37 O 200/09 – *CDC*.

70 Düsseldorf Court of Appeals, judgment of 18 February 2015, case VI U 3/14; CDC has not further appealed this decision.

71 In Germany, the court and legal fees in civil proceedings are determined based on the value of the claim.

in an EU Member State finding an infringement of EU antitrust law.[72] The binding effect is, however, limited to the determination of the antitrust infringement, so that causation and amount of damages need to be established subject to the normal rules on burden of proof in German court proceedings.[73]

VIII FUTURE DEVELOPMENTS

The FCO can be expected to further expand its activities with respect to the internet economy and in the e-commerce sector, as FCO president, Andreas Mundt, stated that the FCO intended to continue taking a leading role in this area among other competition authorities. With respect to possible dominance issues, he explained that the internet economy would be of primary interest for the FCO, as 'big data' was quickly becoming a source of market power. According to Mundt, it is essential for safeguarding competition that markets are kept assailable. The FCO is, thus, currently investigating whether Facebook's terms of use infringe data privacy laws and whether such an infringement would be abusive under antitrust law.

In addition, the FCO recently announced its intention to develop a guidance paper on the control of abusive practices with respect to electricity generation (in cooperation with the Federal Network Agency). The FCO is, thus, consulting the producers of electricity in Germany. According to Mr. Mundt, the FCO wants to provide these electricity producers with a higher level of legal certainty.[74]

The Monopolies Commission recently repeated that it sees competitive deficits in the fields of railway transportation, postal services and in the energy sector. While the Monopoly Commission does not have enforcement or legislative powers, the FCO and the legislator take its view into account in their enforcement and legislative strategy and practice.

72 Section 33b of the ARC (formerly, Section 33(4) of the ARC, changed by the Ninth Amendment).

73 Munich Court of Appeals, judgment of 21 February 2013, case U 5006/11 Kart; Berlin District Court, judgment of 6 August 2013, case 16 O 193/11 Kart.

74 See the FCO's press release of 1 April, 2016, available in German only at: www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2016/01_04_2016_Fragebogen_Leitfaden_Stromerzeugung.html?nn=3590016.

Chapter 14

ITALY

Matteo Beretta and Gianluca Faella[1]

I INTRODUCTION

Abuse of dominance within the Italian market, or in a substantial part of it, is prohibited by Article 3 of Law 10 October 1990, No. 287 (the Competition Act), which closely resembles Article 102 of the Treaty on the Functioning of the European Union (TFEU). Article 3 does not provide a definition of abuse but lists examples of abusive conduct.[2]

In principle, Italian competition rules apply only to practices that do not affect intra-EU trade. As the Italian Competition Authority (ICA) and the Italian courts tend to interpret broadly the notion of effect on intra-EU trade, in most cases they apply EU rules. However, the choice of the applicable rules does not materially affect the outcome of a case, given that, pursuant to Article 1(4) of the Competition Act, Article 3 must be interpreted in accordance with well-established EU principles.

The ICA has not issued formal guidance on abuses of dominance. However, the Commission Guidance on exclusionary abuses (the Guidance) may provide useful indications on the interpretation of Article 3.[3]

Article 3 applies also to public firms and to those in which the state is the majority shareholder. Pursuant to Article 8 of the Competition Act, antitrust rules do not apply to firms entrusted with the supply of services of general economic interest or holding a legal monopoly, insofar as this is indispensable to perform the specific tasks assigned to them.[4]

---

1 Matteo Beretta is a partner and Gianluca Faella is counsel at Cleary Gottlieb Steen & Hamilton LLP.

2 In particular, it is prohibited to: (1) directly or indirectly impose unjustifiable burdensome purchase or selling prices or other contractual conditions; (2) limit or restrict production, market outlets or market access, investment, technical development or technological progress; (3) apply to other trading partners objectively dissimilar conditions for equivalent transactions, thereby placing them at an unjustifiable competitive disadvantage; and (4) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

3 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02.

4 Firms holding a legal monopoly must operate through separate companies if they intend to operate on other markets. When firms entrusted with the provision of services of general economic interest or holding a legal monopoly supply their subsidiaries on different markets with products or services over which they have exclusive rights, they must make these products or services available to their direct competitors on equivalent terms and conditions. This provision applies regardless of the market position of the subsidiary.

II YEAR IN REVIEW

In 2016, the ICA closed three investigations regarding abuse of dominance. In one case, it found an infringement and imposed a fine.[5] In the other two cases, the ICA accepted commitments offered by the dominant firm and closed the proceedings without establishing the alleged infringement.[6] In November 2016, the ICA applied for the first time its fining powers under the rules on abuse of economic dependence (Article 9 of Law No. 192/1998).[7]

At the beginning of 2017, the ICA issued two additional commitment decisions,[8] and the Regional Administrative Tribunal of Latium (TAR) partially annulled a decision adopted by the ICA in 2015, by reducing the amount of the fine.[9]

The abuse cases in the period under review concerned, *inter alia*, excessive pricing, refusal to deal, discriminatory practices and misuse of rights and legitimate interests. The 2016 decision-making practice confirms the ICA's tendency to adopt a broad and flexible interpretation of the principles on refusal to deal, and seems to show a renovated interest in exploitative abuses, including excessive pricing, which has traditionally been the subject of a limited number of decisions.

In February 2016, the ICA accepted commitments offered by the London Stock Exchange Holdings Italia and its subsidiaries Borsa Italiana, the Italian stock exchange, and BIt Market Services (BIMS), a company vertically integrated with Borsa Italiana, which is active in the provision of financial information. Borsa Italiana supplies financial data to intermediaries and information providers (including BIMS) active in the downstream market for the provision of financial information. The ICA contested that Borsa Italiana had abused its dominant position by forcing BIMS's competitors to provide a detailed list of their customers and the type of data sold to them. This information enabled BIMS to learn the identity and needs of competitors' clients and to specifically target them, including through selective price cuts.

In order to remove the ICA's concerns, the parties offered both structural and behavioural remedies. In particular, they undertook to divest BIMS's business division in charge of supplying financial information services in the downstream market. In addition, the parties undertook to implement a set of behavioural remedies during the time needed for the divestiture of the financial information division, with a view to ensuring a certain degree of separation between the financial information division and Borsa Italiana, thus preventing possible discriminatory practices and limiting the exchange of sensitive information.[10]

In September 2016, the ICA imposed a fine of more than €5 million on Aspen Pharma Trading, Aspen Italia, Aspen Pharma Ireland and Aspen Pharmacare Holdings (a group of companies active in the manufacture of pharmaceutical products) for having charged

5 Decision of 29 September 2016, No. 26185, A480, *Aspen-Incremento prezzi farmaci*.

6 Decisions of 3 February 2016, No. 25859, A482, *E-Class/Borsa Italiana*; 6 September 2016, No. 26167, A486, *Enel Distribuzione-Rimozione coatta dispositivi smart metering*.

7 Decision of 23 November 2016, No. 26251, RP1, *Hera-affidamenti gruppi misura gas/termini di pagamento*.

8 Decisions of 18 January 2017, No. 26350, A490, *Net Service-Software processo civile telematico*; 22 March 2017, No. 26497, A489, *Nuovo Imaie-Condotte anticoncorrenziali*.

9 TAR, 23 January 2017, No. 1188.

10 Decision of 3 February 2016, No. 25859, A482, *E-Class/Borsa Italiana*. See also decision of 6 July 2016, No. 26098, A482, *E-Class/Borsa Italiana*, which introduced a minor amendment to the commitments (namely, an extension of the deadline to move a business division of Borsa Italiana into a separated building).

excessive prices for certain drugs (the 'Cosmos' oncological drugs). According to the ICA, Aspen engaged in a very aggressive negotiation strategy *vis-à-vis* the Italian Medicines Agency (Agenzia Italiana del Farmaco; AIFA), which also led to the threat to disrupt the direct supply of the products concerned on the Italian market.[11] In particular, Aspen's negotiation strategy was articulated in three types of initiatives: (1) repeated requests to include Cosmos drugs in the 'C-class' list of pharmaceutical products (the price of a C-class drug is not subject to the renegotiation procedure, can be freely determined by the seller, is paid for by the patient and the Italian National Health Service (SSN) does not reimburse it); (2) serious threats to withdraw the drugs from the Italian market; and (3) abuse of Aspen's 'stock allocation mechanism', which systematically created artificial product shortage in Italy before AIFA's acceptance of Aspen's request.

This aggressive negotiation strategy resulted in an increase between 300 per cent and 1,500 per cent in prices for Cosmos drugs, which were life-saving and irreplaceable for patients. In order to establish whether the prices charged by Aspen were excessive and unfair, the ICA applied a two-stage test. First, it considered the disproportion between prices and costs on the basis of two parameters: (1) the difference between prices and costs, measured through the gross contribution margin, and (2) the difference between revenues and a 'cost plus' benchmark, including direct costs, the share of indirect costs allocated to the products concerned and a profit margin. Second, in order to verify whether the prices were unfair, the ICA took into account a number of additional factors, including the historical prices for Cosmos drugs, the lack of economic justifications for the price increases, the absence of any non-economic benefits for patients, the nature of the pharmaceutical products concerned, the characteristics of the Aspen group and the harm caused to the SSN.

In September 2016, the ICA accepted the commitments offered by Enel Distribuzione (Enel D) and Enel (Enel) in proceedings concerning advanced monitoring and supply of electricity consumption data to final customers (smart metering services).[12] The ICA contested that Enel D (a wholly owned subsidiary of Enel) had implemented an exclusionary strategy against the complainant, AEM Acotel Engineering and Manufacturing (Acotel), on four markets: the upstream markets for (1) the distribution of electricity and (2) the provision of electricity measurement services, and the downstream markets for (3) the retail sale of electricity to domestic and non-domestic final customers and (4) the provision of smart metering services. The exclusionary strategy was allegedly implemented through different practices, such as: (1) the unjustified detachment of many smart metering devices of Acotel from final customers' meters; (2) the denial of physical access to the meter to install smart metering devices when the meter was placed inside covers, grids or cases; and (3) the refusal to grant the complainant access to technical information and know-how required to develop an advanced metering system, based on an innovative device to be placed in electric sockets, similar to the 'in-home' device produced by Enel D. According to ICA's preliminary findings, the refusal to grant access to technical information and know-how could have been incompatible with EU principles on essential facilities.

To address the ICA's concerns, Enel D and Enel proposed a number of commitments aimed at promoting the development of metering services provided through different devices. *Inter alia*, Enel D committed to: (1) remove metering devices only when strictly necessary,

11 Decision of 29 September 2016, No. 26185, A480, *Aspen-Incremento prezzi farmaci*.

12 Decision of 6 September 2016, No. 26167, A486, *Enel Distribuzione-Rimozione coatta dispositivi smart metering*.

and provide timely information on interventions on meters that entail the detachment of these devices; (2) make a new electronic device (the signal emitter card, or ES Card) available for free to facilitate the provision of smart metering services in case of meters placed inside covers, grids or cases; and (3) provide competitors with an original equipment manufactor (OEM) module, to be integrated in third parties' in-home devices, or a brand-free version of Enel D's in-home device, in both cases at a cost price, in order to enable other players to sell in-home devices. At the same time, Enel committed to vouch for: (1) the effective and timely implementation of Enel D's commitments; and (2) non-discrimination by Enel D in commercial relations with other companies, especially with regard to the supply of OEM modules. The ICA considered these commitments adequate to address its concerns and closed the proceedings without finding any abuse.

In November 2016, the ICA applied for the first time the rules on abuse of economic dependence (i.e., economic power in the contractual relationship with a single customer or supplier, or relative dominance).[13] The ICA imposed a fine of €0.8 million on Hera, a multi-utility company, for having infringed national rules on payment terms. Pursuant to Article 9, paragraph 3 *bis*, of Law No. 192/1998, the widespread and repeated violation of the rules on payment terms provided for by Legislative Decree No. 231/2002 in contractual relationships with firms (in particular small and medium undertakings) constitutes an abuse even in the absence of economic dependence. According to the ICA, Hera violated Article 9, paragraph 3 *bis*, of Law No. 192/1998 because, for more than three and a half years, it systematically made payments to gas meter suppliers within 120 days, instead of within the 60-day term provided for by national law.

In January 2017, the ICA accepted the commitments offered by Net Service in proceedings initiated in May 2016, concerning an alleged abuse committed by Net Service in the market for application software used to create and manage online legal documents and files on the online civil trial (*processo civile telematico*; PCT) platform. Net Service had the exclusive right to develop and manage the PCT platform, which was considered an essential facility to operate in the related market for application software. According to ICA's preliminary findings, Net Service had used its monopoly in the management of the PCT platform to leverage its market power in the downstream market.[14] In particular, the dominant company would have used upgrades to technical specifications of the PCT platform in advance of other operators in the downstream market for application software. This would have granted Net Service a competitive advantage in the provision of application software in the downstream market.

In order to remove the ICA's concerns, Net Service undertook to implement a functional and physical separation of its upstream and downstream activities, through structural and behavioural remedies. In particular, Net Service committed to: (1) split its activities into two different divisions, dealing with the PCT platform and application software, respectively; (2) open a blog in which firms active in the PCT sector can discuss things between themselves and with Net Service, thus promoting a useful debate on technical issues; and (3) prepare reports relating to the activities carried out by the PCT blog to increase transparency on possible

13 See decision of 23 November 2016, No. 26251, RP1, *Hera-affidamenti gruppi misura gas/termini di pagamento*.

14 Decision of 18 January 2017, No. 26350, A490, *Net Service-Software processo civile telematico*.

technical problems. The ICA considered that this set of remedies would have addressed its concerns and solved the issues raised by the competitive advantage enjoyed by Net Service because of its monopoly in the upstream market.

In March 2017, the ICA closed another investigation by accepting the commitments offered by the allegedly dominant firm.[15] The investigation concerned commercial practices implemented by NUOVOIMAIE, the successor of the former legal monopolist (IMAIE) in the market for collective rights management and intermediation on behalf of artists, authors, musicians and other holders of copyrighted works. According to the ICA's preliminary findings, NUOVOIMAIE had implemented a complex exclusionary strategy aimed at hindering access by new entrants through: (1) the refusal to grant competitors access to the general database of authors and copyrighted works developed under IMAIE's legal monopoly, which the ICA considered essential to enable competitors to identify and contact rightholders; and (2) discrimination against rightholders registered with competitors, in particular in relation to payments due by the former monopolist, which were managed and made by NUOVOIMAIE as legal successor.

The dominant firm offered a number of commitments aimed at solving the competition problems caused by the above-mentioned practices. In particular, NUOVOIMAIE committed to: (1) implement a system of access to its database based on licence agreements with competitors; (2) implement initiatives aimed at removing the alleged discrimination; (3) grant foreign collecting companies a right of termination of current agreements, and enter into one-year agreements without tacit renewal in the future; and (4) implement a series of behavioural remedies aimed at removing the concerns concerning the agreements with the most relevant national customers (such as offering certain counterparties a licensing agreement at FRAND terms and proposing arbitration proceedings to solve issues relating to payments).

In January 2017, the TAR partially annulled a decision adopted by the ICA in 2015, which had imposed a fine on Società Esercizi Aeroportuali (SEA) for abusive practices in the markets for the management and provision of airport facilities for commercial and general aviation, and ground-handling services for general aviation at Milan Linate airport.[16]

SEA is the sole manager of Milan Linate and Milan Malpensa airports for both aviation activities (i.e., management, development and maintenance of infrastructures and handling services) and non-aviation activities (i.e., commercial and real estate services). In 1961, SEA had granted ATA Trasporti (ATA) an exclusive subconcession to manage certain general aviation facilities. In 2013, ATA's main shareholder, a company then in liquidation, held a tender procedure to sell its 98.3 per cent stake in ATA. Cedicor, a Uruguayan company active in the management of airport infrastructures, made a bid to acquire the stake. According to the ICA, SEA adopted three initiatives to hinder access to the market by Cedicor through the acquisition of ATA: (1) SEA tried to obstruct the procedure for the sale of ATA shares by contesting inefficiencies and lack of information by the adviser and the seller; (2) it terminated the subconcession agreement with ATA after it found out that Cedicor's offer for ATA shares was higher than its own; and (3) it submitted a second bid, higher than the first,

15 Decision of 22 March 2017, No. 26497, A489, *Nuovo Imaie-Condotte anticoncorrenziali*.

16 TAR, 23 January 2017, No. 1188, and decision of 25 March 2015, No. 25397, A474, *SEA/Convenzione ATA*.

to win the tender. In the ICA's view, SEA's conduct intentionally and irremediably altered competition for the market by preventing the entry of an efficient competitor, which was capable of offering a high quality service.

The TAR upheld the ICA's view that SEA had prevented Cedicor from entering the market for the management of airport facilities for general aviation by misusing its contractual right to terminate the subconcession agreement. In particular, the TAR confirmed the ICA's finding that SEA had strategically exercised its contractual right to terminate the subconcession agreement to alter the outcome of the tender procedure for the sale of ATA to the detriment of Cedicor. However, the TAR considered that the ICA had misapplied the 2014 Fining Guidelines and annulled the part of the decision concerning the amount of the fine.

In 2016, Italian civil courts also dealt with a number of abuse of dominance cases, which provide important indications on some aspects of damages actions, including calculation of damages, causal link, burden of proof and passing-on defence.

In April 2016, the Italian Supreme Court annulled a judgment of the Milan Court of Appeal concerning an alleged abuse committed by the Land Agency in the provision of economic and financial information services through the use of data based on real estate registers and cadastres.[17] Some firms active in the liberalised downstream market for continuative research services sued the Land Agency because it had, at the same time: (1) abruptly and significantly increased its prices for the provision of the information, thus making the plaintiffs' businesses far less profitable; and (2) started providing competing services in the liberalised market for continuative research services. The Milan Court of Appeal stated that the Land Agency's conduct infringed, *inter alia*, the rules on abuse of dominance, but did not award damages on the ground that an interim injunction previously adopted by the court had prohibited one the two essential elements of the alleged abuse, namely the direct provision of continuative research services by the Land Agency.[18] The Supreme Court confirmed that the Land Agency should be considered an undertaking under competition rules because it provided services of an economic nature, notwithstanding its legal status of public entity. However, the Supreme Court reversed the judgment of the Court of Appeal because it had erroneously considered that, taken alone, the price increase was not capable of causing antitrust damages. According to the Supreme Court, the possible passing on of the price increase would not have prevented any damage, as the subsequent increase in the final price could have reduced the demand for downstream services.The Supreme Court noted that, in situations of information asymmetry, lower courts should facilitate the burden of proof placed on the alleged victims of antitrust infringements. Even though a price increase may be passed on to consumers through higher retail prices, it should be presumed that the increase in the prices of final services results in a reduction in demand, unless demand rigidity is proven.

In February and June 2016, the Tribunal of Milan issued two rulings on actions brought against SEA by Saudi Arabian Airlines and Continental Airlines (Saudi and

17 Supreme Court, 1 April 2016, No. 6366. The Land Agency was the fiscal agency in charge of managing the national cadastre. In 2012, the Land Agency was incorporated in the Revenue Agency. Similar actions for damages were brought by other alleged victims of the Land Agency's conduct: see Supreme Court, 23 March 2016, No. 5763; Supreme Court, 11 October 2016, No. 20443; Court of Appeal of Milan, 7 January 2016, No. 9.

18 Court of Appeal of Milan, 12 July 2012, No. 2579.

Continental),[19] and Swiss International Air Lines (Swiss),[20] respectively. In both cases, the Tribunal ascertained that SEA was dominant, in light of its monopoly in the management of Milan airports (Linate and Malpensa).

In the first case, the Tribunal assessed whether SEA had charged Saudi and Continental discriminatory prices for the use of the airports' centralised infrastructures. The Tribunal found that SEA had refused to grant Saudi and Continental a retroactive flat discount, which had been granted to all other carriers, on the basis of settlements entered into following a decision issued by the ICA on 26 November 2008.[21] The Tribunal rejected SEA's objection of limitation on the ground that, according to established case law, the limitation period starts to run only when the damage becomes identifiable and recognisable by the victim of the antitrust infringement.

In the second case, the Tribunal held that SEA had abused its dominant position by charging Swiss the airport fees for non-EEA flights, despite the fact that, according to an agreement entered into between Switzerland and the European Community in 1999 (and entered into force in 2001), Switzerland should have been considered a destination comparable to those within the territory of the Community for the purposes of airport charges. According to the Tribunal, SEA's conduct resulted in a discrimination against Swiss. However, the Tribunal rejected Swiss' request for reimbursement of the overcharge paid between 2002 and 2009. The Tribunal considered that awarding damages to Swiss would have resulted in an unjustified enrichment for Swiss and an undue penalty for SEA, since the overcharge had already been passed on to final consumers.

In January 2017, the Court of Appeal of Milan confirmed a first instance ruling holding that Telecom Italia had abused its dominant position in the fixed-to-mobile call termination market by implementing a margin-squeeze strategy to the detriment of BT Italia.[22] The action for damages was based on the decision issued by the ICA on 3 August 2007, in the *A357* case, concerning alleged anticompetitive practices implemented by Telecom and Wind. Telecom challenged the first instance ruling, *inter alia*, on the grounds that (1) there was no evidence of causal link between conduct and damage, and (2) in the assessment of the casual link, the Tribunal of Milan had made uncritical reference to the report of the expert witness (CTU). The court rejected the appeal and increased the amount of the damages awarded to BT Italia. The court confirmed that the ICA's infringement decisions constitute privileged evidence of the anticompetitive conduct, and that CTU reports play a crucial value in cases involving complex economic assessments, in particular with regard to the assessment of the causal link.

19 Tribunal of Milan, 29 February 2016, No. 2593.

20 Tribunal of Milan, 27 June 2016, No. 7970.

21 Decision of 26 November 2008, No. 19189, A377, *SEA-Tariffe Aeroportuali*.

22 Court of Appeal of Milan, 2 January 2017.

III MARKET DEFINITION AND MARKET POWER

The first step in abuse of dominance cases is the definition of the relevant product and geographical market. The ICA's general approach to market definition is consistent with the Commission's practice (in particular, the ICA typically focuses on demand-side[23] and supply-side substitutability[24]). Similarly, the ICA follows the EU notion of dominance.[25]

Market shares are a key factor in the assessment of dominance.[26] Market shares exceeding 40 per cent are normally considered an indication of dominance. However, firms holding market shares lower than 40 per cent may also be dominant if the remaining part of the market is composed of small competitors.[27] The stability of market shares is also important,[28] but the fact that the market share is decreasing does not necessarily preclude a finding of dominance.[29] In the assessment of dominance, the ICA and national courts may consider a number of additional factors, which give the firm concerned a competitive advantage or raise barriers to entry.

A dominant position may be held by one or more firms. In accordance with EU case law, collective dominance may be based not only on structural or contractual links between the companies concerned, but also on the economic interdependence among firms active in an oligopolistic market.[30]

Abuse of economic dependence in the contractual relationship with a single customer or supplier (relative dominance) is prohibited by Article 9 of Law No. 192/1998. This provision aims at protecting the interests of weak parties in contractual relationships. When the contested conduct affects competition on the market, the ICA may exercise its investigative and fining powers under the Competition Act, and it may apply both Article 9 of Law No. 192/1998 and Article 3 of the Competition Act.[31]

IV ABUSE

i Overview

A dominant firm violates Article 3 only if it commits an abuse. Dominance itself is not an offence.

23 See, e.g., decision of 28 June 2011, No. 22558, A415, *Sapec Agro/Bayer-Helm*.

24 See, e.g., decision of 17 December 1998, No. 6697, A 209, *Goriziane/Fiat Ferroviaria*.

25 See, e.g., decisions of 7 December 1999, No. 7804, A224, *Pepsico Foods and Beverages International-IBG Sud/Coca-Cola Italia*; 14 June 2000, No. 8386, A274, *Stream/Telepiù*; and 10 April 1992, No. 453, A13, *Marinzulich/Tirrenia*.

26 See, for example, decision of 7 December 1999, No. 7804, A224, *Pepsico Foods and Beverages International-IBG Sud/Coca-Cola Italia*; TAR, 23 September 2008, No. 8481.

27 See, for example, decision of 27 November 2003, No. 12634, A333, *Enel Trade-Clienti Idonei*.

28 See, e.g., decision of 30 June 2010, No. 21297, A383, *Mercato del cartongesso*.

29 See, for example, decision of 9 February 1995, No. 2793, A76, *Tekal/Italcementi*.

30 See decision of 3 August 2007, No. 17131, A357, *Tele2/Tim-Vodafone-Wind*.

31 Pursuant to Article 9, paragraph 3 *bis*, of Law No. 192/1998, in case of widespread and repeated violations of the rules on payment terms provided for by Legislative Decree No. 231/2002 in contractual relationships with firms (in particular small and medium undertakings), an abuse may be found even in the absence of economic dependence. See decision of 23 November 2016, No. 26251, RP1, *Hera-affidamenti gruppi misura gas/termini di pagamento*.

Dominant firms have a special responsibility not to impair undistorted competition in the relevant market.[32] As a consequence, conduct that would normally be lawful may be considered anticompetitive if engaged in by a dominant firm.

Article 3 applies to both anticompetitive conduct aimed at excluding competitors (exclusionary abuses) and the exploitation of dominant firms' market power (exploitative abuses).

The list of abuses provided in Article 3 of the Competition Act is not exhaustive and the ICA has often fined *sui generis* anticompetitive practices. The crucial challenge is to identify the practices that pose unacceptable competitive dangers. In this respect, the ICA has traditionally adopted a case-by-case approach, which does not seem to reflect a coherent theoretical framework.

Behaviour is considered unlawful if it may hinder the (limited) level of competition still existing in the market or the development of that competition. To establish an abuse, it is sufficient to demonstrate a potential prejudice to competition. It is not necessary to prove that the conduct had actual anticompetitive effects.[33]

Abuse is an objective concept. An anticompetitive intent is not a prerequisite for a finding of abuse.[34] However, the existence of an exclusionary intent may play an important role in the assessment of an alleged abuse, in particular when the contested conduct is part of a plan aimed at eliminating competitors.[35] An exclusionary intent may also justify a finding of abuse when the dominant firm exercises a right in an objectionable manner to pursue an objective different from that for which the right was granted in the first place.[36]

A conduct does not infringe Article 3 if it is objectively justified. This may be the case, in particular, if the conduct is objectively necessary to protect the dominant firm's or third parties' legitimate interests or leads to a cost reduction.[37]

ii Exclusionary abuses

Exclusionary pricing

The ICA issued its first decision on predatory pricing in 1995 in *Tekal/Italcementi*.[38] In accordance with EU case law,[39] the ICA held that prices below average variable cost (AVC) must be presumed unlawful, while prices between AVC and average total cost (ATC) are unlawful if they are part of an anticompetitive plan. The contested conduct was considered abusive even though it was not proven that the dominant firm was able to recoup the losses

32 See, e.g., Council of State, 19 July 2002, No. 4001; TAR, 14 April 2008, No. 3163; decision of 16 November 2004, No. 13752, A351, *Comportamenti abusivi di Telecom Italia*; Council of State, 15 May 2015, No. 2479.

33 See, e.g., Council of State, 15 May 2015, No. 2479; TAR, 30 August 2006, No. 7807; 20 October 2006, No. 10678.

34 See, e.g., Council of State, 19 July 2002, No. 4001.

35 See, for example, decisions of 16 November 2004, No. 13752, A351, *Comportamenti abusivi di Telecom Italia*; 7 December 1999, No. 7804, A224, *Pepsico Foods and Beverages International-IBG Sud/Coca-Cola Italia*; 9 February 1995, No. 2793, A76, *Tekal/Italcementi*.

36 See Council of State, 12 February 2014, No. 693; 8 April 2014, No. 1673; TAR, 27 March 2014, No. 3398.

37 See, for example, decisions of 25 February 1999, No. 6926, A221, *Snam-Tariffe di Vettoriamento*, Bulletin 8/1999; 23 July 1993, No. 1312, A35, *Cesare Fremura/Ferrovie dello Stato*.

38 Decision of 9 February 1995, No. 2793, A76, *Tekal/Italcementi*.

39 Case C-62/86, *AKZO/Commission*, 1991 ECR I-3359.

incurred by selling at below-cost prices. The ICA's view is consistent with the principles established by the ECJ,[40] and contrasts with US case law, which requires the proof of a reasonable likelihood of recouping the losses suffered by selling below cost.[41]

In *Caronte*,[42] the ICA used different cost benchmarks. Instead of relying on AVC and ATC, the ICA focused on short-run average incremental cost (SRAIC) and LRAIC. According to the decision, prices below SRAIC must be presumed exclusionary, while prices at least equal to SRAIC, but below LRAIC, are unlawful if they are part of an anticompetitive plan. However, a few years later, in *Mercato del calcestruzzo cellulare autoclavato*, the ICA made reference to average avoidable cost (which was considered equal to AVC) and ATC.[43]

More recently, in *TNT/Poste Italiane*,[44] the ICA used the LRAIC benchmark in the analysis of the pricing policies of the incumbent in the postal sector. However, the ICA adopted a strict approach in calculating LRAIC. The latter was considered essentially equal to average operating cost reported by regulatory accounts, which typically also include a share of common costs. The decision was annulled by the TAR,[45] whose judgment was upheld by the Council of State.[46]

In a few cases, the ICA and national courts have held that even above-cost prices offered to strategic customers (selective discounts) may be abusive. This may be the case, in particular, if they are part of a broader exclusionary strategy, implemented through different abusive practices,[47] or the dominant firm uses privileged information, which it holds because of its status of incumbent and vertically integrated operator, but is not available to rivals, to implement win-back or retention policies.[48] Furthermore, according to the ICA and the TAR, a discount may be *per se* abusive, regardless of the relationship between price and cost, if it is the result of a privilege exclusively conferred on the dominant firm by sector-specific rules incompatible with EU rules.[49]

A vertically integrated firm, active in the supply of an input and a final product, may infringe competition rules if it sets its upstream or downstream prices so as to squeeze competitors' margins. For instance, in *Telecom*, the ICA held that the Italian incumbent in

40 Case C-334/96, *Tetra Pak/Commission*, 1996 ECR I-5951.

41 *Brook Group v. Brown & Williamson Tobacco*, 509 US 940 (1993).

42 Decision of 17 April 2002, No. 10650, A267, *Diano/Tourist Ferry Boat-Caronte Shipping-Navigazione Generale Italiana*.

43 Decision of 24 October 2007, No. 17522, A372, *Mercato del calcestruzzo cellulare autoclavato*.

44 Decision of 14 December 2011, No. 23065, A413, *TNT Post Italia/Poste Italiane*.

45 TAR, 25 June 2012, No. 5769.

46 Council of State, 6 May 2014, No. 2302. The Council of State held that the analysis of LRAIC was erroneous in several respects: (1) the predation analysis should have been carried out *ex ante*, on the basis of data and information available when the firm set its prices, and not *ex post*, on the basis of regulatory costs; (2) the ICA had not taken into account the increase in regulatory costs because of universal service obligations; (3) the ICA had assessed the profitability of the service over the first year-and-a-half of activity, without considering that initial losses in the launch of a new product may be inevitable; and (4) the ICA had wrongfully identified the incremental costs borne for the supply of the services concerned by allocating to these services resources used mainly for other services.

47 Decision of 7 December 1999, No. 7804, A224, *Pepsico Foods and Beverages International-IBG Sud/Coca-Cola Italia*; Court of Appeal of Milan, 16 May 2006.

48 Decision of 12 November 2008, No. 19249, A375, *Sfruttamento di informazioni commerciali privilegiate*; Court of Appeal of Milan, 16 May 2006.

49 Decision of 27 March 2013, No. 24293, Case A441, *Applicazione dell'IVA sui servizi postali*, Bulletin No. 16/2013; TAR, 7 February 2014, No. 1525.

the electronic communications sector abused its dominant position by charging competitors more than it charged its commercial divisions for the relevant inputs, thus reducing rivals' margins and excluding equally efficient firms.[50] A price squeeze may also be the result of discounts offered to retail customers.[51]

Exclusive dealing

Exclusive dealing obligations may constitute an abuse under Article 3 when the conduct may significantly foreclose access to the market. In *Diritti calcistici*,[52] the ICA found that Mediaset, the main Italian TV operator, violated Article 102 of the TFEU on the market for the sale of TV advertising lots. In 2004, Mediaset concluded with the major Italian soccer clubs various contracts concerning the broadcasting rights of their home matches for the 2004 to 2007 seasons. Moreover, Mediaset negotiated with the same clubs exclusive pre-emption rights for the broadcasting of their matches through all platforms from 2007 to 2016. Through exclusivity, 'English clauses' and pre-emption rights, Mediaset rendered the relevant TV content *de facto* unavailable for a long period for its competitors.

The ICA has also held that loyalty discounts and rebates, conditioned upon the customer obtaining all or most of its requirements from a dominant supplier, or reaching a given target, may infringe competition rules, because they tend to eliminate or restrict the purchasers' freedom to choose their supply sources, thus hindering rivals' access to the market or development.[53] The loyalty-inducing effect is stronger when loyalty discounts are applied retroactively to all units purchased during a given reference period.[54]

Furthermore, according to the ICA, loyalty discounts may be anticompetitive because they imply discrimination between customers.[55]

The treatment of loyalty discounts is consistent with the traditional formalistic approach of the EU institutions. The ICA does not apply any price-cost test to establish whether a loyalty discount scheme is anticompetitive. It remains to be seen whether the ICA will apply the as-efficient competitor test introduced by the Commission Guidance on exclusionary abuses in the future.

50 Decision of 16 November 2004, No. 13752, A351, *Comportamenti abusivi di Telecom Italia*; see also decision of 23 October 2008, No. 19020, A376, *Aeroporti di Roma-Tariffe aeroportuali*.

51 See, e.g., decision of 9 May 2013, No. 24339, A428, *Wind-Fastweb/Condotte Telecom Italia*, confirmed by the TAR, 8 May 2014, No. 4801, which was upheld by Council of State, 15 May 2015, No. 2479. See also decision of 15 July 2015, No. 25561, A473, *Fornitura acido colico*, concerning both an increase in the upstream price and selective discounts in the downstream market. On the above cases, see Section II, *supra*.

52 Decision of 28 June 2006, No. 15632, A362, *Diritti calcistici*.

53 See, for example, decisions of 27 November 2003, No. 12634, A333, *Enel Trade-Clienti Idonei*; 16 November 2004, No. 13752, A351, *Comportamenti abusivi di Telecom Italia*; 27 June 2001, No. 9693, A291, *Assoviaggi/Alitalia*; 7 December 1999, No. 7804, A224, *Pepsico Foods and Beverages International-IBG Sud/Coca-Cola Italia*; 19 October 1994, No. 2379, A49, *Pozzuoli Ferries/Gruppo Lauro*; 10 April 1992, No. 453, A13, *Marinzulich/Tirrenia*.

54 In some cases, intent and the existence of an overall exclusionary strategy played an important role in the finding of infringement. See, for example, Council of State, 10 March 2006, No. 1271.

55 See, in particular, decisions of 27 June 2001, No. 9693, A291, *Assoviaggi/Alitalia*; 7 December 1999, No. 7804, A224, *Pepsico Foods and Beverages International-IBG Sud/Coca-Cola Italia*.

Leveraging

Article 3(d) of the Competition Act prohibits firms in a dominant position in the market for a particular product or service (the tying product or service) from conditioning the sale of that product or service upon the purchase of another (the tied product or service). Tying may also be obtained through price incentives, such as, in particular, bundled discounts and rebates. For instance, in *Albacom Servizio Executive*,[56] the ICA found that the incumbent in the telecommunications sector infringed Article 3 by making certain rebates on the price of a monopolised service conditional upon attaining certain traffic volumes in a liberalised service.

Refusal to deal

Refusal to deal may amount to an abuse when it may substantially weaken competition in the market where the dominant firm operates or in a different market and is not objectively justified. Refusal to deal encompasses a considerable range of practices, including the refusal to supply products or services, to provide information and to grant access to an essential facility. Practices such as refusal to begin negotiations, refusal to renew a contract or unilateral termination of a contract may be considered instances of refusal to deal. The imposition of onerous conditions by a dominant firm,[57] dilatory strategies[58] and other forms of constructive refusal to deal[59] might have the same effect as an outright refusal to deal. Differences in the processes for the management of requests for services submitted by internal divisions and by competitors may amount to a constructive refusal to deal if they entail more complexity and, possibly, higher costs for competitors.[60]

The ICA defines the notion of essential facility in accordance with principles established by EU case law.[61] Intellectual property rights and information required to carry out an economic activity may also be considered essential facilities.[62]

56 Decision of 29 May 1997, No. 5034, A156, *Albacom Servizio Executive*; see also decisions of 20 September 2000, No. 8692, A247, *Aeroporti di Roma-Tariffe del Groundhandling*; 10 April 1992, No. 453, A13, *Marinzulich/Tirrenia*.

57 See decision of 6 November 1997, No. 5446, A129, *Infocamere/Cerved*. A refusal to deal by a dominant firm is abusive only if it is capable of having a significant impact on the market. Evidence of a single refusal to supply may not be sufficient to find an abuse. See TAR, 21 February 2001, No. 1371.

58 See decision of 25 July 2012, No. 23770, A436, *Arenaways-Ostacoli all'accesso nel mercato dei servizi di trasporto ferroviario passeggeri*. However, the decision was annulled by the TAR, 27 March 2014, No. 3398, according to which the ICA had erroneously held that the administrative procedures initiated by the dominant firm were merely dilatory.

59 See decision of 9 May 2013, No. 24339, A428, *Wind-Fastweb/Condotte Telecom Italia*, confirmed by TAR, 8 May 2014, No. 4801, which was upheld by Council of State, 15 May 2015, No. 2479.

60 Id.

61 See, for example, decision of 25 February 1999, No. 6926, A221, *Snam-Tariffe di Vettoriamento*.

62 See, for example, decisions of 8 February 2006, No. 15175, *Glaxo-Principi attivi*; 15 June 2005, No. 14388, A364, *Merck-Principi attivi*; TAR, 3 March 2006, No. 341; Court of Milan, 4 June 2013, No. 7825; decision of 6 September 2016, No. 26167, A486, *Enel Distribuzione-Rimozione coatta dispositivi smart metering*.

The ICA has applied the principles on refusal to deal and essential facilities in a number of cases, especially in liberalised sectors.[63] In its decision practice, the ICA has made extensive reference to EU competition law principles. However, it has often adopted a broad and flexible interpretation of the requirements set by the ECJ's case law.[64]

A refusal to deal is not abusive if it is objectively justified. This may be the case, for instance, when the dominant firm does not have enough capacity to satisfy third parties' demand, the customer is insolvent or does not respect the contractual terms, or the firm requesting access does not meet the technical or security requirements needed to access an infrastructure.[65]

In principle, lack of capacity on a facility (capacity saturation) should constitute an objective justification.[66] In exceptional circumstances, however, a dominant firm may be obliged to invest in the development of the facility. Indeed, in *Eni-TTPC*,[67] the ICA held that the interruption of the expansion of a pipeline used for the international transport of gas and the termination of the 'ship or pay' agreements entered into by the firm managing the facility – a dominant firm's subsidiary – with independent shippers amounted to an abuse of dominant position. The ICA did not apply the essential facility doctrine since alternative infrastructures could be used to transport gas into Italy, and the dominant firm was not under an obligation to invest in the development of the pipeline. Nonetheless, the ICA held that the interruption of the expansion was abusive, due to the interference of the mother company in the subsidiary's investment decisions. In a similar case,[68] the Commission adopted a different approach, as it explicitly relied on the essential facility doctrine. In particular, the Commission held that the different infrastructures used to transport gas into Italy, taken as a whole, constituted a single essential facility, and stated that the incumbent may have an obligation to invest in the development of an infrastructure, if a system operator not vertically integrated in the sale of gas would do so.

---

63 See, for example, decisions of 17 March 1993, No. 1017, A11, *IBAR/Aeroporti Roma*; 16 March 1994, No. 1845, A56, IBAR/SEA; 10 January 1995, No. 2662, A71, *Telsystem/Sip*; 2 March 1995, No. 2854, A61, *De Montis Catering Roma/Aeroporti di Roma*; 11 November 1996, No. 4398, A102, *Associazione Consumatori Utenti/Alitalia*; 30 October 1997, No. 5428, A178, *Albacom/Telecom Italia-Circuiti dedicati*; 9 May 2013, No. 24339, A428, *Wind-Fastweb/Condotte Telecom Italia*, confirmed by TAR, 8 May 2014, No. 4801, upheld by Council of State, 15 May 2015, No. 2479; 19 February 2014, No. 24804, A443, *NTV/FS/ Ostacoli all'accesso nel mercato dei servizi di trasporto ferroviario passeggeri ad alta velocità*; 22 March 2017, No. 26497, A489, *Nuovo Imaie-Condotte anticoncorrenziali*.

64 See, for example, decision of 15 June 2005, No. 14388, A364, *Merck-Principi attivi*; TAR, 3 March 2006, No. 341.

65 See, for example, decision of 2 March 1995, No. 2854, A61, *De Montis Catering Roma/Aeroporti di Roma*.

66 However, the ICA has normally rejected the defence in the light of the specific facts of the case: see, for example, decisions of 25 February 1999, No. 6926, A221, *Snam-Tariffe di Vettoriamento*; 6 June 1996, No. 3953, A107, *Fina Italiana/Compagnia Italpetroli*; 2 March 1995, No. 2854, A61, *De Montis Catering Roma/ Aeroporti di Roma*.

67 Decision of 15 February 2006, No. 15174, A358, *Eni-Trans Tunisian Pipeline*.

68 Commission decision of 29 September 2010, Case COMP/39.315, *ENI*.

iii Discrimination

Article 3(c) prohibits dominant firms from applying dissimilar conditions to equivalent transactions, thus placing a trading party at a competitive disadvantage. Charging different prices may be abusive only if it is not economically justifiable.[69]

In many cases, the ICA fined dominant firms for having favoured their subsidiaries or commercial divisions active in downstream markets to the detriment of competitors, by granting preferential access to certain resources,[70] or applying discriminatory conditions.[71] Non-price discrimination may also infringe Article 3.[72]

iv Exploitative abuses

A firm may abuse its dominant position if it directly or indirectly imposes unfair selling or purchasing prices. To establish an exploitative abuse, it may be necessary to engage in an in-depth cost analysis, aimed at verifying whether the difference between the costs actually incurred and the price actually charged is excessive.[73] If this analysis cannot be carried out or is inconclusive, the ICA compares the prices imposed by the dominant firm with those charged by the same firm or competitors for the same product or service in other markets.[74] In some cases, the ICA applied both the aforementioned tests in the assessment of prices charged by the dominant firm.[75]

In 2016, in *Aspen*, the ICA applied a two-stage test to determine whether the prices charged by the dominant firm were excessive and unfair: first, it considered the disproportion between prices and costs; second, it took into account a number of additional factors that confirmed the unfairness of the prices (including the historical prices for the products concerned, the lack of economic justifications for the price increases, the absence of any non-economic benefits for final users, the nature of the products, the characteristics of the dominant firm and the harm caused by the practice).[76]

69 For instance, in *Alitalia*, the ICA held that Alitalia's incentive schemes for travel agents were discriminatory because, in some cases, different commissions were granted to travel agents for reaching similar sales targets. Thus, the agreements placed some travel agents at a competitive disadvantage without an acceptable justification. See decision of 27 June 2001, No. 9693, A291, *Assoviaggi/Alitalia*. See also, *inter alia*, decisions of 17 March 1993, No. 1017, A11, *IBAR/Aeroporti Roma*; 10 April 1992, No. 452, A4, *Ancic/Cerved*.

70 See, for example, decisions of 27 February 2014, No. 24819, A444, *Akron-Gestione rifiuti urbani a base cellulosica*; 8 January 2017, No. 26350, A490, *Net Service-Software processo civile telematico*.

71 See, for example, decisions of 3 August 2007, No. 17131, A357, *Tele2/Tim-Vodafone-Wind*; 27 April 2001, No. 9472, A285, *Infostrada/Telecom Italia-Tecnologia ADSL*; 29 March 2006, No. 15310, A365, *Posta elettronica ibrida*; 24 February 2000, No. 8065, A227, *Cesare Fremura-Assologistica/Ferrovie dello Stato*.

72 See, for example, decisions of 27 April 2001, No. 9472, A285, *Infostrada/Telecom Italia-Tecnologia ADSL*; 29 March 2006, No. 15310, A365, *Posta elettronica ibrida*; 11 November 1996, No. 4398, A102, *Associazione Consumatori Utenti/Alitalia*.

73 See, for example, decisions of 29 September 2016, No. 26185, A480, *Aspen-Incremento prezzi farmaci*; 23 October 2008, No. 19020, A376, *Aeroporti di Roma-Tariffe aeroportuali*; 26 November 2008, No. 19189, A377, *Sea-Tariffe aeroportuali*; 16 March 1994, No. 1845, A56, *IBAR/SEA*.

74 In that case, it is for the dominant firm to justify the price differential by showing objective differences between the situation in the markets concerned. See, for example, decision of 25 February 1999, No. 6926, A221, *Snam-Tariffe di Vettoriamento*. See also decision of 28 July 1995, No. 3195, A48, *SILB/SIAE*.

75 See, for example, decisions of 15 November 2001, No. 10115, A306, *Alitalia/Veraldi*; 10 April 1992, No. 452, A4, *Ancic/Cerved*.

76 Decision of 29 September 2016, No. 26185, A480, *Aspen-Incremento prezzi farmaci*.

In some cases, the ICA fined the dominant company for having charged prices remunerating activities or services that were not rendered.[77] In these cases, prices were considered by definition unfair. Article 3 also prohibits the direct or indirect imposition of unfair non-price trading conditions.[78]

V REMEDIES AND SANCTIONS

i Sanctions

Pursuant to Article 15 of the Competition Act, the ICA may impose on firms fines of up to 10 per cent of their total turnover. However, fines actually imposed by the ICA are normally significantly lower than the above-mentioned cap.

In setting the amount of the fine, the ICA normally applies the principles set out by the Commission guidelines.[79]

If a firm fails to comply with an order to cease an abusive conduct, the ICA may impose a fine of up to 10 per cent of the firm's total turnover. If the original infringement decision imposed a fine, the new sanction is at least twice the previous fine, up to 10 per cent of the turnover. If a firm repeatedly violates an order of the ICA, the latter may suspend the firm's activities for up to 30 days.

ii Behavioural remedies

Pursuant to Article 15(1) of the Competition Act, if the ICA finds a violation of antitrust rules, it orders the companies concerned to put an end to the infringement. The ICA typically asks the company involved to desist immediately from the anticompetitive conduct, to enact positive measures to restore conditions of effective competition in the affected markets within a certain time-limit, and to report on its progress.

According to Article 14 *bis* of the Competition Act, in urgent cases, where there is a risk of serious and irreparable damage to competition and a cursory examination of the facts reveals the existence of an infringement, the ICA may order interim measures on its own motion.

77 See, for example, decision of 23 May 2007, No. 10763, A299, *International mail express/Poste Italiane*.

78 Examples of unfair trading conditions include the imposition of a contractual clause that prohibits customers from reselling products bought from a supplier (decision of 10 April 1992, No. 452, A4, *Ancic/Cerved*), the refusal, by a dominant firm providing toll payment services, to reimburse cards not used, or only partially used, after their expiration (decision of 26 July 2007, No. 17069, A382, *Autostrade/Carta prepagata Viacard*), and the request of payment of unpaid bills of former customers as a condition to enter into new agreements for the supply of electricity or communications services (decisions of 10 October 2007, No. 17481, A390, *Enel Distribuzione/Attivazione subordinata a pagamento morosità pregresse*; 21 August 2008, No. 18692, A398, *Telecom-Morosità pregresse*).

79 See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, 2006 OJ (C 210) 2.

iii Structural remedies

The Competition Act does not expressly empower the ICA to impose structural remedies. As a matter of principle, however, the administrative courts' case law seems to leave the door open to the imposition of structural remedies in competition law cases, subject to a strict proportionality requirement.[80]

VI PROCEDURE

The ICA may start proceedings after assessing the information at its disposal or brought to its attention by third parties, such as public authorities, consumer associations and competitors. The ICA may also start antitrust proceedings following a general sector investigation. Antitrust investigations are often triggered by third-party concerns, but this is not always the case.

The decision to start proceedings, which is published in the ICA's Bulletin and website, contains the essential elements of the alleged infringement. The ICA serves the decision upon the parties concerned (i.e., the parties whose conduct is at issue and third parties who submitted complaints or reports). The decision to start proceedings is sometimes served upon the firm under investigation during an unannounced inspection.

Companies under investigation have the right to:

a be heard by the ICA within the time limit indicated in the decision to open proceedings;
b obtain a final oral hearing before the end of the investigation;
c submit briefs and documents; and
d access the case file.

Within 30 days of publication of the decision to start proceedings in the Bulletin, interested third parties (individuals, consumer associations, competitors, or other bodies whose interests might be directly and immediately harmed by the alleged infringement or any measures adopted as a result of the investigation) may request to participate in the proceedings. Complainants and interveners may access the case file and submit briefs and documents. In addition, they may be heard by the ICA officials and be allowed to participate in the final oral hearing, if the latter is requested by the firms under investigation.

Following the opening of the proceedings, the ICA can exercise extensive investigative powers, such as the power to:

a require specific documents or information;
b carry out unannounced inspections at business premises (as opposed to residential premises);
c interview the companies' legal representatives;
d image computer hard drives by using forensic IT tools;
e require explanations about any documents or information supplied by the company concerned; and
f secure premises overnight by seal.

The ICA may impose fines on firms that fail to provide the information or exhibit the documents requested or, intentionally or negligently, supply incorrect or misleading information.

80 See, in particular, TAR, 27 February 2007, No. 1745; 15 January 2007, No. 203.

The Italian legal system does not provide for special rules on legal privilege in antitrust proceedings. In its decision practice, the ICA generally follows the principles and criteria established by EU case law.

Pursuant to Article 22 of Regulation (EC) No. 1/2003, the ICA may seek the assistance of other national competition authorities to carry out investigative activity in their jurisdiction on its behalf.

In urgent cases, the ICA may order interim measures, which cannot be renewed or extended. If the addressee of the interim measures does not comply with the decision, the ICA may impose a fine of up to 3 per cent of the annual turnover.

The investigations may last for several months and often more than one year. When the ICA considers that it has acquired sufficient evidence, it issues a statement of objections (SO), by which it notifies the companies concerned and any complainants of its objections, at least 30 days before the closing date of the investigation. The SO contains an extensive elaboration of the reasons underlying the ICA's assessment of the case.

If the companies being investigated request to be heard by the ICA, a final hearing takes place, typically on the date of closure of the investigation. After the final hearing, the ICA issues a decision. If the ICA finds that the contested conduct is abusive, it orders to put an end to the infringement within a given time limit. If the infringement is serious, the ICA can impose a fine.

Under Article 14 *ter* of the Competition Act, firms may offer commitments aimed at removing the ICA's competition concerns, within three months from the opening of proceedings. After assessing the suitability of such commitments, including by means of a market test, the ICA may make them binding on the firms concerned and close the proceedings without ascertaining any infringement or imposing a fine. Commitment decisions have become a frequently used enforcement tool.

The ICA's decisions are subject to judicial review by the TAR. The parties may file an appeal within 60 days from receipt of the notifications of the decision. The parties can ask the TAR for a stay of execution of the ICA's decision. Hearings for interim measures are usually granted within a short time of the filing of a notice of appeal. A hearing on the merits of a case usually takes place within one year of the filing of an appeal. If the appeal is denied, the party may appeal to the Council of State.

The ICA's decisions are subject to full judicial review with respect to the imposition of fines. Accordingly, administrative courts may also change the amount of the fine. However, they cannot increase the fine, since this would violate the *non ultra petita* rule.[81]

In principle, the judicial review of substantive findings is limited to a control of legality. Accordingly, courts must assess whether the ICA based its conclusions on accurately stated facts and supported its decision on adequate and coherent grounds.[82] The administrative courts have clarified that the judicial review of substantive findings is strong, effective and penetrating, and also covers the economic analysis carried out by the ICA.[83] However, when complex assessments carried out by the ICA remain questionable, the administrative court

81 See Council of State, 2 March 2009, No. 1190.

82 See Council of State, 19 July 2002, No. 4001 and, more recently, TAR, 10 March 2003, No. 1790.

83 See, for example, Council of State, 6 May 2014, No. 2302; 20 February 2008, No. 597; 8 February 2007, No. 515.

cannot substitute its own assessment for that of the ICA.[84] The limits of judicial review of antitrust decision were confirmed by Article 7(1) of Legislative Decree 19 January 2017, No. 3, implementing Directive No. 2014/104/EU on actions for antitrust damages.[85]

In *Menarini*, in light of the judicial review actually exerted by the administrative courts, the European Court of Human Rights held that the Italian administrative enforcement system is compatible with the right to full and effective access to an independent and impartial tribunal established by Article 6(1) of the European Convention on Human Rights (ECHR).[86]

VII PRIVATE ENFORCEMENT

Victims of abusive conduct may bring private antitrust actions before the competent Italian civil courts to ask for compensation, declarations of nullity, restitution or injunctive relief.

Damages for breach of antitrust rules may be claimed by victims of anticompetitive conduct pursuant to Article 2043 of the Italian Civil Code, according to which 'any act committed with either intent or fault causing an unjustified injury to another person obliges the person who has committed the act to compensate the damages'. The Italian Supreme Court has clarified that consumers also have standing to bring damages actions in tort for breach of the Competition Act.[87]

A collective action system has been recently introduced in the Italian legal system.[88] Pursuant to Article 140 *bis* of the Consumer Code, in case of anticompetitive practices affecting a number of consumers or users, any of them has standing to file a class action with the competent court. At the end of the first hearing, the court decides whether the conditions for the certification of the class action are met.[89] If the class action is admitted, a notice about the lawsuit is published and all consumers or users who claim to have a right homogeneous to that for which the class has been established can join it. The opt-in declaration must be filed with the register of the competent court within a certain time.[90] Consumers and users who opt-in do not assume the role of parties to the proceedings and, thus, do not have procedural powers. If the court eventually finds that the class action is well founded, it orders the defendant to pay a certain sum to each member of the class or, alternatively, establishes the criteria on the basis of which these sums must be calculated.

84 See, e.g., Council of State, 6 May 2014, No. 2302; 24 September 2012, No. 5067.

85 Legislative Decree of 19 January 2017, No. 3, implementing in Italy Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2014, OJ L 349/1.

86 ECHR, Case No. 43509/08, *A. Menarini Diagnostics/Italy*.

87 Supreme Court, 4 February 2005, No. 2207.

88 See Article 140 bis of Legislative Decree No. 206/2005 (Consumer Code). The collective action is applicable only with respect to infringements committed after 15 August 2009.

89 The collective action can be rejected by the court for a number of reasons. For instance, it can be dismissed when the consumer or user concerned has interests conflicting with those of the proposed class or does not seem to be able to protect adequately the class's interests.

90 Individuals can decide not to join the class and file a separate lawsuit on their own.

In addition, pursuant to Articles 139 and 140 of the Italian Consumer Code, consumer associations registered with the Ministry for Productive Activities have standing to request cease-and-desist orders against certain practices that may harm consumer interests, and appropriate measures for correcting or eliminating the detrimental effects thereof.

Damages are limited to the plaintiff's actual losses (i.e., 'out-of-pocket' losses plus loss of profits). Punitive or exemplary damages are not available in the Italian legal system. Plaintiffs can only claim damages that they actually incurred. Where a precise amount cannot be determined, the court may also calculate damages on an equity basis.[91]

The calculation of damages based on loss of income is especially difficult when the injured company could not enter the market due to the abusive conduct. In *Telesystem*,[92] the court commissioned an expert report on losses suffered by a potential first mover into the sector for leased-lines services, which failed to enter this new market because of the dominant firm's refusal to grant access to certain essential facilities. The damage liquidation was based, *inter alia*, on the advantage that the plaintiff would have had as first entrant into the sector for leased-lines services. However, the court considered also that, in a free market economy, monopoly rent, such as that of a first mover, tends to be neutralised by competition within a certain time frame.

Contractual clauses amounting to an abuse of dominant position may be found void. In Avir, the Court of Appeals of Milan stated that the clauses provided for by a gas supply agreement, which imposed an excessive price, were void because they were incompatible with Article 3(a) of the Competition Act, and granted restitution of the abusive overcharge paid by the customer.[93]

As a matter of principle, civil courts do not have the power to permanently enjoin the defendant from repeating the anticompetitive conduct in their final judgments, unless the antitrust violations are also qualified as unfair competition acts pursuant to Article 2598 of the Italian Civil Code.

A plaintiff may obtain interim remedies, including temporary injunctions and any other remedy that the court may deem appropriate to preserve the plaintiff's rights until a final judgment is issued. To this end, the claimant must provide sufficient factual and legal grounds to establish a *prima facie* case, as well as the risk of imminent and irreparable damage.

In some cases, the Italian Supreme Court stated that findings contained in an ICA decision constitute privileged evidence, from which a court may legitimately infer the existence of the alleged infringement, damage and causal link. In principle, the presumption is rebuttable. However, the nature of privileged evidence of the ICA's findings prevents the defendant from arguing against the very same facts and grounds that the ICA relied upon to find a violation of antitrust rules.[94] In a judgment delivered in 2014, the Supreme Court stated that, in principle, the ICA's findings are not binding on civil courts and there is no legal category of privileged evidence distinct from that of legal proof.[95] Nonetheless, the Court

91 Court of Appeal of Naples, 28 June 2007, No. 2513.

92 Court of Appeal of Milan, 18 July 1995 and 24 December 1996.

93 Court of Appeal of Milan, 16 September 2006.

94 Supreme Court, 20 June 2011, No. 13486. As a consequence, the defendant can rebut, for instance, the presumption of a causal link by alleging and proving different and specific factors, which were *ex se* capable of causing the damage or contributed to its causation, but it cannot rely on factors already examined and dismissed by the ICA. See Supreme Court, 10 May 2011, No. 10211; Court of Appeal of Milan, 2 January 2017.

95 Supreme Court, 28 May 2014, No. 11904.

confirmed that the findings contained in an ICA decision have 'high evidentiary value' in proceedings before civil courts.[96] According to lower courts, commitment decisions may also have evidentiary value, as they imply at least that an abuse was considered likely on the basis of the investigation carried out by the ICA.[97]

As to stand-alone private actions, the Supreme Court stated that, in light of the information asymmetry between claimants and defendants and the complexity of antitrust cases, civil courts should not adopt a strict application of the burden-of-proof principle.[98] To ensure an effective application of competition rules in private actions for damages, national courts should use the procedural tools available under Italian law (such as orders to submit documents, requests for information from administrative authorities and expert opinions) to acquire and evaluate data and information useful for establishing the alleged anticompetitive conduct.

On 3 February 2017, Legislative Decree 19 January 2017, No. 3, implementing Directive No. 2014/104/EU on actions for antitrust damages, entered into force. The Decree introduced a number of substantive and procedural provisions to facilitate damages claims by victims of antitrust infringements. It follows the EU Directive, with some minor procedural adjustments. The new procedural rules apply to damages actions brought after 26 December 2014.

Inter alia, the Decree strengthens the rules on disclosure of evidence. Upon motivated request, national courts can order the parties to civil proceedings or third parties to disclose relevant evidence in their possession. Courts have to specifically indicate the evidence to be disclosed and, in case of confidential information, they must adopt the necessary measures to protect it (e.g., by redacting sensitive information). If a piece of evidence cannot be produced by the parties or any third party, courts can order the exhibition of the documents in the case file of a national competition authority – apart from leniency statements and settlement submissions – provided that certain conditions are met.

According to the Decree, ICA's decisions and administrative courts' definitive judgments constitute legal proof of antitrust infringements. Nevertheless, the claimant still has to prove the other requirements for civil liability, including the causal link between conduct and damage. Decisions of competition authorities and courts of other Member States constitute evidence that may be considered by national courts, together with other available evidence.

Damages claims based on antitrust infringements are time-barred after five years. However, the limitation period is stayed during ICA proceedings and for an additional year from the moment the infringement decision becomes final, or the proceedings otherwise terminate.

The Decree confirms the principle that victims of antitrust infringements are entitled to full compensation, but overcompensation should be avoided. The alleged infringer may claim that the claimant has passed on all or part of the overcharge to its customers (passing-on defence). In this case, the burden of proof lies with the defendant, which may also ask for a judicial order of disclosure of evidence from the claimant or third parties.

96 In the case at hand, the Court held that the ICA decision was sufficient to prove the alleged infringement, its capability to harm customers and the existence of damage to customers in general.

97 Tribunal of Milan, 28 July 2015, No. 9109.

98 Supreme Court, 4 June 2015, No. 11564; see also Supreme Court, 1 April 2016, No. 6366.

The parties to a cartel are jointly and severally liable for the damage caused, but this principle does not apply when: (1) the cartelist is a small or medium enterprise (SME); or (2) the cartelist received full immunity in the context of leniency applications.

The Decree attributes exclusive competence over actions for antitrust damages to the specialised business divisions of the Courts of Milan, Rome and Naples, which are competent for Northern, Central and Southern Italy, respectively.

VIII FUTURE DEVELOPMENTS

The effects-based approach to abuse of dominance cases does not seem to have established itself in Italian decision practice and case law. The ICA's and national courts' decisions frequently rely on certain traditional statements of EU case law, which reflect the formalistic and structural approach adopted in the past. They usually consider it sufficient to show that the contested conduct tends to restrict competition or is capable of having anticompetitive effects on the basis of an abstract analysis, without carrying out a comprehensive economic assessment of the impact of the practice.

The transition towards an effects-based approach would require a stronger and more penetrating judicial review by administrative courts. The approach of administrative courts in the review of antitrust decisions still seems erratic. In some cases, such as *TNT/Poste Italiane*, they have engaged in an in-depth review of the decision, also taking into account grounds of appeal raising complex economic issues. In other cases, however, the administrative courts seemed to limit themselves to reiterating the ICA's views, also through extensive references to the contested decision, or have simply overlooked some of the arguments put forward by the parties, without providing adequate explanations as to why they should have been dismissed. A more stringent judicial review of antitrust decisions is necessary not only to foster the transition towards an effects-based approach but also to guarantee full compliance with the fundamental right of access to an independent and impartial tribunal established by Article 6(1) of the ECHR, as interpreted by the European Court of Human Rights in *Menarini*.[99] Unfortunately, Legislative Decree 19 January 2017, No. 3, implementing Directive No. 2014/104/EU, confirmed that the judicial review of antitrust decisions does not extend to complex assessments carried out by the ICA, when these assessments are disputable.

Many cases decided by the ICA and national courts in the past few years have concerned highly regulated sectors. The interaction between competition law and sector-specific regulation seems to give rise to an increasing risk of conflicts of jurisdiction and interferences between different authorities. In some cases, the application of competition rules has led to the imposition of obligations incompatible with sector-specific rules, which has often been criticised by administrative courts. In other cases, the application of competition rules seemed to supplement sector-specific regulation by imposing additional and stricter obligations. The use of competition law to impose additional and stricter obligations on firms already subject to pervasive sector-specific regulation also raises delicate issues as to the interference and overlapping between the two sets of rules.

The *Wind-Fastweb/Condotte Telecom Italia* case is a notable example of the risk of conflicts and inconsistencies between the two sets of rules. Access regulation in the electronic communications sector in Italy (and many other states) was traditionally based on the equivalence of output principle, according to which access services offered by the incumbent

99 Judgment of 27 September 2011, *A. Menarini Diagnostics SRL v. Italy*, Application No. 43509/08.

to alternative operators must be comparable to the services it provides to its retail division in terms of functionality and price, but they may be provided through different systems and processes. By contrast, in its 2015 ruling,[100] the Council of State seemed to consider that differences in supply processes (provided for by sector regulation) are problematic in themselves, because they inevitably entail a different treatment of external and internal requests for access services. In order to reduce the risk of further antitrust proceedings and damages actions, in 2016 the incumbent introduced a new equivalence model, based on the use of the same systems and processes for external and internal requests. Thus, antitrust intervention eventually resulted in a radical shift in the regulatory model, which went beyond the remedies imposed by sector-specific regulation.

In the past few years, the ICA and Italian courts have also shown more activism in the assessment of new types of abuse. Some decisions belong to the controversial line of cases concerning the misuse of rights and legitimate interests arising from sector-specific rules, through the initiation of administrative or judicial proceedings aimed at obstructing competitors' activity. In *Pfizer*, the Council of State clarified that this type of abuse – which has been inspired by EU case law[101] – is:

> *[…] nothing but the specification of the broader category of abuse of right, whose precondition is the existence of a right which is used artificially, for a purpose which is incoherent with that for which that right is granted: in the case at issue, the exclusion of competitors from the market.*[102]

Even the exercise of contractual rights, such as the right to termination of a contract, has been considered abusive on the ground that it was strategically exercised with the only purpose of excluding a competitor.[103]

The misuse of rights and legitimate interests lies at the boundary of antitrust liability. An abusive exercise of a right or legitimate interest may be found when the contested conduct is characterised by an additional element that is intrinsically objectionable, such as the provision of false or misleading information to a regulatory authority, or when it is part of a broader exclusionary strategy, implemented also through other anticompetitive practices.[104] The distinction between legitimate exercise and abuse of right becomes much more complex, however, when a dominant firm merely exercises its rights in administrative or judicial proceedings to (artificially) protect its position and interests.

The ICA and administrative courts have often emphasised the dominant firm's alleged exclusionary intent, which seems to be a crucial factor in the assessment of the alleged abuse;[105] however, the distinction between abuse and legitimate exercise of right should not be based merely on the dominant firm's intent. Reference to the dominant firm's exclusionary intent opens the door to considerable uncertainty and to a high margin of appreciation in the assessment of corporate statements, internal documents and commercial choices. In addition,

100 Council of State, 15 May 2015, No. 2479; TAR, 8 May 2014, No. 4801.

101 In particular, in *AstraZeneca*, the Commission and the General Court held that the firm concerned had abused its dominant position by obtaining a supplementary protection certificate on the basis of misleading information and representations provided to the competent authorities. See Case C-457/10 P, *AstraZeneca v. Commission*, ECLI:EU:C:2012:770.

102 Council of State, 12 February 2014, No. 693.

103 Decision of 25 March 2015, No. 25397, A474, *SEA/Convenzione ATA*; TAR, 23 January 2017, No. 1188.

104 See, e.g., decision of 3 September 2015, No. 25035, A476, *Conai-Gestione rifiuti da imballaggi in plastica*.

105 Council of State, 12 February 2014, No. 693. See also, *inter alia*, Council of State, 8 April 2014, No.1673.

a firm's intent is not in itself sufficient to distinguish legitimate from anticompetitive conduct. Indeed, the aim pursued by any firm competing on the market is, in a sense, to prevail against, and eventually to exclude, its competitors. Moreover, in many cases, the rationale behind the rules invoked by the dominant firm is just to exclude or limit competition from other players. This is the case, for instance, with the rules granting and protecting intellectual property rights, as well as those allowing competitors to access a facility or to carry out an economic activity only within certain limits and under certain conditions.[106]

The judgment delivered by the TAR in *Arenaways* in 2014 seems to confirm that, as a general rule, firms may not be deprived of the chance to exercise their rights and legitimate interests, even though this may negatively affect competitors' access to the market; however, the boundaries between legitimate exercise and abuse of right remain unclear and need to be clarified by the competent authorities in the coming years.

As to the enforcement policy, in the past few years the ICA has adopted a more rigorous approach in the assessment of commitments offered by parties. In the past, the ICA often used the commitment procedure to exercise *lato sensu* regulatory functions, by negotiating and making legally binding measures aimed at improving the competitive conditions or at benefiting consumers, even in the absence of a clear and direct link between the commitments and the competitive concerns identified by the ICA. From the introduction of commitments procedures, in 2006, to December 2010, the ICA made extensive use of commitment decisions, which represented around 85 per cent of decisions concluding abuse of dominance cases (28 out of 33), but this trend reversed a few years ago, also due to some rulings by the administrative courts, which have constrained the ICA's discretion in commitment procedures. In the period from 2011 to 2014, the ICA issued commitment decisions only in slightly more than 30 per cent of investigations concerning abuses of dominance.[107]

In 2015 and 2016, commitment decisions represented the majority of abuse of dominance cases closed by the ICA. In both years, the ICA accepted the commitments offered by the parties in two out of three cases. In addition, at the beginning of 2017, it issued two additional commitment decisions. Compared to the past, the ICA now seems to pay more attention to the nexus between the competitive concerns and the commitments offered by the parties. Furthermore, the fact that lower courts tend to consider that commitment decisions may also have evidentiary value may reduce the incentive of firms to offer voluntary remedies.[108] Nonetheless, negotiated enforcement again seems to play a central role in antitrust decision practice. This may have both positive and negative effects. Commitments decisions may reduce the risks for firms, and enable the ICA to address more rapidly the issues raised by potentially anticompetitive practices. On the other hand, an extensive use of commitment decisions may negatively affect the development of case law on abuse of dominance, as these decisions do not contain a complete and detailed analysis of the alleged infringement, and the robustness of the reasoning and interpretative choices is normally not tested before courts.

106 A narrower interpretation of the concept of abuse of dominance is necessary, in particular, in cases concerning the exercise of fundamental rights enshrined in the EU Charter of Fundamental Rights or Member States' constitutional tradition, such as the right of access to justice.

107 Two out of six, three out of nine, one out of five and one out of two, respectively.

108 Tribunal of Milan, 28 July 2015, No. 9109.

Chapter 22

SPAIN

Francisco Enrique González-Díaz and Ben Holles de Peyer[1]

I INTRODUCTION

The key Spanish law provision regulating the abuse of a dominant position (ADP) is Article 2 of the 2007 Spanish Competition Act (LDC).[2] Article 2 is drafted in a similar way to Article 102 of the Treaty on the Functioning of the European Union (TFEU), the essential differences being:

a the territorial reach of the prohibitions (while the LDC prohibits ADP 'in all or part of the national market', the TFEU forbids ADP 'within the internal market or in a substantial part of it [...] in so far as it may affect trade between Member States');

b the inclusion of an additional example in the list of potentially abusive conduct (i.e., '[t]he unjustified refusal to satisfy the demands of purchase of products or provision of services'); and

c the inclusion of Article 2(3) of the LDC, establishing that such prohibition also applies when dominance derives from the law.

Other key provisions include Articles 4 to 6 (legal exemptions, conduct of minor importance and findings of inapplicability), Chapters I and II of Title IV (antitrust procedure) and Title V of the LDC (sanctions). Moreover, the Spanish Competition Rules (RDC)[3] implement the LDC, regulating, notably, a number of procedural issues (e.g., investigation and interim measures). Furthermore, the National Markets and Competition Commission (NMCC)[4] has adopted 'soft law' measures, in particular, a Communication on the quantification of sanctions[5] and Guidelines on the termination of infringement proceedings by means of commitments.[6]

These rules apply to private and public undertakings alike. Indeed, according to the LDC and in line with EU case law, the notion of 'undertaking' refers to any person or entity carrying out an economic activity, regardless of their legal statute and form of financing.

1 Francisco Enrique González-Díaz is a partner at Cleary Gottlieb Steen & Hamilton LLP and Ben Holles de Peyer is an LLM student at Harvard Law School.

2 Law 15/2007, 3 July.

3 Royal Decree 261/2008, 22 February.

4 Throughout this chapter 'NMCC' refers to both the National Markets and Competition Commission and the now defunct National Competition Commission.

5 6 February 2009. In 2015, the Supreme Court of Spain (TS) handed down a judgment setting out a new interpretation of Article 63(1) of the LDC, on sanctions. It is unclear at this stage whether the NMCC will issue a new communication on the quantification of sanctions in accordance with such interpretation.

6 28 September 2011.

Although, *a priori*, public institutions are not subject to these provisions when exercising public prerogatives,[7] the NMCC has interpreted the notion of 'economic activity' widely and even seems to have upheld the applicability of antitrust rules in a case where a public entity did not act as an economic operator, but merely facilitated the commission of an antitrust infringement.[8]

II YEAR IN REVIEW

The NMCC adopted only one fining decision in 2016 for ADP, namely, *Istobal* (refusal to deal).[9] This case led to the imposition of a €638,770 fine.

The total number of fining decisions and level of fines for ADP in 2016 were significantly lower than in recent years. In 2015 the NMCC imposed one €2.79 million fine for ADP.[10] In 2014, the NMCC adopted four fining decisions for ADP, which led to the imposition of fines totalling €12.62 million.[11] In 2013, the NMCC imposed ADP fines reaching a total of €3.5 million, in three fining decisions.[12] In 2012, the NMCC adopted six fining decisions, which imposed fines amounting to €162.4 million, including several key decisions such as *Transporte Televisión*[13] (margin squeeze), *Endesa Instalación*[14] (leveraging and exploitation) and *Mensajes Cortos*[15] (excessive pricing).

The reduction in the number and level of fines in 2016, compared with 2012, is likely because of the specific circumstances of the cases at hand and not because of a general reduction of fines trend in ADP cases.

The following table shows the ADP cases that are currently pending before the NMCC:

7 For a list of situations in which state action is not subject to antitrust law, see: Lillo, C, 'La normativa de competencia: su aplicación a la Administración Pública', *Gaceta Jurídica de la Unión Europea y de la Competencia*, July–August 2011, No. 22, pp. 27–28. See also: González-Díaz, F E, 'Algunas reflexiones sobre las recientes Sentencias del Tribunal de Justicia en los asuntos Ladbroke y Comisión contra Italia, *Gaceta Jurídica de la Unión Europea y de la Competencia*, April–May 1999, No. 200.

8 Case S/0167/09, Productores de Uva y Vinos de Jerez, 6 October 2011. See: Navarro, E and Rambal, M, 'La aplicación de las normas de defensa de la competencia a las Administraciones Públicas que no actúan como operadores económicos en el Mercado', *Gaceta Jurídica de la Unión Europea y de la Competencia*, January–February 2013, No. 31.

9 Case S/DC/0540/14, Istobal, 30 June 2016.

10 Case S/0500/13, *AGEDI/AIE Radio*, 26 November 2015.

11 In 2014, the NMCC adopted the following fining decisions for ADP: *Correos 2* (Case S/0373/11 on margin squeeze), *Endesa Instalación* (Case S/0446/12 on excessive pricing), *Criadores de Caballos* (Case S/0345/11 on leveraging) and *SGAE-Conciertos* (Case S/0460/13 on excessive pricing).

12 In 2013, the NMCC adopted the following fining decisions for ADP: *Correos* (Case S/0341/11 on refusal to deal), *AGEDI* (Case S/0360/11 on unfair, non-transparent and discriminatory management of intellectual property rights) and *Tanatorios Coslada* (Case SAMAD/12/10 on refusal to deal).

13 Case S/0207/09, *Transporte Televisión*, 8 February 2012.

14 Case S/0211/09, *Endesa Instalación*, 21 February 2012.

15 Case S/0248/10, *Mensajes Cortos*, 19 December 2012.

Case Reference	Sector	Conduct	Case opened*
S/DC/0601/16 *Laboratorios Aspen*	Supply of pharmaceutical products	Alleged refusal to supply certain pharmaceutical products and excessive pricing	25 January 2017
S/DC/0580/16 *Criadores de Caballos 2*	Horse breeding	Unknown	19 April 2016
S/DC/0567/15 *Estudios de Mercado Industria Farmacéutica*	Market reports relating to the pharmaceutical industry	Terms in contracts between a supplier of reports relating to the pharmaceutical industry and wholesale distributors of pharmaceutical products	16 December 2015
S/DC/0557/15 *Nokia*	GSM-R (Global System for Mobile Communications – Railway) infrastructure maintenance	Alleged excessive and discriminatory pricing, and refusal to deal	19 November 2015
* 'Case opened' refers to the date on which the NMCC opened its investigation (where known) or announced that it had opened an investigation.			

III MARKET DEFINITION AND MARKET POWER

The criteria used by the NMCC to define the relevant market are practically identical to those described in the Commission Notice on the definition of the relevant market and applied by the Commission in its decisional practice. In fact, according to well-settled decisional practice, the provisions of the Notice are fully applicable to Article 2 of the LDC cases.[16] No formal provisions exist in Spanish law or in the 'soft law' regulating market definition. Although the NMCC is often not very detailed in justifying its specific choice of market definition, this tendency is changing and its analysis is progressively becoming more sophisticated and grounded in economics.[17]

Given the lack of a provision defining 'dominant position', this task has been carried out by the NMCC, which, since 1999, has interpreted this notion in line with EU case law. Indeed, in 1999 the NMCC established that such a position exists when an undertaking has a sufficient degree of economic power and independence in the market to enable it to modify prices or commercial conditions, or both, without taking account of the reactions of competitors or consumers.[18] This definition has been repeated by the NMCC, with small variations, in its more recent decisions.[19]

The specific criteria used by the NMCC to assess dominance are very similar to those used by the Commission. For instance, in *Bacardí*, it was stated that to establish dominance it is necessary to focus on both the structure of the undertaking concerned (resources and methods of production, methods of presentation, transport and sales, technology and vertical integration) and the competitive environment (number and strength of competitors, market shares and sales volumes, prices and barriers to entry).[20] In *McLane/Tabacalera*, however, it

16 See, for example, case 677/05, *Distribuidoras Prensa Ciudad Real*, 24 April 2006, p. 10.

17 See, for example, *Mensajes Cortos*, *supra*, pp. 129–139.

18 See, for example, case 441/98, *Electra Avellana*, 7 July 1999, p. 9.

19 See, for example, case S/0157/09, *EGEDA*, 2 March 2012, p. 52; case S/0220/10, *SGAE*, 3 July 2012, p. 37; *Correos*, *supra*, p. 20; *AGEDI*, *supra*, p. 41; *AGEDI/AIE Radio*, *supra*, p. 48.

20 Case R 362/99, *Bacardí*, 30 September 1999, p. 8.

was established that the *Bacardí* criteria constitute the basis of a 'structural' approach and that account may also be taken of behavioural elements and of the relationship between clients and providers and the undertaking in question.[21]

Finally, it is noteworthy that the NMCC interprets Article 2 of the LDC, which refers to '[a]ny abuse by one or more undertakings', as empowering it to pursue the collective ADP.[22]

IV ABUSE[23]

The NMCC has also adopted the definition of 'abuse' developed by the EU courts in numerous decisions, such as in *Retevisión/Telefónica*.[24] Furthermore, the TS has explicitly established that Article 2 of the LDC must be interpreted in light of the EU case law concerning Article 102 of the TFEU.[25] It has also been confirmed that Article 2 of the LDC and Article 102 of the TFEU do not prohibit dominance in itself but only the use of such a position to impose commercial conditions and to obtain advantages that the undertaking would not be able to obtain under normal competitive conditions.[26]

In line with *Michelin I* and subsequent ADP EU case law, the NMCC and the courts have held that dominant undertakings have a special responsibility not to allow their conduct to impair genuine undistorted competition.[27] As to the list of activities contained in Article 2 of the LDC, it is well established that it must be interpreted as being open-ended.[28]

ADP has generally been described by the NMCC as constituting an objective concept[29] and thus, *a priori*, intent should be irrelevant in determining whether conduct is abusive. However, traditionally, intent has played a significant role in distinguishing between abusive conduct and competition on the merits. In fact, it has even been held on some occasions that intent is a necessary element that must be taken into account when assessing the lawfulness of allegedly anticompetitive behaviour.[30] It is also noteworthy that the NMCC's early decisional practice did not consider it necessary to prove actual anticompetitive effects to establish that conduct was abusive.[31]

In an attempt to clarify the conditions of the notion of 'abuse', in 2006, the TS established that the decisive element in identifying an abuse is not the intention of the

21 Case 486/00, *McLane/Tabacalera*, 24 April 2002, pp. 20–21.

22 See, *inter alia*: case 427/9, *Electra Caldense*, 19 February 1999, pp. 9–10; case 535/07, *Fonogramas*, 9 December 2008, p. 24; *Mensajes Cortos*, *supra*, pp. 155–165.

23 See González-Díaz, F E, Temple Lang, J, 'Chapter 3. The Concept of Abuse', in: González-Díaz, F E, Snelders, R, *EU Competition Law Volume V. Abuse of Dominance Under Article 102 TFEU* (Claeys & Casteels: Daventer, 2013), pp. 115-158.

24 Case 456/99, *Retevisión/Telefónica*, 8 March 2000, p. 28.

25 TS judgment in appeal 4495/1998, 8 May 2003, point of law 7.

26 *SGAE*, *supra*, p. 37.

27 See, for example, case S/0003/07, E.On, 8 November 2011, p. 34; *SGAE-Conciertos*, *supra*, pp. 30–31; *Criadores de Caballos*, *supra*, pp. 28, 30, 32, 39, 41, 49, 59 and 61. See also TS judgment in appeal 3042/2008, 10 February 2011, point of law 6.

28 TS judgment in appeal 4495/1998, *supra*, point of law 7.

29 *Retevisión/Telefónica*, *supra*, p. 28.

30 See, for example, *Retevisión/Telefónica*, *supra*, p. 29.

31 Case 464/99, *Aseguradoras Médicas Vizcaya*, 6 July 2000, p. 17.

dominant undertaking, but rather the objectively illegal nature of its conduct.[32] It was stated for instance, that the willingness to prevent an operator from entering the market may not be objectionable in itself, if implemented through legitimate means. However, although such a statement places the emphasis on objective considerations, it does not definitively rule out the need to take intent into account.

In this context, it has been noted that even if this test does not formally require the proof of anticompetitive effects, in practice, it is very similar to an effects-based approach.[33] It has been argued that today Article 2 of the LDC leaves no room for *per se* abuses and, therefore, a given conduct may only be deemed contrary to such a provision if it is liable to give rise to anticompetitive effects, even if these effects do not actually materialise in the specific case.[34] Recent NMCC decisions confirm this shift towards an effects-based approach.[35] This said, the relevance of effects and intent in the assessment of potentially abusive conduct must logically be analysed by reference to the specific forms of abuse.

Finally, although the NMCC has often been criticised for not being sufficiently rigorous in its economic assessment of exclusionary practices,[36] recent decisions such as *Transporte Televisión* suggest that the NMCC is increasingly willing to base its decisions on solid economic grounds and analysis.[37]

i Exclusionary abuses

In its *Altadis* judgment on predatory pricing,[38] drawing on the criteria set out in *Akzo* and *Tetra Pak*, the TS held that when prices are set below average variable costs, they are presumed to be abusive, while if they are set at a level above average variable costs but below average total costs, they are only deemed abusive if they constitute part of a strategy to exclude competitors. The TS concluded that the decisive element defining predation was the intention to eliminate a competitor. While in the former case such intention would be presumed, in the latter case it must be proven.

In *Transporte Televisión*,[39] the NMCC fined Abertis Telecom for having abusively squeezed the margin between the wholesale prices at which access was granted to digital terrestrial television (DTT) transmission centres and the retail prices for DTT signal transport

32 TS judgment in appeal 9174/2003, 20 June 2006, point of law 8.

33 Gutiérrez, A, 'Artículo 2. Abuso de posición dominante', in: Massaguer, J, Folguera, J, Sala Arquer, JM, Gutiérrez, A, *Comentario a la Ley de Defensa de la Competencia* (Civitas: Pamplona, 2010), pp. 203–204. See also González-Díaz, F E, Temple Lang, J, 'Chapter 3. The Concept of Abuse', in: González-Díaz, F E, Snelders, R, *EU Competition Law Volume V. Abuse of Dominance Under Article 102 TFEU* (Claeys & Casteels: Daventer, 2013), pp. 154–156.

34 Dorronsoro, C, 'Artículo 2. Abuso de posición dominante', in: Odriozola, M, Irissarry, B, Derecho español de la competencia: Comentarios a la Ley 15/2007, Real Decreto 261/2008 y Ley 1/2002 (Bosch: Barcelona, 2008), pp. 149–150. See also: González-Díaz, F E, Temple Lang, J, 'Chapter 3. The Concept of Abuse', in: González-Díaz, F E, Snelders, R, *EU Competition Law Volume V. Abuse of Dominance Under Article 102 TFEU* (Claeys & Casteels: Daventer, 2013), pp. 154–156.

35 See, for example, *Transporte Televisión*, *supra*, pp. 135–139; case S/0391/11, *Llamadas Móviles*, 6 March 2014, pp. 65–68; *AGEDI/AIE Radio*, *supra*, pp. 73–76.

36 See: Ortiz, L, Ibáñez, P, 'Evolving priorities and rising standards: Spanish law on abuses of market power in the light of the 2008 Guidance Paper on Article 82 EC', in: Pace, LF, *European Competition Law: The Impact of the Commission's Guidance on Article 102* (Edward Elgar: Cheltenham, 2011), pp. 90–94.

37 See, for example, *Transporte Televisión*, *supra*, pp. 77–92 and 118–135.

38 TS judgment in appeal 915/2002, 13 December 2004, point of law 7.

39 *Transporte Televisión*, *supra*.

services. The NMCC held that Abertis had control over essential inputs and, after applying the 'as-efficient competitor test', concluded that such conduct constituted ADP, insofar as it hindered the entry of competitors in the DTT signal transport and distribution market. The NMCC noted that entry in the retail market was both technically viable and economically possible and thus the lack of effective competitors could only be the result of the pricing policy adopted by Abertis.

The NMCC's recent decisions in *Llamadas Móviles*, *Correos 2* and *Telefónica* have confirmed that the key test to determine whether a margin squeeze has taken place is the 'as-efficient competitor test'.[40] In *Llamadas Móviles* the NMCC also confirmed that proving the existence of exclusionary anticompetitive effects is essential to conclude that a margin squeeze constitutes a violation of Article 2 of the LDC and Article 102 of the TFEU.[41, 42]

The NMCC decision in *Iberia*[43] constitutes a key precedent on loyalty rebates. This case concerned a target rebate scheme whereby travel agencies benefited from rebates only if their purchases had increased in comparison with their purchases in the previous year. These rebates were analysed in light of the criteria set out in *Hoffmann La Roche* and *Michelin* and were deemed to be abusive insofar as they gave rise to harm to consumers and competitors.

In *Unión Española de Explosivos*[44] the TS assessed exclusivity clauses in light of Article 2 of the LDC. The TS held that such clauses constituted part of a foreclosure strategy engaged in to prevent potential competition. It has been argued that while exclusivity clauses had been traditionally considered as *per se* abuses by the NMCC, this approach changed in *Airtel/Telefónica*, where the NMCC applied an effects-based approach to exclusivity,[45] and as a result of the *de minimis* rule contained in Article 5 of the LDC.[46]

As regards leveraging practices, in *BT/Telefónica*[47] the NMCC considered that Telefónica had unlawfully tied the renting of international circuits to that of national circuits, where competition was less intense, which had the effect of restricting potential competition. In recent years the NMCC has imposed severe fines on several energy companies for having engaged in leveraging practices. For instance, in *Endesa Instalación*,[48] this company was deemed to have taken advantage of its position in the distribution market to increase its market power on the neighbouring market for electrical installation work (i.e., by making use of information to which it had privileged access because of its status as a distributor, offering to carry out installation work for large customers).[49]

Regarding refusal to deal, it has been noted that the NMCC has generally been more willing to consider such conduct abusive when the company requesting supply was already

40 *Llamadas Móviles*, *supra*, p. 66; *Correos 2*, *supra*, pp. 30, 31 and 36.; Case S/0409/12, Telefónica, 29 October 2015, pp. 6–7.

41 *Llamadas Móviles*, *supra*, pp. 65–68.

42 See: González-Díaz, F E, Padilla, J, 'Chapter 5. Margin Squeeze', in: González-Díaz, F E, Snelders, R, *EU Competition Law Volume V. Abuse of Dominance Under Article 102 TFEU* (Claeys & Casteels: Daventer, 2013), pp. 229–317.

43 Case 514/01, *Iberia*, 1 April 2002.

44 TS judgment in appeal 4699/2003, 4 April 2006.

45 Case 413/97, *Airtel/Telefónica*, 26 February 1999, p. 40.

46 Gutiérrez, *supra*, pp. 205–206.

47 Case 412/97, *BT/Telefónica*, 21 January 1999.

48 Case S/0211/09, *Endesa Instalación*, *supra*, pp. 40–48.

49 See similarly: case S/0089/08, Unión Fenosa Instalación, 20 September 2011; case 2795/07, Hidrocantábrico Instalación, 20 September 2011; E.On, *supra*.

a client or competitor of the dominant undertaking and when such refusal constituted an absolute refusal to deal.[50] In *McLane/Tabacalera*, the NMCC concluded that by refusing to supply certain products, Tabacalera abused its dominant position since the products in question were indispensable to compete in the wholesale distribution market.[51] Tabacalera was deemed to have attempted to foreclose potential competition to protect its position in the market, which had recently been liberalised. In an older case, *Iasist/3M*,[52] a refusal to license case, the NMCC considered such conduct abusive despite the lack of indispensability, given the 'excessive influence' that this conduct could have on the competitive conditions of the market in which the complainant operated.

In *Correos*, a more recent refusal-to-deal case, the NMCC fined Correos, the Spanish public postal services operator and owner of the public postal network, for ceasing to supply competitors with wholesale access services, in particular, those related to the delivery of administrative notifications. The NMCC found that this conduct was abusive because (1) access to the Correos network was necessary to effectively compete in the downstream market for the delivery of administrative notifications, (2) this network could not be replicated and (3) such conduct was not objectively justified.[53]

ii Discrimination

According to Article 2(2)(d) of the LDC, discriminatory pricing may be abusive if it unjustifiably places certain competitors at a disadvantage. In recent years there has been a considerable amount of ADP enforcement in this field. For instance, in *Mediapro*, the NMCC considered that by engaging in unjustified discrimination in licensing the use of broadcasting rights, Mediapro had hindered competition in the market for the resale of audiovisual broadcast rights of football matches and in the downstream television markets (especially pay TV).[54]

The NMCC has also focused on discrimination in several cases concerning collecting societies.[55] For instance, in *AGEDI/AIE Radio*, the NMCC concluded that the remuneration system created by two collecting societies for the use of music by radio stations was in breach of Article 2 of the LDC and Article 102 of the TFEU, as it unjustifiably placed certain radio stations that were subject to higher fees at a competitive disadvantage.[56]

iii Exploitative abuses

Exploitative abuses are at the forefront of the NMCC's enforcement priorities. This lies in stark contrast to the Commission's quasi-exclusive focus on exclusionary abuses.[57] By far the

50 Gutiérrez, *supra*, p. 184.

51 *McLane/Tabacalera*, *supra*, p. 25.

52 Case 517/01, *Iasist/3M*, 5 April 2002.

53 *Correos*, *supra*, pp. 21–36.

54 Case S/0153/09, *Mediapro*, 17 March 2011.

55 See: case 2785/07, *AIE*, 23 February 2011; case S/0297/10, *AGEDI/AIE*, 14 June 2012; *SGAE*, *supra*; *AGEDI*, *supra*; *AGEDI/AIE Radio*, *supra*.

56 *AGEDI/AIE Radio*, *supra*.

57 It has been argued that both the sheer number of ADP infringement decisions adopted by the Spanish authorities (nearly three times more than the Commission from 1992 to 2009) and the large proportion of exploitative abuses cases (34 out of 74) reflect the fact that Spanish ADP enforcement may be at a different stage of development from that of Commission Article 102 of the TFEU enforcement. See: Ortiz, Ibáñez, *supra*, pp. 85–87.

largest fine in recent years was levied on three telecommunications companies for excessive pricing.[58] In addition, two out of four fining decisions for ADP in 2014 concerned excessive pricing.[59]

In the past, a number of benchmarks have been used to determine whether prices are excessive (e.g., historical price data, production costs and costs in other competitive geographic markets). In recent cases, the NMCC has relied on a variety of benchmarks, such as, among others, those contained in regulatory prescriptions,[60] price levels in other EU Member States[61] and prices charged by the same undertaking to operators in other sectors.[62]

In *Mensajes Cortos* the NMCC concluded that three mobile network operators had priced termination services at an excessively high level, leading to higher retail prices for SMS and MMS services users. In reaching these conclusions, it was noted, *inter alia*, that: (1) prices of termination services had been high and stable over the relevant period, despite considerable traffic increase and cost reductions; and (2) wholesale termination services prices for short messages in Spain were among the highest in Europe.[63]

In *Endesa Instalación* the NMCC laid out a non-exhaustive list of: (1) the structural market conditions under which excessive pricing is likely; and of (2) the benchmarks that may be used to determine whether prices are excessive.[64] As regards the former, the NMCC concluded that excessive pricing is likely when prices are set by a company that is in a monopoly or quasi-monopoly situation and in markets characterised by the existence of high barriers to entry and relatively inelastic demand. As regards the latter, the NMCC concluded that prices may be deemed excessive by reference to the costs of the product or service, or to the prices of the product or service in a competitive situation, in other geographical markets or in a different time period.[65]

In *SGAE-Conciertos*, the NMCC established that the fees charged by the SGAE, a collecting society, as consideration for the right to publicly play musical content subject to copyright in concerts in Spain, were excessive and thus in breach of Articles 2 of the LDC and 102 of the TFEU. The NMCC carried out an in-depth analysis of the rates charged by collecting societies in other EU Member States and observed that the fees charged by the SGAE were significantly higher than the rates paid in 73 per cent of the EU Member States and in the United States.[66] The NMCC concluded that such fees had an exploitative effect on concert promoters and could indirectly prejudice consumers by leading to higher ticket prices.[67]

58 *Mensajes Cortos*, *supra*. The NMCC imposed a fine of €119.96 million on Telefónica, Vodafone and Orange.

59 Case S/0446/12, *Endesa Instalación*, *supra*, and *SGAE-Conciertos*, *supra*.

60 Case S/0211/09, *Endesa Instalación*, *supra*, p. 51.

61 *EGEDA*, *supra*, pp. 41–44 and 55–60; *SGAE-Conciertos*, *supra*, pp. 17–18 and 22–26.

62 *EGEDA*, *supra*, pp. 41–44 and 55–60.

63 *Mensajes Cortos*, *supra*, pp. 141–154.

64 Case S/0446/12, *Endesa Instalación*, *supra*, pp. 25–26.

65 See also, for example, case S/0501/13, *Continental Automotive*, 15 October 2015, p. 31.

66 *SGAE-Conciertos*, *supra*, pp. 17–18 and 22–26.

67 *SGAE-Conciertos*, *supra*, pp. 25–26.

V REMEDIES AND SANCTIONS

i Sanctions

The key provisions concerning sanctions are Articles 61 to 70 of the LDC.

As a general rule ADP is considered a serious infringement, punishable with a fine of up to 5 per cent of the total turnover of the infringing undertaking in the immediately preceding business year. However, when ADP is committed by an undertaking operating in a recently liberalised market, such an undertaking has a market share near monopoly or it enjoys special or exclusive rights, it will be considered a very serious infringement and the NMCC may levy fines of up to 10 per cent of such turnover.

The aggravating and mitigating circumstances provided for in the LDC are very similar to those enshrined in the 2006 Commission Fining Guidelines. Certain differences, however, exist as regards the regulation of mitigating factors: (1) the LDC explicitly provides that the NMCC may reduce the fine due to the adoption of actions intended to repair the damage; and (2) according to the Fining Guidelines, the Commission may reduce the fine where the undertaking provides evidence that the infringement has been committed as a result of negligence and where the anticompetitive conduct has been authorised or encouraged by public authorities or legislation.

The NMCC may also impose fines of up to €60,000 on the legal representatives and managers of the infringing undertakings and periodic penalty payments (PPPs) of up to €12,000 per day under specific circumstances.

ii Behavioural remedies

The NMCC has often adopted behavioural remedies in ADP cases. For instance, in the *SGAE* case, the SGAE was ordered to withdraw a specific clause from its contracts, which was deemed unfair and discriminatory.[68] In *AIE*, this undertaking was given two months to proceed to the publishing of the decision and to send it to certain clients, under threat of PPPs.[69] In *Correos*, this company was given two months to grant private postal operators access to its network.[70]

Moreover, the NMCC may adopt interim measures, either *ex officio* or at the request of one of the parties, at any moment throughout the proceedings. These measures may consist of: (1) cease-and-desist orders or orders imposing specific obligations to prevent potential damage; or (2) securities to ensure the availability of funds to face future damages claims. The conditions for the adoption of interim measures are the existence of *fumus boni iuris* and *periculum in mora*.

iii Structural remedies

Structural remedies may only be imposed in the absence of equally effective behavioural remedies or when these remedies would be more onerous for the undertaking in question than the imposition of structural remedies. The NMCC has not yet imposed this type of remedy in its Article 2 of the LDC and Article 102 of the TFEU enforcement.

68 *SGAE*, *supra*, p. 49.

69 *AIE*, *supra*, p. 42–43.

70 *Correos*, *supra*, p. 41.

VI PROCEDURE

The NMCC ADP infringement proceedings are regulated in Chapters I and II, Title IV of the LDC, as well as in Chapters I and II, Title II of the RDC. These proceedings are divided into two phases, before two different bodies within the NMCC: (1) the Competition Directorate (CD), in charge of the investigation of the case and of making proposals to the Council; and (2) the Council of the NMCC (CNMCC), with adjudicatory functions and power to issue sanctions.

Proceedings may be initiated: (1) *ex officio* by the CD, on its own initiative or on that of the CNMCC; or (2) by complaint made by any natural or legal person. In practice, investigations are commonly triggered either way. Once the CD receives information concerning a potential infringement, it may conduct a preliminary investigation (prior to the opening of formal proceedings), to determine whether it may open such proceedings. As a result, the CD may carry out inspections. Although at this stage the parties' procedural guarantees are limited, the NMCC must abide by fundamental rights standards (e.g., impossibility to access premises without consent or court order) and must respect legal professional privilege. The CNMCC may then adopt a decision either dismissing the case or opening formal proceedings.

Once proceedings have been opened, interested parties will have the right to access the file. The CD may carry out two types of investigatory acts: (1) inspections at the undertaking's premises, means of transport or in the private homes of the companies' managers and staff (with consent or judicial authorisation); and (2) requests for information directed at any natural or legal person. If an undertaking fails to comply with its obligation to submit to an inspection, it may be subject to a fine of up to 1 per cent of its total turnover in the immediately preceding business year. Companies are also obliged to reply to requests for information, under threat of PPPs of up to €12,000 per day. All acts and decisions adopted by the CD may be subject to appeal before the CNMCC if they breach the parties' rights of defence or give rise to irreparable damage.

Subsequently, the CD may issue a statement of objections. Interested parties have 15 days to reply to it and to submit relevant evidence. After carrying out all necessary investigatory acts the CD may propose a draft decision and interested parties may submit allegations and request that an oral hearing be held before the CNMCC. This puts an end to the first phase of the proceedings and marks the beginning of the second phase before the CNMCC.

The CNMCC may order the production of evidence as well as complementary measures to clarify certain issues. It may also hold a hearing upon request of the parties. The CNMCC then issues its final decision, which may be challenged within two months before the High Court of Spain (AN), which exercises full judicial review and may adopt interim measures such as, for instance, the suspension of the decision. The adoption of interim measures, regulated in the Law on Contentious Administrative Jurisdiction,[71] may be requested at any stage of the judicial proceedings. These measures may remain in force until a final non-appealable judgment is issued.

Alternatively, administrative proceedings may be terminated through the acceptance of commitments proposed by the parties before the end of the 15-day period to reply to the statement of objections. While the decision as to whether to begin a commitments procedure

71 Law 29/1998, 13 July, Articles 129–136.

is the responsibility of the CD, it is the CNMCC who adopts the final decision accepting, rejecting or requesting new commitments. Commitments proceedings are regulated in the NMCC Guidelines on the termination of infringement proceedings by means of commitments.

As to the timing, while the duration of the preliminary investigation is not subject to a statutory limit, formal proceedings may not last more than 18 months and the first phase may last no longer than 12 months.

Concerning international cooperation, it suffices to note that the NMCC and the courts are subject both to Chapter IV of Regulation 1/2003 on cooperation as well as to the Commission Notice on cooperation within the Network of Competition Authorities and the Commission Notice on the cooperation between the Commission and the courts of the EU Member States.

Although the LDC empowers the NMCC to issue findings of inapplicability with regard to conduct *a priori* falling under Article 2 of the LDC, these powers may only be exercised *ex officio* and where the public interest so requires.

Finally, it is noteworthy that there are reasonable prospects for successfully appealing NMCC decisions before the Spanish courts.

As an example, in July 2015, the AN annulled the NMCC's margin squeeze decision in *Correos 2*.[72] In *Correos 2*, the NMCC concluded that Correos, the Spanish public postal services operator and owner of the public postal network, had abused its dominant position by squeezing the margins of its competitors, thereby preventing them from providing postal services to a specific category of customers, i.e., to 'large customers' whose yearly budget for postal services exceeds €100,000. Citing recent case law of the EU courts, such as *Post Danmark*, the AN concluded that Correos could not be held to have breached Article 2 of the LDC or Article 102 of the TFEU, because the NMCC had not demonstrated that Correos' conduct had actually or potentially excluded its competitors from the market. The AN stressed that a finding of illegal margin squeeze requires proof of actual or at least potential exclusionary anticompetitive effects.

Additionally, in September 2015, the AN annulled[73] an NMCC decision,[74] according to which there was not sufficient evidence that Oracle had abused its dominant position through a refusal to deal. The AN concluded that Oracle was dominant in the markets for high-performance databases and for databases in general, and that by rendering its high-performance database incompatible with Hewlett-Packard's Itanium processor, and thus with Hewlett-Packard's Integrity servers, Oracle had excluded Hewlett-Packard's servers from the market, favouring its own server business. Having found an infringement of Article 2 of the LDC and Article 102 of the TFEU, the AN referred the case back to the NMCC, which will decide on a possible fine.

VII PRIVATE ENFORCEMENT

According to the LDC, the commercial courts have jurisdiction to rule on civil actions concerning the application of Article 2 of the LDC. Although private enforcement in the form of actions for damages arising from ADP has traditionally been fairly limited, it is slowly

72 AN judgment in appeal 118/2014, 1 July 2015.

73 AN judgment in appeal 168/2013, 24 September 2015.

74 Case S/0354/11, *Oracle*, 26 February 2013.

becoming a reality and more and more courts are ruling against competition law infringers and considering them to be civilly liable.[75] Actions for damages may be brought before the courts under Article 1902 of the Civil Code.

In principle, any person affected by ADP has standing to bring an action on this basis. To date no final judgments have been issued in Spain awarding damages as a result of a collective action. However, Article 11 of the Code of Civil Procedure[76] recognises the possibility for consumer protection organisations to bring collective actions in representation of these. This provision may be applicable by analogy to other organisations or groups of individuals.[77]

In these cases, much controversy has arisen concerning the quantification of damages, especially that of *lucrum cessans*. In practice, damages have been calculated on the basis of a number of often case-specific considerations. It appears, however, that at least when the conduct is deemed to violate Article 102 of the TFEU, damages must cover not only *damnum emergens* but also *lucrum cessans* and interest in light of the *Manfredi and Others* case law.[78]

As to the interplay between public and private enforcement, since 2007, the possibility of pursuing civil actions is no longer conditional upon the prior finalisation of the administrative procedure. However, the law does provide for the possibility of suspending the time limit to issue the judgment when the judge deems it necessary to have prior knowledge of the content of the administrative decision. Moreover, the NMCC has the power to provide information and submit observations during judicial proceedings. With regard to the effect of documents and statements made during the administrative proceedings, it has been noted that these should be interpreted in accordance with the general rules set out in the Code of Civil Procedure and may thus be used as evidence within the civil proceedings.[79]

VIII FUTURE DEVELOPMENTS

In 2013, the Spanish authorities merged a number of regulatory authorities including the former National Competition Commission into a single institution, the NMCC. The aim of this institutional reform was, primarily, to maximise economies of scale, attain synergies and reduce public expenditure. While such reform gave rise to a new institutional structure, it did not bring about any substantive changes to antitrust enforcement.

In December 2016, however, a proposal was tabled in the Spanish Parliament to divide the NMCC into two independent bodies, namely: (1) the Independent Markets Regulation Authority, which would be in charge of sector-specific market regulation; and (2) the Independent Competition Authority, which would be in charge of competition law enforcement. The aim of this proposal is to guarantee the independence and separation between the regulatory authority, on the one hand, and the competition authority, on the other. At this stage, it remains unclear whether such a reform will take place.

75 See: Ordóñez, D, 'La reclamación ante los tribunales españoles de los daños sufridos en violación del Derecho europeo de la competencia', *Gaceta Jurídica de la Unión Europea y de la Competencia*, January–February 2011, No. 19, p. 21.

76 Law 1/2000, 7 January.

77 Fernández, C, 'Diez años de la aplicación privada del Derecho comunitario de la competencia en España', *Gaceta Jurídica de la Unión Europea y de la Competencia*, September–October 2012, No. 29, pp. 13–14.

78 Fernández, *supra*, p. 21.

79 Rodríguez-Sastre, I, 'Disposición adicional primera', in: Odriozola, Irissarry, *supra*, p. 1196.

Chapter 24

UNITED KINGDOM

Paul Gilbert and John Messent[1]

I INTRODUCTION

For so long as the United Kingdom remains an EU Member State, the provisions of Article 102 of the Treaty on the Functioning on the European Union (TFEU) will continue to apply in the United Kingdom.[2]

The United Kingdom has also implemented national legislation that substantially mirrors the provisions of Article 102, contained in Chapter 2 of the Competition Act 1998 (the Act). Section 18 of the Act provides that, subject to limited exclusions: 'any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom' (the Chapter 2 Prohibition). The UK competition authorities and courts are required to interpret the relevant provisions of the Act consistently with EU competition law wherever possible, and to have regard to relevant decisions and statements of the European Commission.[3]

Public enforcement of UK and EU competition law is carried out primarily by the Competition and Markets Authority (CMA).[4] In addition to the CMA, the following sectoral regulators have the power to enforce competition law in their sectors:

Regulator	Sector
Civil Aviation Authority (CAA)	Air traffic services and airport operation services in the UK
Financial Conduct Authority (FCA)	Financial services in the UK
Monitor (part of NHS Improvement)[1]	Healthcare services in England
Northern Ireland Authority for Utility Regulation	Gas, electricity, water and sewerage services in Northern Ireland
Office of Communications (Ofcom)	Electronic communications, broadcasting and postal services in the UK[2]
Office of Gas and Electricity Markets (Ofgem)	Gas and electricity in Great Britain
Office of Rail and Road (ORR)	Railway services in Great Britain

1 Paul Gilbert is counsel and John Messent is an associate at Cleary Gottlieb Steen & Hamilton LLP.

2 See Section VIII, *infra*, on the implications of the UK's withdrawal from the EU.

3 Section 60 of the Act.

4 The CMA was created on 1 October 2013, and acquired its powers and responsibilities on 1 April 2014. It replaced two former public authorities: the Office of Fair Trading (OFT) and the Competition Commission (CC). The OFT had powers to enforce the prohibitions in Articles 101 and 102 of the TFEU and the equivalent UK prohibitions, as well as to carry out Phase I merger reviews and market studies. The CC was a reference body, carrying out Phase II merger reviews, market investigations and certain regulatory appeals. Where relevant, this chapter refers to the former OFT and CC.

Regulator	Sector
Payment Systems Regulator (PSR)[3]	Payment systems in the UK
Water Services Regulation Authority (Ofwat)	Water and sewerage in England and Wales

1 NHS Improvement, established in April 2016, is the operational name for the organisation that combines Monitor with several other NHS bodies. Monitor remains the statutory body for competition law purposes.
2 In the telecommunications sector, Ofcom also has the power to oversee the BBC (from 3 April 2017, including its impact on fair and effective competition) and impose regulatory conditions on undertakings found to have 'significant market power'. Significant market power is equivalent to the concept of dominance under EU and UK competition law.
3 The PSR has been established as a separate body under the FCA, with its own managing director, board and budget.

The United Kingdom has also established a specialist competition court, the Competition Appeal Tribunal (CAT). Any person who is found to have infringed Article 102 or the Chapter 2 Prohibition by the CMA or a regulator has a right of appeal to the CAT.[5] The CAT can also hear follow-on damages claims in competition cases and, since October 2015, has had the power to hear stand-alone claims for damages or injunctive relief, or both. The civil courts can also hear competition claims, but may transfer cases to the CAT.

When enforcing Article 102 and the Chapter 2 Prohibition, the CMA and regulators have regard to the European Commission's 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings'.[6] The CMA also has regard to its own substantive and procedural guidance (including previous OFT guidance that the CMA has formally adopted).[7] These include:

a 'Abuse of a dominant position', December 2004;
b 'Assessment of market power', December 2004;
c 'Guidance on the CMA's investigation procedures in Competition Act 1998 cases', March 2014;
d 'Involving third parties in Competition Act investigations', April 2006;
e 'CMA Powers of Investigation of anti-competitive behaviour', December 2004; and
f 'Competition Law Application and Enforcement', December 2004.

Separately, the CMA has the power to investigate markets as a whole, by carrying out market studies. At the end of a market study, the CMA can make recommendations to businesses and government, or initiate enforcement action under other statutory powers (including the Chapter 2 Prohibition and Article 102). If the CMA has reasonable grounds for suspecting that a feature of a market is preventing, restricting or distorting competition, it can initiate a full market investigation. A market investigation can also be initiated by any of the concurrent regulators (listed above) or by the Secretary of State. Following a market investigation, the CMA has the power to tackle any features having an adverse effect on competition (including unilateral conduct features) by imposing a wide range of remedies. The identification of anticompetitive features in a market investigation is not a finding that market participants have infringed the law, and remedies are intended to be prospective rather than punitive.

5 Section 46 of the Act.
6 2009/C 45/02.
7 The investigation procedures followed by the sectoral regulators differ in some respects from the CMA's procedures.

II YEAR IN REVIEW

i Levels of public enforcement

The CMA has investigated relatively few dominance cases over recent years, but is currently pursuing six dominance investigations. Two main reasons are usually cited to explain the relative lack of enforcement by the CMA: (1) cross-border cases affecting the United Kingdom often fall to be investigated by the European Commission, depriving the CMA of jurisdiction to investigate the same conduct in parallel (which is unlikely to be the case after the United Kingdom leaves the EU); and (2) cases involving natural monopolies generally fall to be investigated by the concurrent sectoral regulators. On top of this, the CMA can investigate unilateral behaviour through market studies and investigations.

Recent government reforms have sought to encourage greater use of competition law enforcement by the sectoral regulators in particular. These regulators now have a duty to apply *ex post* competition law in preference to *ex ante* regulation where possible. The government has placed a responsibility on the CMA to monitor the work of sectoral regulators and, if appropriate, take enforcement action in their sectors. The CMA is also obliged to publish an annual report on the functioning of the concurrency regime as soon as practicable after the end of each financial year,[8] and the Secretary of State retains a right to remove concurrent powers from sectoral regulators if they are not used.

Nevertheless, in February 2016, the National Audit Office (NAO) published a critical report into the UK competition regime, which strongly encouraged the CMA and the concurrent sectoral regulators to find ways to increase levels of competition enforcement. CMA enforcement activity (in dominance cases and more generally) has increased following the publication of the NAO report. In the 12 months that followed the NAO report, the CMA opened six new dominance cases (compared with only one case in the previous 12 months) and issued statements of objections in two of these new cases within a year of opening an investigation. It also issued infringement decisions in two of the three investigations open at the time of the NAO report, imposing significant fines on several pharmaceutical suppliers. The sectoral regulators, however, have opened no new dominance cases over the past year.[9]

ii Major developments in public enforcement

The CMA issued two infringement decisions and two statements of objections during the past year. In addition, Ofcom closed one investigation on the basis of binding commitments.

One of the CMA's infringement decisions and one of its statements of objections concern excessive or unfair pricing (in both cases, relating to the supply of pharmaceutical products to the National Health Service (NHS)). One of the CMA's other ongoing investigations also concerns suspected excessive pricing of pharmaceuticals. Excessive pricing cases are rare. The prioritisation of these investigations, and cases involving the NHS more generally, may therefore indicate a policy decision to focus resources on abuses of dominance that directly impact the public purse.

8 The third Annual Report was published on 28 April 2017. The CMA also published a 'Baseline Report' on concurrency on 1 April 2014.

9 The FCA opened its first Competition Act investigation in 2016, but it was revealed in April 2017 that the investigation concerned Article 101 and/or the Chapter 1 prohibition (information-sharing in the aviation (re)insurance sector) rather than Article 102 and/or the Chapter 2 prohibition.

There is a noticeable difference in the speed with which these excessive pricing investigations progressed. The first (involving Pfizer and Flynn Pharma) took more than two years to advance from case opening to statement of objections. The experience and confidence gained from this case enabled the CMA to proceed more efficiently in the latter case (concerning Actavis UK), which took only 10 months to reach a statement of objections. The difference in timing may also be attributable to an increase in resources dedicated to competition enforcement over the last year, following the conclusion of a number of substantial CMA market investigations.

Infringement decisions, statements of objections and commitments decisions

GSK, Generics UK, and Alpharma

In February 2016, the CMA issued an infringement decision against GSK, Generics UK, and Alpharma concerning the supply of branded paroxetine (an antidepressant medicine), imposing fines of approximately £45 million. The CMA found that GSK had entered into 'pay for delay' agreements with each of Generics UK and Alpharma, deferring the date on which they would launch generic paroxetine products in competition to GSK's branded product, Seroxat. The CMA concluded that these were anticompetitive agreements, infringing Article 101 TFEU and/or the Chapter 1 prohibition. In addition, the CMA found that GSK had infringed the Chapter 2 prohibition, on the following grounds:

a GSK was dominant on the market for the supply of paroxetine in the UK;

b GSK made value transfers to Generics UK, Alpharma and IVAX (potential competitors) that were commercially rational for GSK only on the basis that they would induce the generic companies to delay independent market entry, and could not be explained on any other commercial basis;

c The CMA concluded that this conduct 'deviated from GSK's special responsibility not to allow its conduct to impair genuine undistorted competition' and was intended, capable, and likely to restrict competition; and

d GSK's conduct was not objectively justified, either as a legitimate defence of its patent rights or by the creation of efficiencies in the form of reduced prices that were passed on to consumers.

The parties have appealed this decision to the CAT, with GSK arguing, among other things, that the CMA erred in finding that GSK held a dominant position because the CMA defined the relevant product market incorrectly. The appeals were heard in February and March 2017, and judgment is awaited.

Pfizer and Flynn Pharma

In December 2016, the CMA issued an infringement decision against Pfizer and Flynn Pharma for charging excessive and unfair prices in the UK for the anti-epilepsy drug phenytoin sodium (PS). The CMA imposed a record fine of £84.2 million on Pfizer and a £5.2 million fine on Flynn Pharma, and ordered both to reduce their prices.

Before September 2012, Pfizer manufactured and sold PS capsules at regulated prices to UK wholesalers and pharmacies under the brand name Epanutin. In September 2012, Flynn acquired the UK distribution rights for Epanutin, de-branded the drug (such that it was no longer subject to price regulation), and increased prices to the NHS by around 2,600 per cent.

Although PS is rarely prescribed to new epilepsy patients, there are around 48,000 patients in the UK taking PS capsules. Clinical guidance recommended that patients who were stabilised on one manufacturer's PS capsule should not be switched to a different manufacturer's PS capsule. On this basis, the CMA found that Pfizer PS capsules were not substitutable with any other anti-epilepsy drugs (including other PS capsules or tablets). The CMA concluded that Pfizer was therefore dominant on the market for the manufacture of Pfizer-manufactured PS capsules in the UK, and Flynn was dominant on the market for the supply of Pfizer-manufactured PS capsules in the UK.

The CMA calculated the direct and common costs of Pfizer and Flynn, and determined that a reasonable rate of return on sales for both would be 6 per cent. The CMA found that no demand-side or non-cost factors would increase the value of Pfizer-manufactured PS capsules above that level, and concluded that the prices charged by Pfizer and Flynn bore no reasonable relation to the economic value of the PS capsules. The CMA identified an adverse effect on the end consumer, namely NHS Clinical Commissioning Groups, which had been forced to divert funds from other healthcare services to pay for the increased cost of PS capsules.

Both Pfizer and Flynn Pharma have appealed the CMA's decision to the CAT. Flynn also applied for interim relief from the CMA's direction to reduce its prices. This application was rejected by the CAT in January 2017. The CAT found that the public harm suffered from diverting scarce NHS funds to continue paying the higher prices to Flynn in the period until final judgment (which could not be fully compensated by a cross-undertaking by Flynn or future damages claims) outweighed the financial losses that would be suffered by Flynn if it lowered prices as directed but subsequently won its substantive appeal.

Actavis UK

In December 2016, the CMA issued a statement of objections to Actavis UK, alleging that it had charged excessive and unfair prices to the NHS for hydrocortisone tablets. The CMA provisionally found that Actavis UK increased the price of de-branded (generic) 10mg and 20mg hydrocortisone tablets by over 12,000 per cent and nearly 9,500 per cent, respectively, from April 2008 to March 2016. Prior to April 2008, the drugs were sold by a different company as a price-regulated branded drug.

Concordia and Actavis UK

In March 2017, the CMA issued a separate statement of objections to Concordia and Actavis UK, relating to the supply of hydrocortisone tablets. The CMA alleges that the parties have infringed Article 101 and the Chapter 1 Prohibition (prohibitions on anticompetitive agreements) by agreeing that Actavis UK would supply Concordia with hydrocortisone tablets at a low price for resale in the UK, thereby incentivising Concordia not to enter the market with its own competing version of hydrocortisone tablets. The CMA also alleged that Actavis UK had abused its dominant position by inducing Concordia to delay its independent entry into the market.

Scottish and Southern Electric

In November 2016, Ofgem closed a Competition Act investigation into Scottish and Southern Electric (SSE) on the basis of binding commitments.

Ofgem provisionally found that SSE was likely to hold a dominant position on markets for non-contestable connection services for connections to its own distribution networks.

Customers could obtain connections to that network either (1) directly from SSE's connections business (where the quotation would include charges for both contestable and non-contestable services), or (2) from an independent distribution network operator (IDNO) or independent connections provider (ICP), which would need to obtain non-contestable services from SSE.

Ofgem provisionally found that SSE-supplied non-contestable connection services to IDNOs and ICPs on less favourable terms (in respect of higher non-contestable costs, geographical point of connection (POC) location and connection voltage) than to its own connections business for equivalent transactions, placing its competitors at a disadvantage.

The commitments accepted by Ofgem included the following: (1) broad equivalence of quotations in respect of non-contestable charges, POC location and connection voltage; (2) functional separation of SSE's contestable connections team, which would have the same interface with SSE's non-contestable connections team as any IDNO or ICP would; (3) enhanced automation of SSE's quotation system, with reasons for any differences between comparable works being recorded, independently audited and available to the customer, Ofgem and (on request) third-party providers.

Conclusion of cases without adopting infringement or commitments decisions

The CMA and Ofcom closed two cases without adopting infringement or commitments decisions.

In February 2016, Ofcom closed an investigation into BSkyB concerning the wholesale supply of Sky Sports channels to BT. BT complained that BSkyB had made the supply of Sky Sports 1 and 2 conditional on BT supplying BT Sport channels for resale on Sky's satellite platform. BT subsequently obtained access to Sky Sports 1 and 2 on a non-reciprocal basis. Ofcom therefore decided that pursuing its investigation further was no longer an administrative priority.

In February 2017, the CMA closed an investigation into tying practices in the medical equipment sector on administrative priority grounds, without disclosing the names of the parties. The CMA's case closure statement indicated, in particular, that 'the impact of the observed conduct on the market for the relevant medical equipment is unclear'.

In September 2016, the CMA published the final report on its remitted *Private Healthcare* market investigation. This market investigation began in 2012. The CMA published a final report in April 2014, concluding (among other things) that there were features of the market in central London that resulted in an adverse effect on competition (AEC). Specifically, it found that one provider, HCA, held a position of market power in central London and was able to charge higher prices than other providers. Although not a formal finding of dominance, the CMA's report sought to impose a divestment remedy on HCA, to address the AEC. In December 2014, the CAT quashed key parts of the CMA's report, including the divestment remedy, and remitted the case to the CMA for further investigation. In September 2016, the CMA published its new final report. The CMA continued to identify an AEC resulting from weak competitive restraints on HCA, but conceded that the evidence in support of this AEC was 'less certain' than at the time of the previous final report and that it was 'no longer able to conclude on the extent of the customer detriment arising from the AEC'. On these grounds, as well as the evidence of expected new entry in the market, the CMA found that ordering HCA to divest hospitals in central London would be disproportionate, and that no alternative remedy would be effective and proportionate.

iii Current abuse of dominance investigations

The CMA and sectoral regulators are currently investigating eight suspected abuse of dominance cases, summarised in the table below.

Sector	Investigating authority	Conduct	Case opened*
Consumable goods	CMA	Suspected breach of competition law relating to loyalty-inducing practices in the supply of consumable goods.	February 2017
Auction services	CMA	Suspected breaches of competition law relating to the supply of auction services.	November 2016
Pharmaceuticals	CMA	Suspected unfair pricing in the supply of certain pharmaceutical products by Concordia International RX (UK) Ltd.	October 2016
Pharmaceuticals	CMA	Suspected abuse of dominance (inducement to delay entry) by Actavis UK in relation to hydrocortisone tablets (as well as suspected anticompetitive agreements between Concordia and Actavis UK).	April 2016
Pharmaceuticals	CMA	Suspected abuse of dominance (excessive pricing) by Actavis UK in relation to hydrocortisone tablets.	March 2016
Pharmaceuticals	CMA	Discounts offered for Remicade, a branded pharmaceutical product, by Merck Sharp & Dohme Ltd.	December 2015
Airport operation services	CAA	Provision of access to car parking facilities at an airport.	March 2015
Postal services	Ofcom	Complaint by TNT Post UK Limited (now Whistl) about the terms offered by Royal Mail for certain letter delivery services to downstream access customers.	April 2014
* 'Case opened' refers to the date on which the authority opened its investigation (where known) or announced that it had opened an investigation.			

iv Major developments in private actions in 2016–2017

In April 2017, the High Court found that Unwired Planet had not abused its dominant position by seeking an injunction against Huawei based on the infringement of standard-essential patents (SEPs).[10] Unwired Planet owns a portfolio of SEPs relating to mobile telephone technology. The SEPs were subject to commitments given to ETSI to license on fair, reasonable, and non-discriminatory (FRAND) terms. Unwired Planet sought an injunction against Huawei (a manufacturer of mobile telephones) for infringing those patents. In response, Huawei argued that seeking an injunction was an unlawful abuse of dominance because Huawei had offered to pay FRAND terms for a licence to use the patented technology. While the case has broader implications for the resolution of SEP disputes, the competition law arguments made by Huawei covered five main grounds:

a premature injunction proceedings: The Court held that it was not necessarily an abuse of dominance for an owner of SEPs to seek an injunction without complying precisely with the scheme for negotiation of FRAND terms set out in the CJEU's judgment in *Huawei v. ZTE*. The Court found that, in this case, it was 'obvious […] that the issuing of proceedings did not indicate that the SEP owner did not wish to license its SEPs to Huawei' (paragraph 753);

b excessive or unfair prices: The Court held that offering non-FRAND terms during the course of negotiations did not infringe Article 102(a) unless the terms were 'so far above

10 *Unwired Planet International Ltd v Huawei Technologies Co. Ltd and another* [2017] EWHC 711 (Pat).

FRAND as to act to disrupt or prejudice the negotiations themselves' (paragraph 765). On the facts, the Court found that the terms offered by Unwired Planet did not cross this threshold.

c multi-jurisdictional tying: Unwired Planet insisted that Huawei accept a worldwide licence, while Huawei sought to license only the UK SEP portfolio. After discussion of the CJEU's judgments in *Microsoft* and *Post Danmark*, the Court found that foreclosure of competition had not been established by offering only a worldwide licence: 'Given the prevalence of worldwide licences and the prevalence of assessment based on patent families, I am not prepared to assume that the tying of a SEP licence in one country to a SEP licence in another country has by its nature a competitive foreclosure effect. A close analysis of the actual effects would be required and that has not been done' (paragraph 550);

d tying SEP licences and non-SEP licences: The Court found that, although one Unwired Planet offer had tied SEP and non-SEP licences, it had later offered to separate out the SEPs: 'I am in no doubt that a patentee subject to a FRAND undertaking cannot insist on a licence which bundles SEPs and non-SEPs together. But it does not follow from this that it is contrary to competition law to make a first offer which puts SEPs and non-SEPs together' (paragraph 787); and

e discrimination: The Court aligned the 'non-discrimination' limb of FRAND with the concept of abusive discrimination under Article 102. Specifically, the Court held that the non-discrimination limb of FRAND does not consist of a further 'hard edged' component that would justify a licensee demanding a lower rate than the FRAND rate simply because another similarly situated licensee had obtained more favourable terms. The non-discrimination obligation in FRAND is only triggered where the discrimination would distort competition between the two licensees.

Although it rejected Huawei's competition law arguments, the Court confirmed that a FRAND undertaking was a binding legal commitment on which third parties (including Huawei) could rely (without needing to rely on competition law), and that Unwired Planet's previous offers were not FRAND. The Court identified the terms that would be FRAND, and in particular agreed with Unwired Planet that it was entitled to insist on a licence for its worldwide SEP portfolio, rather than for its UK SEP portfolio only.

In conclusion, the Court found: (1) Unwired Planet had established that its patents had been infringed; (2) Unwired Planet was not in breach of competition law; (3) Huawei had not been prepared to take a licence on the terms the Court found to be FRAND (as it had not agreed to a worldwide licence); and (4) accordingly, a final injunction to restrain infringement by Huawei should be granted. In June 2017, the final injunction was granted but stayed pending appeal.

Two other notable cases before the High Court are the actions by Infederation Limited (trading as Foundem) and Streetmap.EU Limited against Google. The first case concerns an alleged abuse of dominance by Google in how it selects, ranks and displays rival shopping comparison services in its internet search results, allegedly favouring its own services. The second case concerned the allegation that Google favoured its own maps when displaying a map in its search results.

These cases are interesting because they show the High Court attempting to grapple with issues that in part overlap with, and in part supplement, matters being considered by the European Commission in a separate Article 102 investigation. Relying on assurances from the European Commission, the High Court ruled that distinct questions of abuse not being investigated in Brussels could be heard before the Commission had concluded its investigation.[11]

In *Streetmap*, the Court was able to hear allegations of abuse separately from allegations of dominance (which were stayed). In February 2016, the High Court decided that Google's conduct was not abusive, even if Google was considered dominant.[12] Specifically, the Court found that changes to the way Google displayed excerpts from Google Maps in response to search queries (called a 'Maps OneBox') were not reasonably likely to have an appreciable effect on competition in the market for online maps, and, even if they were to have such an effect, the changes were in any event objectively justified. In February 2017, the Court of Appeal rejected Streetmap's application for leave to appeal the High Court judgment and refused to remit issues relating to objective justification to the High Court or the CAT. In contrast, the *Foundem* case has been stayed in its entirety because of practical difficulties in separating out distinct allegations of abuse.

Other cases before the CAT and the High Court are summarised below.

Case	Allegation	Status
Labinvesta Limited v. Dako Denmark	Alleged abuse of dominance by Dako Denmark on the market for the supply of reagents for immunohistochemistry tests for conducting cancer diagnostics in Belarus.	Pending. Claim launched in January 2017 (amending claim previously launched in September 2016).
UKRS Training Limited v. NSAR Limited	Alleged abuse of dominance on the market for accreditation services to providers of training to work on Network Rail infrastructure.	Pending. Claim launched in June 2016. In response to UKRS's application for an interim injunction, NSAR undertook not to enforce the suspension of UKSR's accreditation pending the hearing.
Socrates Training Limited v. The Law Society of England and Wales	Alleged abuse of dominance by the Law Society in the market for the provision of certification and accreditation services to conveyancing firms. Application for damages and an injunction.	Pending. Claim launched in April 2016, hearing on liability held in November 2016.
NVIDIA Corporation and others v. Qualcomm Inc and others	Predatory pricing and loyalty-inducing rebates. The same allegations are also being investigated by the European Commission, which issued two Statements of Objections in December 2015.	Pending. Claim launched in December 2015.
Secretary of State for Health and others v. Servier Laboratories Ltd and others	Follow-on damages claim relating to the European Commission's 'pay for delay' infringement decision against Servier and others concerning the supply of perindopril.	Pending. Claims launched in December 2011 and suspended during the Commission's investigation. Servier granted permission in October 2016 to plead that the claimants failed to take reasonable steps to encourage switching from perindopril to cheaper generic alternatives.

11 *Infederation Ltd v. Google Inc. and others* [2013] EWHC 2295 (Ch) (26 July 2013).

12 *Streetmap.EU Limited v. Google Inc. and others* [2016] EWHC 253 Ch.

Case	Allegation	Status
Westpoint Group Trading Limited and others v. XL Farmcare UK Limited and others	Alleged abuse of dominance by several veterinary practice groups with regard to the award of subcontracts to eligible veterinary practices to provide tuberculosis testing to livestock in five English regions.	Case settled and claim withdrawn in December 2016, having been launched in October 2016.
Shahid Latif & Mohammed Abdul Waheed v. Tesco Stores Limited	Restrictive covenant in a land agreement that prevented the claimant from developing retained land in a way that could have competed with the defendant.	Case settled and claim withdrawn in March 2016.
NCRQ Ltd v. Institution of Occupational Safety and Health	Interim injunction sought relating to alleged abuse of dominance in the market for the accreditation of qualifications in the health and safety sector.	Case settled and claim withdrawn in January 2016.
Packet Media Ltd v. Telefónica UK Ltd	Refusal by Telefonica (O2) to supply services for resale by Packet Media Limited.	Interim injunction awarded in July 2015. Interim injunction discharged and claim dismissed by summary judgment in January 2016.

UK Regulations implementing the EU Damages Directive (described in more detail in the EU chapter) came into force on 9 March 2017.[13] Although many of the provisions of the Damages Directive did not require amendment of the UK regime, and many changes relate primarily to cartel infringements, the Regulations contain several provisions that may have a bearing on UK claims for damages from abuse of dominance. For example, the Regulations: (1) address the burden of proof with respect to the passing-on defence; (2) suspend the limitation period while competition authority investigations or consensual dispute resolution processes are ongoing; (3) exclude the award of exemplary damages, as noted below; (4) exempt small and medium-sized enterprises, as well as defendants that settle with the claimant, from the principle of joint and several liability; and (5) amend rules on disclosure.[14]

III MARKET DEFINITION AND MARKET POWER

The assessment of market definition and market power in the United Kingdom is consistent with EU law. The UK competition authorities and courts are required to interpret the provisions of the Act consistently with EU competition law wherever possible, and to have regard to relevant decisions and statements of the European Commission.

One difference between EU and UK law is that under the Chapter 2 prohibition there is no need to show a cross-border effect, and no minimum market size threshold: a 'dominant position' refers to a dominant position in the United Kingdom or any part of the United Kingdom. This means that dominant positions can be found even for small suppliers in small markets.

13 The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (No. 385).

14 For further detail and analysis, see *The UK implements the EU Antitrust Damages Directive*, Cleary Gottlieb Alert Memorandum, 10 January 2017, available at: https://www.clearygottlieb.com/news-and-insights/publication-listing/the-uk-implements-the-eu-antitrust-damages-directive.

IV ABUSE

i Overview

The assessment of abuse in the United Kingdom is consistent with EU law. The UK competition authorities and courts are required to interpret the provisions of the Act consistently with EU competition law wherever possible, and to have regard to relevant decisions and statements of the European Commission. There is no exhaustive list of abuses under Section 18 of the Act (the equivalent of Article 102).[15] Any conduct by a dominant undertaking that excludes competitors or exploits customers is potentially abusive, unless that conduct is objectively justified. Moreover, the High Court has held that conduct should be looked at 'in the round', rather than seeking to identify on a narrow basis whether conduct departs from 'competition on the merits'.[16]

ii Exclusionary abuses

Enforcement action in the United Kingdom has focused primarily on exclusionary abuses.

The OFT decision in *Gaviscon* is notable in that it demonstrates the OFT's (and, by extension, the CMA's) willingness to grapple with novel abuses. The case concerned abusive behaviour by Reckitt Benckiser, which held a dominant position in the market for alginates and antacids. Reckitt Benckiser withdrew its Gaviscon Original product from sale to the UK National Health Service (NHS) when the product no longer benefited from patent protection, even though it remained on sale 'over the counter'. Reckitt Benckiser replaced Gaviscon Original with a similar product, Gaviscon Advance, which continued to benefit from patent protection. Because of the way the NHS computer system operated, the withdrawal of Gaviscon Original made it more difficult for doctors to prescribe alternative generic products as opposed to Gaviscon Advance. The OFT concluded that this action was expected to 'hinder the development of generic competition' to Gaviscon, thereby excluding competition from the market. Reckitt Benckiser entered into a settlement agreement with the OFT, agreeing not to challenge its decision and to pay a fine of £10.2 million.

In *Cardiff Bus*, the OFT investigated exclusionary behaviour preventing a competing bus company, 2 Travel, from establishing a rival service to the dominant incumbent. The case concerned both price and non-price predation. Cardiff Bus reacted to the launch of a rival 'no-frills' service by introducing its own no-frills service on the same routes, without a valid business case and running at a loss. In both *Cardiff Bus* and *Gaviscon* the OFT uncovered evidence of anticompetitive intent.

The focus on exclusionary conduct is borne out by other recent investigations. For example, in addition to cases mentioned in Section II, *supra*:

a In December 2015, the ORR closed an investigation into Freightliner on the basis of binding commitments. The ORR had investigated the terms of Freightliner's agreements with customers for the provision of rail freight services between deep-sea container ports and inland destinations. The terms included exclusive purchasing obligations, minimum volume commitments and suspected loyalty-inducing rebates.

15 This point was underlined by the High Court in *Purple Parking Limited v. Heathrow Airport Limited* [2011] EWHC 987 (Ch).

16 *National Grid plc v. GEMA*, [2010] EWCA Civ 114.

Certain customers were also prevented from reselling capacity purchased under the contracts. Freightliner committed to remove or amend the provisions in its contracts to address the ORR's concerns.

b In June 2015, the CMA closed an investigation into suspected loyalty-inducing rebates in the pharmaceutical sector, on the grounds of administrative priorities. The case was closed before any statement of objections was issued. The CMA nonetheless sent a warning letter to the relevant party, identifying potential concerns that may arise in the context of discounts and rebates

c In October 2014, Ofcom closed an investigation into suspected margin squeeze by BT in relation to superfast broadband services, following a complaint by TalkTalk Telecom Group plc.

d In September 2014, the CMA closed an investigation into suspected abuse of dominance by Epyx concerning the market for vehicle service, maintenance and repair platforms on the basis of binding commitments. The CMA had investigated whether Epyx's contracts prevented customers from switching to competing suppliers.

e In June 2014, the CMA closed an investigation into suspected abuse of dominance by Certas Energy UK Limited (previously GB Oils Limited) concerning the wholesale supply of road fuels in the Western Isles of Scotland on the basis of binding commitments. GB Oils had entered five-year exclusive contracts with filling stations, preventing them from sourcing fuel from other suppliers.

f In 2011, the OFT issued a reasoned 'no grounds for action' decision in relation to Idexx Laboratories Limited, a supplier of in-clinic companion-animal diagnostic testing equipment. The OFT investigated whether Idexx had engaged in anticompetitive bundling and predatory pricing, concluding that there was insufficient evidence that Idexx's conduct was likely to restrict or impair effective competition in the relevant markets.

g In 2010, the OFT issued a similar 'no grounds for action' decision following an investigation of Flybe. The investigation followed a complaint that Flybe had engaged in predatory conduct that excluded a rival airline, Air Southwest, from certain routes. It was clear that Flybe had priced below its average avoidable costs of entry. However, the OFT noted that Flybe was itself a new entrant and that it was normal commercial practice for an airline in this position to operate at a loss. The situation could therefore be distinguished from the position of a dominant incumbent reacting to new entry.

iii Discrimination (including discriminatory pricing)

Discrimination cases in the United Kingdom have also tended to focus on exclusionary conduct. For example, in 2006 the ORR found that English, Welsh and Scottish Railway (EWS) had engaged in abusive discriminatory conduct through the prices it charged for access to its coal haulage services. The ORR found that EWS had discriminated against Enron Coal and Steel Limited (ECSL), offering prices that excluded ECSL from bidding effectively for coal haulage contracts. More recently, in *SSE* (mentioned above), Ofgem accepted binding commitments to address the provisional concern that an upstream supplier was offering discriminatory terms that favoured its own downstream business over those of competitors.

Similar concerns were considered by Ofwat in 2015 in *Bristol Water* and *Anglian Water*, and are being considered by Ofcom in its ongoing *Royal Mail* investigation.

In March 2015, Ofwat closed an investigation into Bristol Water on the basis of binding commitments. Bristol Water holds a local monopoly in the upstream market for the supply and maintenance of water infrastructure. Bristol Water is also active as a 'self-lay' contractor in a contestable downstream market, installing pipes that connect to the mains supply. Bristol Water was suspected of abusing its position in the upstream market by offering discriminatory terms to other self-lay contractors. The commitments require Bristol Water to ensure functional separation between its upstream and downstream services, and to ensure that its upstream business offers equivalent price and non-price terms to third-party contractors as offered to its own downstream business.

In December 2015, Ofwat closed an investigation into Anglian Water, finding no grounds for action. This followed a statement of objections issued in December 2011 and a supplementary statement of objections in April 2014. Anglian Water has a statutory monopoly for the provision of water and sewerage services in its region. Ofwat provisionally found that Anglian Water had implemented an illegal margin squeeze when pricing its upstream services to a rival, Independent Water Networks Limited (IWN), which was competing with Anglian Water for the contract to supply a new site with water and sewerage services. Ofwat eventually concluded that, as the site developer evaluated bids for water and sewerage services on a combined basis, it was unlikely that a margin squeeze applied to sewerage services alone would have made it materially more difficult for IWN to compete for the contract.

In July 2015, Ofcom issued a statement of objections to Royal Mail. Ofcom provisionally concluded that Royal Mail had engaged in unlawful price discrimination when setting prices for its bulk mail delivery services – prices charged to other postal operators who collect business mail and pass it to Royal Mail for final sorting and delivery. Ofcom alleged that Royal Mail charged higher prices to customers who competed with Royal Mail in delivery than to those who did not. Ofcom considered that these higher access prices could discourage entry into the downstream delivery market and increase barriers to expansion for postal operators seeking to compete with Royal Mail.

In *Purple Parking*, the High Court found that Heathrow Airport had abused a dominant position by offering discriminatory terms of access to providers of valet parking services.[17] Heathrow permitted its own valet parking service access to its forecourts at Terminals 1 and 3, while requiring rival service providers (including Purple Parking) to relocate from the forecourts to the car parks. The High Court held that the forced relocation of rival providers placed them at a competitive disadvantage, and that this was sufficient to show abuse. The case is unusual in that there was no requirement to show that access to the forecourts was an essential facility or that competition would be eliminated entirely.

Similarly, in *Streetmap* (discussed above), the High Court proceeded on the assumption that, at least in principle, a dominant undertaking might commit an abuse by promoting its own products or services in a separate market over those of a rival, provided the conduct had an appreciable effect on competition in the second (non-dominated) market and was not objectively justified. The Court did not specifically consider whether a dominant undertaking that was not an essential facility could be required to provide access to downstream rivals on equivalent terms to those offered to its own downstream business. This question was not necessary to decide the case on the facts, and arguably overlaps with questions currently being considered by the European Commission.

The Court went further in *ATS v. London Luton Airport Operations*. In this case, the Court concluded that a concession agreement granted to National Express by London Luton Airport Operations that carved out easyBus from the exclusivity provisions was discriminatory

17 *Purple Parking Limited v. Heathrow Airport Limited* [2011] EWHC 987 (Ch).

against other bus operators, even though Luton Airport Operations (the upstream supplier) was not active in the downstream bus market. The *Luton Airport* case clarifies a question previously considered in *SEL-Imperial Ltd v. British Standards Institution*.[18] In this case, the High Court considered an action for strike out by the British Standards Institution of an abuse of dominance claim concerning the certification of replacement vehicle parts. The High Court refused to strike out the claim because it was insufficiently clear at the time whether decisions affecting a market in which the alleged dominant undertaking was not active could constitute an abuse.

iv Exploitative abuses (including excessive pricing)

While the focus of UK enforcement action has mostly been on exclusionary conduct, excessive pricing has been considered in a number of cases, including *Napp Pharmaceutical Holdings Limited* (OFT decision of 2001), *Thames Water Utilities Ltd/Bath House and Albion Yard* (Ofwat decision of 2003), and *Albion Water v. Ofwat* (Ofwat decision appealed to the CAT, judgment of 2006). These cases have all considered the potential exclusionary effect of pricing behaviour. More recently, as noted above, the CMA has fined Pfizer and Flynn Pharma for 'pure' excessive pricing (where there was no exclusionary effect). In the last year, the CMA has also issued a statement of objections addressed to Actavis UK and opened an additional investigation, concerning suspected excessive pricing.

The Court of Appeal grappled with the concept of excessive pricing in 2007 in A*ttheraces Limited v. British Horseracing Board Limited*.[19] This case concerned the price at which the British Horseracing Board made available pre-race data to Attheraces for sale to overseas bookmakers. Attheraces claimed that the price charged was excessive, as well as discriminatory, amounting to a refusal to supply. Attheraces was successful at first instance, but its claim was overturned by the Court of Appeal. The Court of Appeal accepted that, in principle, prices were excessive if they significantly exceeded the economic value of the product. However, in assessing economic value, it was insufficient merely to show that prices exceeded costs by a reasonable amount, without having regard to the price customers (in this case the overseas bookmakers) were prepared to pay. The Court also noted that there was little evidence of harm to ultimate consumers (i.e., the betting public) from the alleged excessive pricing.

V REMEDIES AND SANCTIONS

i Sanctions

An undertaking that has abused a dominant position may be fined up to 10 per cent of its worldwide turnover in the last business year, calculated according to rules set out by Statutory Instrument.[20] An undertaking may be fined only if its conduct was intentional or negligent (i.e., where the undertaking ought to have known that its conduct would result in a

18 *Sel-Imperial Ltd v. The British Standards Institution* [2010] EWHC 854 (Ch).

19 [2007] EWCA Civ 38.

20 Section 36 of the Act, and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309), as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259).

restriction or distortion of competition).[21] Any undertaking whose turnover does not exceed £50 million benefits from immunity from fines for infringing the Chapter 2 prohibition (but not Article 102), although immunity may be withdrawn on a prospective basis.[22]

The CMA is obliged to publish guidance as to the appropriate amount of a penalty (which is subject to approval by the Secretary of State). The CMA (and concurrent regulators) must have regard to that guidance when imposing penalties. The OFT published new guidance in September 2012, following a series of successful appeals against its fining decisions before the CAT.[23] The guidance, which was adopted by the CMA, sets out a six-step approach to calculating fines:

a calculation of a starting point by multiplying the undertaking's turnover in the relevant market by a percentage of up to 30 per cent depending on the seriousness of the infringement (under its previous guidance the maximum was 10 per cent);
b adjustment for duration;
c adjustment for aggravating and mitigating factors;
d adjustment to achieve sufficient deterrence and to ensure proportionality;
e adjustment to ensure the statutory cap (10 per cent of worldwide turnover) is not exceeded; and
f adjustment to reflect any settlement discount.

The CMA's guidance states that it will apply a starting point percentage 'towards the upper end of the range' when considering the most serious abuses of a dominant position. Seriousness will be assessed by reference to the structure and size of the market, the effect on competitors (and others), the need for deterrence and the damage caused to consumers.

ii Behavioural remedies (including interim measures)

On reaching an infringement decision, the CMA (or regulator) may give any person such directions as it considers appropriate to bring the infringement of Article 102 or the Chapter 2 prohibition to an end.[24] Directions may be enforced through the civil courts.[25]

The CMA and regulators also have the power to impose interim measures.[26] Interim measures may be imposed only where the authority has opened a formal investigation (and therefore has 'reasonable suspicion' of an infringement) and considers it necessary to impose interim measures as a matter of urgency for the purposes of preventing significant damage, or to protect the public interest.

The CMA is yet to impose interim measures, although it did consider and reject an application by Worldpay against Visa UK Limited in 2014.[27] The OFT imposed interim measures only once (in 2006), and those measures were subsequently withdrawn. However, the legal threshold for the OFT to impose interim measures was one of 'serious, irreparable

21 *Napp Pharmaceutical Holdings Limited and Subsidiaries v. Director General of Fair Trading* [2002] CAT 1, paragraph 457.
22 Section 40 of the Act.
23 In connection with the OFT's infringement decisions concerning: (1) bid-rigging arrangements in the construction sector; and (2) cartel behaviour by recruitment agencies.
24 See, for example, *Phenytoin sodium capsules*, December 2016, Case CE/9742-13, described in Section II(ii), *supra*.
25 Sections 33 and 34 of the Act.
26 Section 35 of the Act.
27 See CMA press release of 27 March 2015.

damage', whereas the CMA need only show the prospect of 'significant damage'. This change in the legal threshold is intended to make it easier for the CMA to impose interim measures in future. Until now, parties seeking interim relief have generally found it necessary to resort to the civil courts.[28]

iii Structural remedies

The CMA and regulators have no power to impose structural remedies following a finding of abuse of dominance. However, it is possible for a dominance investigation to be closed on the basis of structural commitments. This has happened on one occasion.

In January 2013, Ofwat accepted binding commitments from Severn Trent Water, the first time it had accepted commitments in a competition case. The investigation considered whether Severn Trent Water was cross-subsidising its water analysis business, Severn Trent Laboratories, from its core regulated business. Specifically, Ofwat considered whether (as a result of cross-subsidisation) Severn Trent Laboratories was able to price below cost when competing for contracts with other providers of water analysis services. The commitments included the divestment of Severn Trent Laboratories. The decision to accept commitments in this case is notable not only because it included a structural divestment, but also because the decision to accept commitments departed from the published guidance, which states that commitments will not generally be accepted in serious abuse of dominance cases, such as predatory pricing.

In *Bristol Water* and *SSE* (mentioned above), Ofwat and Ofgem (respectively) accepted quasi-structural commitments under which the suppliers agreed to introduce functional separation between their upstream and downstream businesses.

The CMA also has the power to impose structural measures to address unilateral market power following a market investigation.

a In 2014, following its *Private Healthcare* market investigation, the CMA decided that HCA should divest private hospitals in central London (although that decision was subsequently quashed by the CAT and remitted for reinvestigation by the CMA, and the CMA decided at the conclusion of its remitted investigation in September 2016 that ordering a divestiture would be disproportionate).

b In 2014, following a market investigation into *Aggregates, Cement and Ready Mix Concrete*, the CC found that Hanson had exclusive rights to produce ground granulated blast-furnace slag (an input into cement) in Great Britain and forced it to divest one of its facilities to create competition.

c In 2010, the CC required BAA plc (the owner of the largest UK airports) to divest two London airports and one Scottish airport, to improve competition in the relevant markets.

28 See, for example, *Dahabshiil Transfer Services Limited v. Barclays Bank plc and Harada Limited* and *Berkeley Credit And Guarantee Limited v. Barclays Bank plc* [2013] EWHC 3379 (Ch). This case concerned an alleged abuse of dominance by Barclays, which withdrew certain money-servicing activities from the claimant. The High Court granted an interim injunction, subject to standard cross-undertakings in damages, requiring Barclays to continue providing the services to the claimant pending a full trial. See also *Packet Media Ltd v. Telefonica UK Ltd* (above). By contrast, interim relief was refused by the High Court in *Bruce Baker v. The British Boxing Board of Control* [2014] EWHC 2074 (QB).

VI PROCEDURE

The UK enforcement procedure is similar in many respects to the procedure that applies at EU level (under Regulation 1/2003). The CMA (or concurrent regulator) investigates a suspected infringement and reaches an administrative decision in the first instance. That decision is then subject to appeal. The stages of a CMA investigation are as follows:

a Investigations are usually triggered by complaints. However, this is not always the case, and the CMA is able to investigate on its own initiative. The OFT's *Gaviscon* investigation, for example, began after evidence was submitted by a whistle-blower.

b Before opening a formal investigation the CMA must be satisfied that it has 'reasonable suspicion' of an infringement.[29] The CMA has no power to use formal investigation powers unless this legal threshold is met. For this reason, it typically carries out 'informal' information gathering in the first instance (including seeking further information from complainants).

c As well as satisfying the legal threshold, the CMA must decide whether the case is an administrative priority, in accordance with its published Prioritisation Principles.[30] The Prioritisation Principles are intended to ensure the CMA makes efficient use of its resources when deciding which cases to pursue. The High Court has upheld the CMA's right to prioritise its cases in this way, and to close investigations on administrative grounds, even after considerable investigation has been carried out.[31]

d Once it has opened an investigation, the CMA will publish a short notice on its website indicating in broad terms the relevant sector and conduct under investigation. It does not usually name the parties to its investigations before a statement of objections is issued. However, in exceptional circumstances, the CMA can decide to publish the names of the parties in its initial public notice. Exceptional circumstances include instances where a party's involvement is already in the public domain, or where the CMA considers that the potential harm to consumers or other businesses from non-disclosure is sufficient to justify disclosure.

e Provided the legal threshold for opening a case is met, the CMA has wide powers to require the production of information. It may require the production of specified documents or information, ask individuals oral questions or carry out interviews with individuals. Individuals are required to answer the CMA's questions, subject to their privilege against self-incrimination, and failure to do so can result in civil sanctions. The CMA may also carry out unannounced visits of business or domestic premises (i.e., 'dawn raids'). It may enter premises without a warrant, or it may enter and search premises with a warrant (which it can obtain from the Competition Appeal Tribunal or the High Court).

f If the CMA is minded to reach an infringement decision against an undertaking, it must issue a statement of objections, setting out its case and evidence it intends to rely on. The decision whether to issue a statement of objections must be taken by the case team's senior responsible officer. The CMA must also allow access to its case file when it issues a statement of objections. The CMA's file must contain all material relevant to the matters in the statement of objections (subject to certain redactions). Any party

29 Section 25 of the Act.

30 CMA16, April 2014.

31 *R (ex p. Cityhook) v. OFT* [2009] EWHC 57.

receiving a statement of objections has the right to submit written representations and to attend an oral hearing. The same process applies in relation to any proposed fine (i.e., the CMA will provide details of its proposed fine and allow the opportunity for written representations and an oral hearing).

g The CMA will consider entering into settlement discussions in any case where it considers that the evidential standard for giving notice of its proposed infringement decision is met.[32] 'Settlement' is the process whereby a business under investigation is prepared to admit that it has breached competition law and confirms that it accepts that a streamlined administrative procedure will govern the remainder of the CMA's investigation of that business's conduct. If so, the CMA will impose a reduced penalty on the business. Settlement discussions can be initiated either before or after the statement of objections is issued. The CMA retains broad discretion in determining which cases to settle, and this includes the discretion whether to explore interest in settlement discussions, whether to continue or withdraw from settlement discussions and whether to settle at all. Businesses do not have a right or an obligation to settle in a given case and may withdraw from settlement discussions at any time.

h Parties can offer commitments at any stage of an investigation, although the CMA encourages parties considering commitments to offer them before a statement of objections is issued. The commitments process is similar to the EU process under Article 9 of Regulation 1/2003. There is no obligation on parties to offer commitments. However, if accepted, the commitments become binding and are enforceable through the courts.

i Following parties' written and oral representations, the CMA must decide whether to issue an infringement decision. This decision is taken on a collective basis by a three-member case decision group (CDG), which may include any senior CMA staff or board member or any member of the CMA panel. The senior responsible officer may not be a member of the CDG, to ensure that the final decision is taken by officials who were not involved in the decision to issue the statement of objections. The CMA may equally decide at this stage to issue a reasoned decision that it has no evidence of an infringement. Final decisions are published (in redacted form) on the CMA's website.

j CMA infringement decisions are subject to appeal to the Competition Appeal Tribunal (CAT), and subsequently to the civil appeal courts on points of law.

CMA investigations vary significantly in duration, and no statutory deadlines apply. Very broadly, a CMA investigation is likely to take around three years (from case-opening until decision), with the statement of objections being issued roughly halfway through that period.

During an investigation, disputes over procedural matters (such as deadlines for responding to information requests, or confidentiality redactions) that cannot be resolved with the case team itself may be referred to the CMA's Procedural Officer. The Procedural Officer will review the party's written application and relevant correspondence, and allow an opportunity for each side to present its views orally (which may be by telephone). The Procedural Officer will then issue a short reasoned decision (within a target deadline of 10 working days), which is binding on the CMA. CMA procedural decisions are ultimately subject to judicial review by the civil courts.

32 In the past, settlement was formally referred to as 'early resolution'.

As explained above, the CMA has the power to impose interim measures to prevent significant damage, or to protect the public interest. If the CMA is minded to impose interim measures, it must first give notice to the party in question and allow them the opportunity to make representations. Interim measures decisions are subject to appeal to the CAT.

The Consumer Rights Act 2015 also gives the CMA a new power to certify voluntary compensation schemes following an infringement decision, intended to encourage firms to offer compensation without the need for victims to commence private litigation.

Outside an investigation, the CMA has the power to publish opinions on novel issues of competition law where it considers there is sufficient need for general guidance (e.g., because of their economic importance for consumers). The CMA has never published an opinion in relation to a question of abuse of dominance. The CMA is sometimes prepared to offer private, informal advice on an *ad hoc* basis but only in exceptional cases and only where the matter in question would satisfy its case Prioritisation Principles. By contrast, the CMA does encourage potential complainants to approach it with possible complaints for discussion on an informal and confidential basis.

VII PRIVATE ENFORCEMENT

Two types of private action exist in the United Kingdom: follow-on actions and stand-alone actions.

A follow-on action is a damages action founded on an infringement decision by a UK competition authority or the European Commission. The court is bound by the findings of infringement already made (as well as findings of fact in the infringement decision). The claimant is therefore required only to show loss and causation. In a stand-alone action, the claimant must prove that the defendant infringed competition law, as well as proving that the claimant suffered reasonably foreseeable loss. Since October 2015, stand-alone actions and follow-on actions can be brought before the CAT as well as the civil courts (the High Court of England and Wales, the High Court of Northern Ireland, or the Court of Session or Sheriff Court in Scotland).[33] The civil courts and the CAT have wide jurisdiction to award damages and equitable remedies, including injunctive relief, specific performance and declarations of illegality.

In the past, private claims tended to gravitate towards the civil courts, and particularly the High Court of England and Wales, for a variety of reasons. The Consumer Rights Act 2015 aims to reverse this trend. Not only does the CAT now have the power to hear stand-alone actions and grant injunctive relief, it is also the only venue in which claimants can bring opt-out and opt-in collective actions (discussed below). Further, some cases before the CAT will qualify for fast-track review, capping the costs risk for claimants.[34] The civil courts also have the power to transfer competition cases to the CAT. The CAT's procedural rules and limitation periods are now generally aligned with those that apply to the civil courts, although some questions remain over how the new rules apply to claims relating to conduct pre-dating October 2015. Taken together, these changes are intended to make the CAT the principal venue for competition cases in the United Kingdom.

There are four forms of collective action in the United Kingdom.

33 Before October 2015, the CAT did not have jurisdiction to hear stand-alone actions.

34 See, for example, *Socrates Training Limited v. The Law Society of England and Wales* [2016] CAT 10, judgment (costs capping) of 21 June 2016.

a Collective actions before the CAT: since October 2015 any representative of a class of persons may bring a collective action for damages before the CAT on an opt-out basis or an opt-in basis. In either case, the claimant must obtain permission from the CAT (a 'collective proceedings order') to continue with a claim on this basis, by showing that they are a suitable representative and that the claims in question are sufficiently similar to be brought in collective proceedings.

b Consumer actions by specified bodies: 'specified bodies' can bring follow-on damages actions before the CAT on behalf of consumers, on an opt-in basis. A 'specified body' is a consumer organisation specified by the Secretary of State by statutory order. To date, only the Consumers' Association (also known as 'Which?') has been designated a specified body. Which? has brought only one action under these provisions (concerning replica football kits and which was ultimately settled), and has publicly stated that it will not bring any further actions of this type.

c Group litigation orders: the High Court has the power to make a group litigation order combining claims that raise common or related issues. A group litigation order will also provide for the establishment of a group register of the claims forming the group. Judgments are binding on all parties on the group register.

d Representative actions: it is, in theory, possible for a claimant to bring an action in the High Court on behalf of all claimants with the same interest.[35] However, following a 2010 Court of Appeal judgment,[36] it seems highly unlikely that mass representative actions can be brought in competition cases under these provisions and far more likely that representative claimants will seek to launch collective proceedings before the CAT.

Damages in competition claims are intended to be compensatory: they are intended to place the victim in the position he or she would have been in had the infringement not occurred. In exceptional circumstances, where compensatory damages would otherwise be an inadequate remedy, damages might be awarded on a restitutionary basis (i.e., an account of the profits earned unjustly by the defendant). While the Court of Appeal has accepted in principle that restitutionary damages may apply,[37] they have never been awarded in practice.

As noted above, exemplary damages are no longer permitted in competition litigation, following the enactment of Regulations implementing the EU Damages Directive in the UK.[38] This reverses the principle established in the *Cardiff Bus* case that exemplary damages were possible in dominance cases where no administrative fine had been imposed.[39]

35 Civil Procedure Rule 19.6.

36 *Emerald Supplies Ltd v. British Airways plc* [2010] EWCA Civ. 1284.

37 *Devenish Nutrition Ltd v. Sanofi-Aventis SA (France) & Ors* [2008] EWCA Civ. 1086.

38 The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (No. 385) came into force on 9 March 2017; see Part 8.

39 See *2 Travel Group plc (in liquidation) v. Cardiff City Transport Services Limited* [2012] CAT 19, judgment of 5 July 2012. In 2008, the OFT issued an infringement decision, finding that Cardiff City Transport Services Limited (trading as Cardiff Bus) had engaged in predatory behaviour in the supply of local bus services in the Cardiff area. No fine was imposed on Cardiff Bus, because its turnover fell below the statutory threshold for immunity from fines. However, a rival bus company, 2 Travel, which had exited the market (and was by now in liquidation), sought follow-on damages in the CAT under several heads. The CAT found that Cardiff Bus was liable for 2 Travel's loss of profit of around £34,000 (plus interest), but

More generally, the UK has become a popular venue for private actions even where the claimant has a choice of jurisdiction. There are two principal reasons for this. First, the UK rules on disclosure of evidence are favourable to claimants (allowing access to evidence that might not be available in other jurisdictions). Secondly, costs are generally awarded on 'loser-pays' basis. A successful claimant is therefore likely to recover a significant proportion of his or her costs from the defendant.

Public funding is generally unavailable for competition law actions. However, other funding options are available. In particular, parties may enter conditional fee agreements (CFAs) with lawyers. Under a CFA, the lawyer will be paid nothing if the case is lost but will be entitled to a success fee (i.e., an uplift) of up to 100 per cent for winning the case. Competition actions in the United Kingdom may also be funded through 'after-the-event' insurance or by professional funders. However, in most cases, any uplift or after-the-event insurance premium will not be recoverable from an unsuccessful defendant. Since April 2013, claimants have also been able to instruct lawyers in High Court actions under a damages-based agreement (DBA). Under a DBA the lawyer is entitled to a percentage of the damages awarded to a successful claimant, but receives nothing if the claim is unsuccessful. DBAs are not permitted in opt-out collective proceedings before the CAT.

VIII FUTURE DEVELOPMENTS

The public enforcement and private litigation regimes in the United Kingdom have undergone considerable reform in recent years. While these reforms are significant from an institutional and procedural perspective, the substantive rules on dominance are unchanged. The reforms were intended to result in more competition law enforcement cases, especially in the regulated sectors, together with greater use of market investigations to tackle concerns about unilateral conduct and an increase in private litigation. The expected boost to public enforcement and private litigation (and collective actions in particular) has been slow to materialise, although CMA enforcement activity increased significantly following criticism by the National Audit Office in February 2016. There is reason to believe this growth in public enforcement will continue to gain momentum over the coming year.

In the longer term, the most significant future development in UK antitrust enforcement will be the withdrawal of the UK from the EU. On 29 March 2017, the UK government notified its intention to withdraw from the EU under Article 50 of the Treaty on European Union, commencing a two-year countdown (subject to extension only if all Member States agree). The UK government indicated in its White Paper on Brexit that it would introduce a Great Repeal Bill to convert the body of existing EU law into domestic law, such that 'the same rules and laws will apply on the day after we leave the EU as they did before.'[40] There is, however, extensive scope for change to competition enforcement in the UK. The terms of the UK's post-Brexit relationship with the EU have yet to be determined, but likely implications for competition enforcement include the following:

that the other claimed losses had not been proven. The CAT nevertheless awarded exemplary damages of £60,000 (almost tripling the total damages awarded), on the basis that Cardiff Bus's abusive conduct had been calculated to make a profit that was likely to exceed the compensation payable to the claimant.

40 'The United Kingdom's exit from and new partnership with the European Union', Cm 9417, paragraph 1.1.

a EU competition law would no longer be directly applicable in the UK, although it would still apply to UK companies active in the EU;
b European Commission infringement decisions would no longer extend to the UK;
c a European Commission investigation would no longer preclude the CMA from investigating the same conduct;
d the CMA, sectoral regulators, CAT and UK civil courts may have greater freedom to interpret UK competition law differently from equivalent EU competition law;
e the European Commission would no longer have the power to conduct dawn raids in the UK; and
f European Commission infringement decisions adopted post-Brexit would not necessarily be binding on the CAT and UK civil courts, including in follow-on damages claims.

Any post-Brexit changes to UK competition enforcement will present both challenges and opportunities – for business, for the CMA and sectoral regulators and for the legal profession. There will inevitably have to be detailed amendments to UK statutes, secondary legislation and guidance, and the UK competition authorities may have to adjust their prioritisation and investigation priorities to meet increased demands on their resources. However this unfolds, it is unlikely that the substantive provisions of the Competition Act 1998 will change materially in the short term.

Chapter 25

UNITED STATES

Kenneth S Reinker, Daniel Culley and Morgan L Mulvenon[1]

I INTRODUCTION

The US Supreme Court has emphasised that the opportunity to attain a monopoly and reap its benefits encourages investment and innovation.[2] Thus, possessing and exercising monopoly power does not violate US antitrust law 'unless it is accompanied by an element of anticompetitive conduct'.[3] Unlike the competition laws of many other jurisdictions, therefore, US antitrust law does not recognise claims for abuses of dominance that merely exploit existing monopoly power, such as claims for excessive pricing. This difference in focus is reflected throughout the standards adopted in US law as discussed below.

The US antitrust statute specific to monopolies is Section 2 of the Sherman Act, 15 USC Section 2. It provides that '[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony […]'. US law recognises three separate violations that arise under this statute:

a monopolisation, which requires: (1) monopoly power and (2) anticompetitive conduct that helps to obtain or maintain that power;[4]

b attempted monopolisation, which requires: (1) a dangerous probability of achieving monopoly power; (2) anticompetitive conduct that threatens to help achieve that power; and (3) a specific intent to monopolise;[5] and

c conspiracy to monopolise, which requires: (1) a conspiracy; (2) a specific intent to monopolise; and (3) an overt act in furtherance of that conspiracy.[6]

The Sherman Act can be enforced in civil actions through injunctions brought by the US Department of Justice (DOJ) and through private litigation, as detailed below.[7]

Other statutes also apply to the behaviour of monopolists. Most notable is Section 5 of the Federal Trade Commission (FTC) Act, 15 USC Section 45, which prohibits 'unfair

1 Kenneth S Reinker and Daniel Culley are partners, and Morgan L Mulvenon is an associate, at Cleary Gottlieb Steen & Hamilton LLP.

2 See *Verizon Communications Inc v. Law Offices of Curtis V Trinko LLP*, 540 US 398, 407 (2004).

3 Id. [Emphasis in the original.]

4 Id.

5 See *Spectrum Sports Inc v. McQuillan*, 506 US 447, 453–54, 459 (1993).

6 See *United States v. Yellow Cab Co*, 332 US 218, 225–26 (1947).

7 Criminal sanctions are also theoretically available in monopolisation cases. In practice, however, the DOJ typically pursues criminal sanctions – which include fines and imprisonment – only for horizontal cartels that engage in plainly illegal activity such as price fixing.

methods of competition'. The FTC Act reaches all conduct covered by the Sherman Act and probably reaches more broadly.[8] It can be enforced solely by the FTC through civil action for injunctions and prospective cease-and-desist orders.[9]

Many US states have analogous statutes that apply to monopolists. In addition, in certain industries, other regulations can also apply to and potentially limit monopolists.

II YEAR IN REVIEW

The US Supreme Court did not decide any monopolisation cases in the past year. The FTC was involved in a number of monopolisation cases, particularly in the pharmaceutical industry. The FTC continued its enforcement against 'reverse payment settlements'. The FTC also settled monopolisation charges against a drug maker that allegedly acquired a potential competitor and against a biomaterial supplier that allegedly used long-term exclusive agreements. The FTC initiated lawsuits in federal court against a drug maker that allegedly abused government processes by filing regulatory petitions to block generic entry and against a semiconductor device manufacturer that allegedly raised its rivals' costs and foreclosed them from key customers through its patent licences practices.

i The FTC continues to target reverse payment settlements

In 2013, the US Supreme Court held in *FTC v. Actavis* that reverse payment settlements – that is, payments made by a drug manufacturer to delay the entry of a generic competitor –'can sometimes violate the antitrust laws'.[10] Over the past year, the FTC has continued its enforcement efforts against reverse payments. In January 2017, brand-name manufacturer Endo Pharmaceuticals settled FTC claims that Endo used reverse payment settlements to block entry by generic versions of the drugs Opana ER and Lidoderm.[11] The FTC originally filed suit in March 2016, alleging that Endo had agreed not to release authorised generic products for a period of time and, in exchange, the generic manufacturers agreed to delay entry for up to two-and-a-half years. At the same time that the FTC settled with Endo, the FTC refiled charges against two generic drug manufacturers that had entered into agreements with Endo. Two other generic manufacturers settled in 2016.

ii The FTC settles allegations that acquisition of a potential competitor protected a monopoly

In January 2017, the FTC settled charges that Questcor Pharmaceuticals (since acquired by Mallinckrodt) protected its monopoly by acquiring a potential competitor. Questcor sells Acthar, a drug used to treat infantile spasms as well as certain other disorders. Acthar is the only long-acting adrenocorticotropic hormone (ACTH) drug sold in the United States.[12]

8 See *FTC v. Cement Inst*, 333 US 683, 691–94 (1948).

9 15 USC Sections 45, 53(b).

10 *FTC v. Actavis Inc*, 133 S. Ct. 2223, 2227 (2013).

11 Joint Motion for Entry of Stipulated Order for Permanent Injunction, *FTC v. Allergan PLC*, No. 17-cv-00312 (N.D. Cal. 2017), available at www.ftc.gov/system/files/documents/cases/allergan_jt_mtn_re_stip_order.pdf.

12 Stipulated Order for Permanent Injunction and Equitable Monetary Relief, *FTC v. Mallinckrodt Ard Inc, formerly known as Questcor Pharmaceutical Inc*, No. 1:17-cv-00120 (D.D.C. 2017), available at www.ftc.gov/system/files/documents/cases/170118mallinckrodt_stipulated_final_order.pdf.

The FTC alleged that Questcor acquired the US rights to develop Synacthen Depot, a synthetic ACTH drug sold primarily in Europe. Synacthen Depot was not patented, was not approved for use in the United States and was not in clinical trials at the time of acquisition, and it was highly uncertain whether Synacthen Depot would ever be approved by the US Food and Drug Administration (FDA). The FTC nonetheless alleged that if Questcor had not bought the drug, another bidder would have used it to pursue entry and took the view that a monopolist can violate the antitrust laws by acquiring a potential competitor, even if entry is highly unlikely. The settlement required Questcor to make a $100 million equitable monetary payment and to sublicense the rights to Synacthen Depot for two conditions, infantile spasms and nephrotic syndrome (a kidney disorder) (while allowing Questcor to retain the rights for all other conditions).

Republican Commissioner Maureen K Ohlhausen voted to accept the settlement but issued a concurring statement expressing concern about the monetary remedy.[13] Historically, the FTC's use of equitable monetary remedies was limited to cases where, among other things, there was a clear violation of the antitrust laws and a reasonable basis for calculating the disgorgement amount. In 2012, however, the Obama Administration FTC withdrew the policy statement that articulated these limitations. Since then, the FTC has increasingly imposed equitable monetary remedies, and Commissioner Ohlhausen has been a vocal critic, arguing that this remedy should only be used in limited cases. The Trump Administration FTC could take a different approach on equitable monetary remedies.

iii The FTC sues Shire ViroPharma for abusing government processes

In February 2017, the FTC filed a complaint in federal court against Shire ViroPharma (ViroPharma) for allegedly maintaining a monopoly by abusing government processes to delay generic entry.[14] ViroPharma sells a branded drug called Vancocin Capsules, which are used to treat a gastrointestinal bacterial infection. According to the FTC, the FDA's practice is to refrain from approving generic applications until it resolves pending 'citizen petitions' related to the application. The FTC alleged that ViroPharma engaged in a campaign of baseless and repetitive filings to delay FDA approval of competing generics, specifically alleging that ViroPharma submitted a total of 43 FDA filings and filed three lawsuits against the FDA (the most filings that a company had ever made pertaining to a single drug), failed to support its filings with any clinical data and continued making filings even after an independent panel rejected its assertion. ViroPharma has moved to dismiss. This case is still pending.

iv The FTC sues Qualcomm for standard-essential patents licensing terms

In January 2017, the FTC filed a complaint in federal court against Qualcomm, charging it with using anticompetitive patent licensing practices to maintain its monopoly on the supply of baseband processors, which are semiconductors used in cell phones and other products.[15]

13 Concurring Statement of Maureen K. Ohlhausen, *In the Matter of Mallinckrodt ARD Inc*, 18 January 2017, available at www.ftc.gov/system/files/documents/cases/170118_mallinckrodt_statement.pdf.

14 Complaint, *FTC v. Shire Viropharma Inc*, No. 5:17-cv-00220 (D. Del. 2017), available at www.ftc.gov/system/files/documents/cases/170216viropharma_unredacted_sealed_complaint_.pdf.

15 Complaint, *FTC v. Qualcomm Inc*, No. 5:17-cv-00220 (N.D. Cal. 2017), available at www.ftc.gov/system/files/documents/cases/170117qualcomm_redacted_complaint.pdf.

Qualcomm both has a dominant position in the sale of baseband processors and a number of standard-essential patents related to baseband processor technology, which Qualcomm had promised to license on fair, reasonable, and non-discriminatory (FRAND) terms.

The FTC alleged that Qualcomm implemented a 'no license, no chips' policy, meaning that Qualcomm would only supply its baseband processors (i.e., chips) to cell phone manufacturers that also agreed to a Qualcomm patent licence that required the customer pay royalties to Qualcomm even when using baseband processors purchased from Qualcomm's competitors. The FTC also alleged that Qualcomm refused to license its standard-essential patents to its competitors in contravention of its FRAND commitments. The FTC argues that these practices imposed an anticompetitive 'tax' on competitors and raised the cost of using competing baseband processors. The FTC also alleged that Qualcomm entered into exclusive dealing agreements for baseband processors with Apple, an important cell phone manufacturer, in exchange for reduced patent royalties. This arrangement allegedly foreclosed competitors of access to a key customer.

Republican Commissioner Ohlhausen dissented, noting that the FTC's complaint failed to allege that Qualcomm charged more than a reasonable royalty for its patents and arguing that this omission 'speaks to the dearth of evidence in this case'.[16] Qualcomm has moved to dismiss the case, and the FTC is still defending it, but it remains to be seen whether the Trump Administration FTC will continue or voluntarily dismiss the case. Apple and other private plaintiffs have also brought similar claims against Qualcomm.

v The FTC settles charges for Invibio's use of long-term exclusive agreements

In April 2016, the FTC settled charges that Invibio used long-term exclusive agreements to maintain a monopoly in implant-grade polyetheretherketone (PEEK), a polymer used to make spinal implants and other medical implants.[17] Invibio was the first-to-market with PEEK, and the FTC alleged that it used exclusivity to foreclose customers and prevent new entrants Solvay and Evonik from developing into fully effective competitors. The FTC alleged that Invibio has been able to maintain approximately 90 percent of PEEK sales worldwide, seven years after the FDA approved the use of Solvay PEEK and four years after the FDA approved Evonik PEEK. Invibio settled the FTC's charges by agreeing not to enter into new exclusive contracts and by allowing some current customers to modify existing contracts to eliminate exclusivity.

III MARKET DEFINITION AND MARKET POWER

Monopoly power is a prerequisite to bringing a monopolisation claim. Monopoly power is the ability to control prices or exclude competition.[18] It can be proven through direct evidence of actual price increases or the exclusion of rivals. More typically, however, courts infer monopoly power from the combination of high market shares and entry barriers. Higher

---

16 Dissenting Statement of Commissioner Maureen K Ohlhausen, *In the Matter of FTC v. Qualcomm, Inc*, 17 January 2017, available at www.ftc.gov/system/files/documents/cases/170117qualcomm_mko_dissenting_statement_17-1-17a.pdf.

17 Analysis of Agreement Containing Consent Order to Aid Public Comment, *In the Matter of Victrex, plc*; *Invibio, Limited*; and *Invibio, Inc*, File No. 141-0042, available at www.ftc.gov/system/files/documents/cases/160427victrex-analysis.pdf.

18 See, for example, *United States v. EI DuPont de Nemours & Co*, 351 US 377, 391 (1956).

market shares are more likely to support the inference of monopoly power, and typically shares below 50 per cent cannot support that inference.[19] But even a very high share does not automatically establish monopoly power.[20]

Monopoly power is not required for attempted monopolisation or conspiracy to monopolise claims. Attempted monopolisation instead requires only a 'dangerous probability' of achieving monopoly power, and, thus, can be sustained with a lesser showing of market power. A conspiracy to monopolise arguably requires no showing of market power at all, although cases alleging a conspiracy to monopolise in the absence of market power are relatively rare.

Inferring monopoly power requires measuring market shares and, thus, requires defining a relevant market. Relevant markets have both product and geographic dimensions. Product markets are defined by looking at what products are reasonably interchangeable substitutes for one another.[21] Geographic markets are defined by looking at what other geographies sellers operate in and buyers can turn to.[22] One method that is often used to determine what products or geographies are in the market is to ask whether customers would substitute from one product or geography to another in response to a small price increase above competitive levels.[23]

IV ABUSE

i Overview

Monopolisation requires anticompetitive conduct that helps to obtain or maintain a monopoly. Obtaining or maintaining a monopoly through other means, such as 'superior product, business acumen, or historic accident', is therefore not a violation.[24]

US courts and antitrust regulators have not established a definitive list of what conduct can be anticompetitive nor have they adopted clear standards for distinguishing between pro-competitive and anticompetitive conduct. The DOJ did issue guidance on monopolisation in 2008 but withdrew it in May 2009.[25] The list below, although not exhaustive, discusses the most important types of potential anticompetitive conduct that courts and regulators have recognised could support a monopolisation claim.

ii Exclusionary abuses

Exclusionary pricing

Predatory pricing is charging low prices to try to drive competitors from the market. Because low prices are generally pro-competitive and beneficial to consumers, US law imposes rigorous

19 See, for example, *Domed Stadium Hotel Inc v. Holiday Inns Inc*, 732 F.2d 480, 489 (5th Cir 1984) ('Supreme Court cases, as well as cases from this court, suggest that in the absence of special circumstances, a defendant must have a market share of at least fifty percent before he can be guilty of monopolization.').

20 US law does not recognise 'relative dominance' or 'collective dominance'.

21 See, for example, *Brown Shoe Co v. United States*, 370 US 294, 325 (1962); DuPont, 351 US at 395.

22 See, for example, *Tampa Elec Co v. Nashville Coal Co*, 365 US 320, 327–28 (1961).

23 Cf. Horizontal Merger Guidelines, US Dep't of Justice and the Federal Trade Commission Section 4.1.1 (19 August 2010) (describing similar approach in merger context using prevailing prices as baseline).

24 See, for example, *United States v. Grinnell Corp*, 384 US 563, 570–71 (1966).

25 Press release, US Dep't of Justice Office of Public Affairs, 'Justice Department Withdraws Report on Antitrust Monopoly Law' (11 May 2009), available at www.justice.gov/opa/pr/2009/May/09-at-459.html.

requirements to sustain a predatory pricing claim. Specifically, a plaintiff must prove: (1) that the defendant's prices are below cost; and (2) 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.[26] The US Supreme Court has not specified the precise measure of cost that should be used in this analysis, although most lower courts have required pricing below some measure of incremental cost.

A price squeeze or margin squeeze is when a firm that is active in upstream and downstream markets charges high prices for the upstream input and low prices for the downstream product. The potential antitrust concern is that a downstream competitor that is not vertically integrated must therefore pay high prices for an input while charging low prices to compete downstream. However, US law does not recognise price-squeeze claims without either an upstream duty to deal with competitors or downstream predatory pricing.[27]

Exclusive dealing

Exclusive dealing can have many pro-competitive benefits, including encouraging investment by reducing uncertainty about future sales, encouraging relationship-specific investments, and encouraging better product promotion and related services. However, exclusive dealing can also have anticompetitive effects when it forecloses rivals from the market and impairs their competitiveness. Under US law, exclusive dealing cannot be anticompetitive unless it forecloses a 'substantial share' of the relevant market.[28] What counts as 'substantial' is unsettled. Some courts have suggested that foreclosure of 30 per cent or less may suffice, while others have suggested that 40 to 50 per cent may be required.[29] Courts have also suggested that the foreclosure required to sustain a claim may be somewhat lower where the defendant is a monopolist.[30]

Loyalty conditions are when a seller charges customers one price if the customer purchases a certain percentage of its needs of a product from the seller and a higher price if the customer does not. Loyalty conditions can pro-competitively reduce costs, shift risk in volatile industries, or lead to efficient contracting such as by encouraging promotional or marketing efforts. But like exclusive dealing, they can also foreclose rivals and impair their competitiveness. US law on loyalty discounts is unsettled. Some courts have applied a predatory pricing analysis, finding loyalty conditions to be potentially anticompetitive only when the resulting price is below cost.[31] Other courts have applied an exclusivity analysis, finding loyalty conditions to be potentially anticompetitive whenever they foreclose a

26 *Brooke Group Ltd v. Brown & Williamson Tobacco Corp*, 509 US 209, 222–24 (1993). In a predatory pricing claim based on price discrimination brought under the Robinson-Patman Act, 15 USC Section 13, a plaintiff must prove a 'reasonable prospect' of recoupment. Id. at 224.

27 *Pacific Bell Telephone Co v. linkLine Communications Inc*, 555 US 438 (2009).

28 *Tampa Electric Co v. Nashville Coal Co*, 365 US 320, 327 (1961).

29 *Compare Twin City Sportservice Inc v. Charles O Finley & Co Inc*, 676 F.2d 1291, 1298, 1304 (9th Cir 1982) (finding substantial foreclosure where defendant 'controlled 24 per cent' of the market), with *Stop & Shop Supermarket Co v. Blue Cross & Blue Shield of RI*, 373 F.3d 57, 68 (1st Cir 2004) (foreclosure is 'unlikely to be of concern where they are less than 30 or 40 per cent'), with *United States v. Microsoft Corp*, 253 F.3d 34, 70 (DC Cir 2001) (en banc) ('roughly 40 per cent or 50 per cent share usually required' for an unreasonable restraint of trade claim).

30 See *Microsoft*, 253 F.3d at 70.

31 See, for example, *Concord Boat Corp v. Brunswick Corp*, 207 F.3d 1039, 1060–62 (8th Cir 2000).

substantial share of the market.[32] Some courts and regulators may also focus on the loyalty condition's effect on the incremental price of a customer's 'contestable' share that it would be willing to switch to the defendant's rivals.[33]

MFN clauses provide that a customer will receive pricing or other terms as good as those that the seller offers other customers.[34] MFNs can pro-competitively help buyers obtain low prices and can help prevent opportunism when one party makes relationship-specific investments. But MFNs can also anticompetitively limit competition by preventing new entrants from obtaining prices as low as they otherwise would have. US case law on MFNs is relatively undeveloped. However, antitrust regulators have pursued enforcement actions against MFNs, most often in healthcare.[35]

Tying

Tying is when a supplier conditions its sale of one product (the tying product) on the customer purchasing another product (the tied product).[36] Tying can be accomplished through an absolute refusal to sell the items separately or through a price difference between the bundle and the separate items if the difference is sufficiently large that most or all customers would purchase the bundle. Tying can pro-competitively lower costs or increase the value of the items to customers, improve quality or protect goodwill, and efficiently meter consumption. On the other hand, tying may anticompetitively allow a company with monopoly power in the tying product to increase its market power in the tied product, help it protect its monopoly power in the tying product, or otherwise increase its monopoly profits. A successful tying claim requires that the tying and tied items be separate products. Items are deemed separate products when customers want to buy them separately and when offering them separately is possible and efficient.[37] Additionally, tying requires that the defendant have market power in the tying product.[38] More recent cases have recognised the potential pro-competitive benefits of tying, although some older precedents could be read to suggest that pro-competitive justifications are inadmissible in a tying case.[39] Proving that a substantial share of the relevant market is foreclosed is not a requirement for a tying claim.

Bundling is when a supplier charges one price if a customer purchases two or more products together, but charges a higher price when the products are purchased separately. Bundling can pro-competitively lower costs or increase the value of the products to customers. But bundling raises similar potential anticompetitive concerns as tying. Bundling can also be combined with loyalty conditions, such that obtaining a lower price requires that the customer buy a certain share of its needs across multiple products from a particular

32 See, for example, *LePage's Inc v. 3M*, 324 F.3d 141, 157–59 (3d Cir. 2003) (en banc).

33 See, for example, US Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act 107 (2008) (now withdrawn).

34 For discussions of MFNs, see, for example, Baker, 'Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses', 64 *Antitrust L.J.* 517 (1996); and Salop & Scott Morton, 'Developing an Administrable MFN Enforcement Policy', 27(2) *Antitrust Magazine* 15 (2013).

35 See, for example, Complaint, *United States v. Blue Cross Blue Shield of Michigan*, No. 2:10-cv-14155-DPH-MKM (E.D. Mich. 18 October 2010).

36 See *Jefferson Parish Hospital v. Hyde*, 466 US 2, 21 (1984).

37 See *Eastman Kodak Co v. Image Technical Services Inc*, 504 US 451, 462 (1992).

38 See *Jefferson Parish*, 466 US at 13–14.

39 See *Ill Tool Works Inc v. Independent Ink Inc*, 547 US 28, 35 (2006).

company. Similar to loyalty conditions, US case law on bundling is unsettled. Some courts have ruled that bundling cannot be anticompetitive unless it results in prices that are below 'an appropriate measure' of cost.[40] In applying this cost-based test, some courts have used a 'discount attribution test' that applies the entire price 'discount' across all bundled products to the standalone price of the competitive product and then compares the resulting price to the cost of the competitive product.[41] Other courts have instead found that bundling can be potentially anticompetitive whenever it forecloses a substantial share of the market.[42]

Exclusionary product design – where a company designs its product in a way that makes it difficult for competitors to develop compatible or interoperable products – can raise similar concerns as tying. Although exclusionary product designs can in certain circumstances be actionable,[43] antitrust laws encourage innovation and US courts are generally reluctant to second-guess product design decisions.[44] Unless the product design clearly has no benefits to customers, a court is relatively unlikely to sustain an exclusionary product design claim.

Refusal to deal

US law generally does not impose a duty to deal with competitors because the possibility of obtaining monopoly power and the ability to exclude rivals encourages investment and innovation and because setting the terms of dealing and monitoring would be administratively burdensome. However, in limited circumstances, a refusal to deal with rivals can be anticompetitive conduct. The cases where courts have found a duty to deal generally involve the defendant ceasing a prior, voluntary and profitable course of dealing with its rivals and the defendant dealing with rivals on different terms than with non-rivals (such as where the defendant refuses to sell a product to rivals that the defendant sells at retail).[45] Even when other US regulations mandate dealing between competitors, US courts generally will not find an antitrust duty to deal.

iii Discrimination

Discriminatory pricing occurs when a seller charges different customers different prices for the same product. Unless the pricing is predatory, price discrimination alone is not anticompetitive conduct. However, a separate statute called the Robinson-Patman Act, which is not specific to monopolists, prohibits discriminatory pricing in the sale of commodities where the effect may be to reduce downstream competition between customers.[46] This aspect of the Robinson-Patman Act has been widely criticised, and enforcement of it is relatively rare. Although the statute requires an effect on competition, US courts typically infer that effect from the fact of differential pricing.[47] Discriminatory pricing is not prohibited by the Robinson-Patman Act if the sale does not involve commodities, if the customers do not

40 See, for example, *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 903 (9th Cir 2008).

41 See id., at 906–08.

42 See, for example, *LePage's Inc v. 3M*, 324 F.3d 141, 154–57 (3d Cir 2003) (en banc).

43 See, for example, *United States v. Microsoft Corp*, 253 F3d 34, 65 (DC Cir 2001) (en banc); *CR Bard Inc v. M3 Systems Inc*, 157 F3d 1340, 1382 (Fed Cir 1998).

44 See, for example, *Berkey Photo Inc v. Eastman Kodak Co*, 603 F2d 263, 286-87 (2d Cir 1979).

45 See, for example, *Verizon Communications Inc v. Law Offices of Curtis V Trinko LLP*, 540 US 398, 409–10 (2004); *Aspen Skiing Co v. Aspen Highlands Skiing Corp*, 472 US 585, 605–11 (1985).

46 15 USC Section 13.

47 See *FTC v Morton Salt Co*, 334 US 37, 47 (1948).

compete with one another downstream, or if the price differential is justified by differential costs, an effort to meet competitors' pricing, or changing conditions.[48] The Robinson-Patman Act therefore does not prohibit price discrimination between final consumers, as they do not compete downstream.

iv Exploitative abuses

As noted, exercising monopoly power is generally legal under US law. US law therefore does not in general recognise exploitative abuses.

v Miscellaneous

A variety of other types of conduct can, in certain circumstances, support a monopolisation claim. A non-exhaustive list is discussed here.

Monopoly leveraging is using monopoly power in one market to gain an advantage in a second market. But under US law, monopoly leveraging likely cannot support a monopolisation claim unless it involves some anticompetitive conduct (such as tying, exclusive dealing, or a refusal to deal) and it helps the defendant obtain or maintain a monopoly in the second market (or creates a dangerous probability of doing so).[49]

Monopolisation claims have also been brought against patent holders for abusing standard-setting processes. Such claims might be brought where the patent holder induces a standard-setting organisation to adopt a standard that includes its patents but either deceptively promises to license the patents on FRAND terms and reneges or fails to disclose the existence of its patents in the first place. The concern is that such abuses may result in monopoly pricing that otherwise could have been avoided. Some courts have allowed such claims to go forward, while others have suggested they do not constitute monopolisation.[50] The FTC has also used Section 5 of the FTC Act to pursue enforcement actions against alleged abuses of the standard-setting process.[51]

Monopolisation claims can also be brought against companies that abuse government processes. For example, 'sham' litigation and other abuses of the litigation process can be monopolisation.[52] Similarly, enforcing intellectual property rights obtained through fraud can be monopolisation.[53] Other abuses of governmental processes are also possible.

Additionally, in extreme cases, more general tortious conduct can support a monopolisation claim. For example, one US court allowed a monopolisation claim when a defendant removed its rival's products and advertising from retail stores without permission.[54]

48 15 USC Section 13(a), (b).

49 See *Trinko*, 540 US at 415 n. 4.

50 Compare *Broadcom Corp v. Qualcomm Inc*, 501 F.3d 297 (3rd Cir 2007) (allowing claim for breach of FRAND commitments), with *Rambus Inc v. FTC*, 522 F.3d 456, 462 (DC Cir 2008) (not allowing such a claim).

51 See, for example, *In re Negotiated Data Solutions*, File No. 051-0094, slip op at 2 (FTC 23 January 2008) (Statement of the Commission), available at www.ftc.gov/os/caselist/0510094/080122statement.pdf.

52 See, for example, *Professional Real Estate Investors Inc v. Columbia Pictures Industries Inc*, 508 US 49, 60–61 (1993) (holding that sham litigation requires both objective and subjective baselessness); *California Motor Transport Co v. Trucking Unlimited*, 404 US 508 (1972) (allowing claims based on abuse of the litigation process through repetitive lawsuits).

53 See, for example, *Walker Process Equip v. Food Mach & Chem Corp*, 382 US 172 (1965).

54 See *Conwood Co v. United States Tobacco Co*, 290 F.3d 768, 783–84 (6th Cir 2002).

Mergers that help obtain or maintain a monopoly can constitute monopolisation, although typically mergers are 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'.

V REMEDIES AND SANCTIONS

Available remedies in monopolisation cases include injunctive relief and monetary damages.[55] Civil fines are not available.

Both the US antitrust regulators and private plaintiffs can seek injunctive relief, a court order that either requires the defendant to take certain actions or prohibits the defendant from taking certain actions. Injunctive relief has multiple purposes, including stopping the anticompetitive conduct, reversing its anticompetitive effects, and denying the defendant the fruits of that conduct.[56] Courts have broad discretion to frame appropriate injunctive relief to achieve these goals. Appropriate relief may include structural remedies (such as dissolving or splitting the defendant or requiring divestitures) or behavioural remedies (such as prohibiting the defendant from engaging in certain activities in the future or requiring that the defendant grant rivals access to certain property). Moreover, injunctive relief can include monetary equitable remedies, such as disgorgement (an order requiring the defendant give up supracompetitive profits related to the antitrust violation) or restitution (an order requiring that the defendant compensate victims for their losses).

Private plaintiffs can seek monetary damages equal to three times their actual injury, plus litigation costs and reasonable attorney fees, as detailed below.[57] US and state governments also can seek treble damages for injury to their own business or property (as can foreign governments, although they are usually limited to single damages).[58] In addition, a US state can bring a *parens patriae* action seeking treble damages on behalf of its residents.[59]

VI PROCEDURE

Monopolisation enforcement principally occurs through government investigations by the US antitrust regulators and court proceedings initiated by the US antitrust regulators, states or private plaintiffs.

Investigations by US antitrust regulators can start in a variety of ways, including the regulator's own initiative, complaints from private parties, or requests from other governmental actors (e.g., the US Congress). The DOJ and FTC can work voluntarily with the target of the investigation and third parties or can use compulsory process, including subpoenas and 'civil investigative demands' (CIDs), to obtain documents, written responses to questions, and witness testimony.[60] Entities subjected to compulsory process often seek to negotiate the scope of the discovery and sometimes seek to quash it,[61] although in practice

55 As noted, criminal sanctions are theoretically available but not pursued in practice.

56 See, for example, *United States v. United Shoe Mach Corp*, 391 US 244, 250 (1968).

57 15 USC Section 15.

58 15 USC Section 15(b); 15a.

59 15 USC Section 15c.

60 See 15 USC Sections 46, 49, 57b-1; 15 USC Sections 1311–1314.

61 See 15 USC Section 1314(b); 16 CFR 2.7(d).

doing so is relatively difficult, particularly for a target of an investigation. An investigation can be dropped at any time and that decision is unreviewable by a court. An investigation can also be resolved through settlement at any time. The DOJ, as an agency of the US executive branch, must obtain court approval of its settlements, while the FTC, as an independent administrative agency, must approve settlements by majority vote of the FTC Commissioners.

An investigation can also lead to litigation. The DOJ must pursue litigation in federal court, following the procedures described below. The FTC, by contrast, has its own administrative courts, with somewhat different procedures, followed first by an appeal to the Commission itself and then an appeal to a federal appellate court.

Court proceedings in a monopolisation case are similar to court proceedings in other cases. US federal courts have exclusive jurisdiction to hear cases under the federal antitrust laws, although state courts can hear cases under state antitrust laws.[62] Antitrust cases that seek monetary damages are generally tried before a jury, while antitrust cases that seek only injunctive relief are instead tried before a judge. A court case starts with the plaintiff filing a complaint laying out the allegations against the defendant. The defendant can move to dismiss a complaint on several grounds, most importantly that the allegations fail to state a plausible claim. If the case proceeds, parties engage in potentially wide-ranging discovery, including document production, written interrogatories, requests for admissions, and depositions. After discovery, a party may move for summary judgment on some or all issues if no genuine dispute exists as to any material fact and, given the material facts, the party is entitled to judgment as a matter of law. During and after a trial, parties can again move for judgment as a matter of law. Adverse decisions can be appealed, although typically not until after a final judgment. In general, the parties are free to settle at any time during this process.

Both the US antitrust regulators and private plaintiffs can also seek preliminary relief prior to a full adjudication by moving for a temporary restraining order or preliminary injunction to stop the challenged conduct. Preliminary relief can only be obtained from a court. Whether preliminary relief is appropriate depends on balancing the likelihood each party will succeed on the merits with the harm to the defendant from granting the preliminary relief and the harm to the plaintiff and the public from not granting it. In general, preliminary relief is unusual in a monopolisation case.

Further, the DOJ offers a business review process and the FTC offers an advisory opinion process that may allow businesses to obtain guidance about the DOJ's or FTC's present enforcement intentions as to certain conduct.[63] The business must submit a written request to the DOJ or FTC describing the conduct and provide documents and other information. The DOJ or FTC typically will consider only requests related to proposed conduct (and, thus, typically will not consider requests related to conduct that is already ongoing), and they can decline to issue guidance. If the DOJ or FTC responds, the response and request are made available publicly. The guidance is not legally binding, but in practice the DOJ and FTC are unlikely to pursue enforcement action against a requesting party that relies on it (except in special circumstances, such as if the facts provided were inaccurate).

62 See *General Investment Co v. Lake Shore & Mich S Ry Co*, 260 US 261, 286–88 (1922).

63 See 16 CFR Sections 1.1–1.4; 28 CFR Section 50.6.

VII PRIVATE ENFORCEMENT

As explained above, private plaintiffs can and often do seek treble damages and injunctive relief in monopolisation cases. Private actions can be brought by individual plaintiffs or through an opt-out class action that adjudicates the claims of many similarly situated plaintiffs in a single lawsuit. Class actions have additional procedural requirements that must be satisfied.[64] Often, antitrust actions are viewed as amenable to resolution on a class-wide basis because many of the relevant issues will be market-wide and thus common to the class. Still, procedural hurdles remain, including demonstrating that impact can be proven on a common basis.

Typically, monopolisation suits are brought either by customers alleging that they paid more because of the reduction in competition caused by the monopolisation or by competitors alleging that they made less profit because their ability to compete was impaired. In general, indirect purchasers cannot bring claims under US federal antitrust laws, although many states allow indirect purchasers to bring claims under state antitrust laws.[65]

To obtain damages, a private plaintiff must establish more than the antitrust violation itself. It must also show that it was injured, that the violation was a material cause of its injury, that its injury was sufficiently closely related to the violation, and that its injury resulted from an anticompetitive effect of the violation. Finally, it must prove the amount of damages.

Conceptually, the appropriate measure of damages is the difference between the plaintiff's position in the actual world and what its position would have been in the but-for world without the challenged conduct. Establishing what would have happened in the but-for world is often difficult, so courts typically require plaintiffs to prove damages only with reasonable certainty. Plaintiffs can do so by offering a rough approximation, and in practice, they typically compare the actual world to a baseline unaffected by the challenged conduct (e.g., the same market before the challenged conduct began or a similar market where the challenged conduct never occurred). Increasingly, damages are modelled using econometric techniques.

To obtain an injunction, by contrast, a private plaintiff must generally show that monetary damages would not be an adequate remedy because it cannot prove the amount of damages with reasonable certainty. The forms of injunctive relief discussed above (including behavioural and structural remedies) are in theory available to private plaintiffs.

Private enforcement also interacts with public enforcement. Private plaintiffs can encourage the government to open an investigation. If the government brings a public enforcement action and obtains a favourable judgment, that may benefit private plaintiffs by precluding the defendant from re-litigating certain issues in future private actions by providing *prima facie* evidence of a violation under the antitrust statutes or under more general procedural principles governing preclusion.[66] In contrast, if the government chooses not to bring an action or if it brings an action and loses, that does not prevent a future private action. A settlement likewise does not prevent a future private action, and, if entered before testimony is obtained, also cannot be used as *prima facie* evidence of a violation. In addition, regardless of whether the government decides to bring an action, private plaintiffs

64 See Fed R Civ P 23.

65 See *Illinois Brick Co v. Illinois*, 431 US 720 (1977); *California v. ARC America Corp*, 490 US 93 (1989).

66 See 15 USC Section 16(a).

can often benefit from the fruits of a government investigation, such as the discovery that the government obtains. The statute of limitations for private actions can also be suspended by a government action.

VIII FUTURE DEVELOPMENTS

At the time of publication, there were no significant monopolisation cases pending before the US Supreme Court. As described above, the US regulatory agencies have continued to bring monopolisation cases. However, the election of President Donald Trump could potentially change monopolisation enforcement by the DOJ and FTC. Republican administrations have historically brought fewer monopolisation cases than Democratic administrations.

Appendix 1

ABOUT THE AUTHORS

STEPHAN BARTHELMESS

Cleary Gottlieb Steen & Hamilton LLP

Stephan Barthelmess is a partner based in the Brussels and Frankfurt offices and a member of the bars in Frankfurt am Main, New York and Brussels.

Mr Barthelmess's practice focuses on European and German competition law, including administrative and civil litigation. He has published various articles, primarily in the field of antitrust law. He is a co-author of the Loewenheim commentary on European and German antitrust law (2008).

Mr Barthelmess joined Cleary Gottlieb Steen & Hamilton LLP in 1986 and became a partner in 1995. He has been resident in the New York, Brussels, Paris and Frankfurt offices. Mr Barthelmess received an LLM degree from the University of Michigan Law School in 1986 and obtained a doctorate in law (Dr iur) from the University of Erlangen-Nuremberg Law School in Germany in 1987. He also obtained a pre-diploma from the University of Erlangen-Nuremberg Business School in 1983. He passed his second state examination in the state of Bavaria in 1985 and the first state examination at the University of Erlangen-Nuremberg in 1982.

MATTEO BERETTA

Cleary Gottlieb Steen & Hamilton LLP

Matteo Beretta is a partner at Cleary Gottlieb Steen & Hamilton LLP, based in the Milan office. His practice primarily focuses on European law and antitrust law. He advises numerous major international companies with regard to merger control procedures, and cartels and abuse of dominance matters. He regularly lectures at numerous conferences on competition matters and has authored several articles in US and European legal journals.

Mr Beretta is distinguished as a leading competition and European law expert by *Chambers Europe*. He is also recommended for competition law by *The Legal 500 EMEA* and *Who's Who Legal*. In 2013, he was named the 'Best Italian Competition Law Lawyer of the Year' by Italian legal magazine *TopLegal*.

ESTHER BITTON

Cleary Gottlieb Steen & Hamilton LLP

Esther Bitton is a Cleary Gottlieb Steen & Hamilton LLP associate based in the Paris office, and her practice focuses on EU and French competition law.

Mrs Bitton has represented clients in a number of international cartel and dominance investigations, including in the consumer goods and automotive parts sectors. She regularly represents clients before French and European Courts in enforcement matters. She has also advised clients in complex international merger control cases in Europe, the US, Brazil, China and many other jurisdictions.

Mrs Bitton joined the firm in 2009. She graduated from ESSEC Business School in 2008, and she received law degrees from the Université Paris 1 Pantheon-Sorbonne in 2009

FRÉDÉRIC DE BURE

Cleary Gottlieb Steen & Hamilton LLP

Frédéric de Bure is a Cleary Gottlieb Steen & Hamilton LLP counsel based in the Paris office, and his practice focuses on EU and French competition law.

Mr de Bure has advised clients in complex merger control cases before the European Commission and the French Competition Authority. He has also represented clients in a number of international cartel and abuse of dominance investigations including several recent investigations in the internet and the pharmaceutical sectors. He has wide experience in litigation before the European courts and the French courts in private enforcement matters.

Mr de Bure teaches competition law at Université Montpellier 1 (DJCE/DCI) and is co-author of the book *EU Competition Law – Abuse of Dominance under Article 102 TFEU* (Claeys & Casteels Publishing).

Mr de Bure joined the firm in 2003 and became counsel in 2012. From 2003 to 2008, he was resident in the Brussels office. Mr de Bure graduated from the Institut d'études politiques de Paris (IEP) in 1997 and received a master of science degree from the London School of Economics in 1999. He also received a law degree from the Université Paris 1 Pantheon-Sorbonne in 2002.

DANIEL CULLEY

Cleary Gottlieb Steen & Hamilton LLP

Daniel Culley is based in Cleary Gottlieb Steen & Hamilton LLP's Washington, DC office and practises in a broad range of antitrust matters, including litigation, mergers, cartels and counselling, across a broad range of industries.

Mr Culley received his JD, *magna cum laude*, Order of the Coif, from Georgetown University Law Center in 2008 and received his BS, *magna cum laude*, in international economics, from Georgetown University School of Foreign Service in 2005. He has written a number of articles on antitrust and competition law, with a particular focus on the application of antitrust and competition law to intellectual property and high-technology industries.

GIANLUCA FAELLA

Cleary Gottlieb Steen & Hamilton LLP

Gianluca Faella is a counsel at Cleary Gottlieb Steen & Hamilton LLP. His practice focuses on EU and Italian competition law, state aid and economic regulation (including electronic communications and media regulation). He advises leading companies in proceedings before competition and regulatory authorities and administrative and civil courts, concerning abuses of dominance, restrictive agreements, mergers, state aid and regulatory issues.

He is an adjunct professor of competition law and policy at the University of Siena, and competition and high-tech markets at the LUISS Guido Carli University of Rome. In December 2013 he obtained the national scientific qualification as associate professor in economics, financial and agri-food markets law and regulation. He is a senior research fellow at the Law & Economics LAB (Rome) and lectures regularly on antitrust law issues in several LLM courses at various universities. He was also adjunct professor at the University of Bologna and the University of Naples Federico II, a research fellow at LUISS Guido Carli University (2008–2012), and a research scholar at the New York Law School (2005).

He obtained an LLM degree in competition law and economics at the Erasmus University Rotterdam in 2003, and a PhD in law and economics at LUISS Guido Carli University in 2005.

Mr Faella is the author of a book on discounting policies of dominant firms (*Politiche di sconti delle imprese dominanti*, Giappichelli, Turin, 2012), as well as several articles and essays on competition law, unfair competition, intellectual property and civil law, and he has delivered speeches at several conferences and seminars, in Italy and abroad.

PAUL GILBERT

Cleary Gottlieb Steen & Hamilton LLP

Paul Gilbert is counsel based in the London office of Cleary Gottlieb.

Mr Gilbert's practice focuses on EU and UK competition law, including merger control, anticompetitive agreements, abuse of dominance and sectoral regulation. He has represented clients before the European Commission, the UK Competition and Markets Authority (and its predecessors, the Office of Fair Trading and Competition Commission), as well as in litigation before the UK Competition Appeal Tribunal and Court of Appeal.

Mr Gilbert joined the firm in January 2011 and became counsel in January 2015. Before joining the firm he was Deputy Director of Competition Policy at the UK Office of Fair Trading. Mr Gilbert graduated with first class honours from Trinity College, Oxford in 1997. He obtained postgraduate diplomas in law and legal practice from the College of Law in 2000 and 2001, both with distinction.

Mr Gilbert is a solicitor of the Senior Courts of England and Wales.

FRANCISCO ENRIQUE GONZÁLEZ-DÍAZ

Cleary Gottlieb Steen & Hamilton LLP

Francisco Enrique González-Díaz is a partner based in the Brussels office.

Mr González-Díaz's practice focuses on European and Spanish competition law, including mergers and acquisitions, restrictive practices, abuse of dominance and state aid.

Mr González-Díaz has a law degree from the University of Granada (Spain), as well as LLM degrees from the Free University of Brussels (Belgium) and Harvard University (United States), and an economics and mathematics degree from the Open University (UK).

Prior to joining Cleary Gottlieb Steen & Hamilton LLP, Mr González-Díaz held a number of positions within European institutions. Between 1998 and 2003, he headed one of the enforcement units of the European Commission's Merger Task Force and led the European Commission in its review of a number of large and complex cases in a wide array of market sectors. Between 1996 and 1998, Mr González-Díaz clerked at the European Court in Luxembourg. From 1990 to 1996, Mr González-Díaz was a member of the European Commission's Legal Service.

Mr González-Díaz has written extensively on EU law matters, particularly in the field of antitrust and competition law. He has recently authored and edited a book on abuse of dominance at EU level. He was a lecturer in private international law at the University of Alicante from 1985 to 1989. He also serves on the advisory and editorial boards of a number of legal publications.

Mr González-Díaz is a member of the Bars in Madrid and Brussels. His native language is Spanish, and he is fluent in English and French.

THOMAS GRAF

Cleary Gottlieb Steen & Hamilton LLP

Thomas Graf is a partner at Cleary Gottlieb Steen & Hamilton LLP. Mr Graf's practice focuses on EU competition law, regulatory affairs and intellectual property law. His experience includes work in a number of industries, including IT, pharmaceuticals, media, sports rights, energy and engineering.

JOHN MESSENT

Cleary Gottlieb Steen & Hamilton LLP

John Messent is an associate based in the London office of Cleary Gottlieb.

Mr Messent's practice focuses on EU and UK competition law, including merger control, anticompetitive agreements, abuse of dominance and sectoral regulation. He is a practising barrister and has represented clients before the European Commission and the UK Competition and Markets Authority, as well as in litigation.

Mr Messent joined the firm's Brussels office in 2008, and moved to the London office in 2012. From October 2013, he spent six months on secondment in the policy department of the UK Office of Fair Trading, working on guidance documents to be published by the new Competition and Markets Authority (including guidance on mergers, Competition Act investigations and criminal cartel offence prosecutions).

BEN HOLLES DE PEYER

Harvard Law School

Ben Holles de Peyer is an LLM student at Harvard Law School.

Mr Holles de Peyer was an attorney at Cleary Gottlieb Steen & Hamilton LLP between 2012 and 2016. His practice focused on EU and Spanish competition law and regulation in network industries. He has experience advising clients active in online markets, as well as in the energy and telecoms sectors. Moreover, he has appeared before the EU courts in litigation involving data protection and abuse of dominant position.

Mr Holles de Peyer received a master's degree from the College of Europe in 2012 after graduating at the Autonomous University of Madrid with two bachelor's degrees in law and political science. He also participated in an international exchange programme at Sciences Po, Paris.

Mr Holles de Peyer is a member of the Bar in Madrid. His native languages are English, Spanish and Catalan, and he is fluent in French

TILMAN KUHN

Cleary Gottlieb Steen & Hamilton LLP

Tilman Kuhn is a counsel based in the Cologne office and a member of the Cologne Bar.

Mr Kuhn's practice focuses on European and German competition law, including administrative and civil litigation. He publishes regularly on antitrust topics and is a co-author of the Frankfurt commentary on EU and German competition law.

Mr Kuhn joined Cleary Gottlieb Steen & Hamilton LLP in 2004 and became counsel in 2012. From 2004 to 2009, he was resident in the Cologne office, and from 2009 to 2010, he was resident in the Brussels office. He received an LLM degree from the University of Amsterdam in 2001 and a doctorate in law (Dr iur), *summa cum laude*, from the University of Cologne in 2005. Mr Kuhn passed his second state examination in the state of North Rhine Westphalia in 2003 and the first state examination at the University of Bonn in 2000

ATHINA VAN MELKEBEKE

Cleary Gottlieb Steen & Hamilton LLP

Athina Van Melkebeke is an associate in the Brussels office of Cleary Gottlieb Steen & Hamilton LLP. Ms Van Melkebeke's practice focuses on EU and Belgian competition law. She has experience in international merger control proceedings, cartel and abuse of dominance investigations. Ms Van Melkebeke graduated *summa cum laude* from Universiteit Gent (UG, Belgium) in 2013 and obtained an LLM degree as a BAEF scholar at the University of Chicago Law School (2014). Ms Van Melkebeke is a member of the Brussels Bar. Her native language is Dutch, she is fluent in English, and she has a proficient knowledge of French.

HENRY MOSTYN

Cleary Gottlieb Steen & Hamilton LLP

Henry Mostyn is an associate in the London office of Cleary Gottlieb Steen & Hamilton LLP, having joined the firm in 2012. He is a barrister of England and Wales. Mr Mostyn's practice focuses on all aspects of EU competition law

MORGAN L MULVENON

Cleary Gottlieb Steen & Hamilton LLP

Morgan Mulvenon is based in Cleary Gottlieb Steen & Hamilton LLP's Washington, DC office and practises in a broad range of antitrust matters, including litigation, mergers and counselling, across a broad range of industries.

Ms Mulvenon received her JD, *magna cum laude*, Order of the Coif, from Georgetown University Law Center in 2012, where she was an executive editor for the *Georgetown Law Journal*, and received her AB, *magna cum laude*, in public policy studies and history from Duke University in 2009.

KENNETH S REINKER

Cleary Gottlieb Steen & Hamilton LLP

Ken Reinker is based in Cleary Gottlieb Steen & Hamilton LLP's Washington, DC office and practises in a broad range of antitrust matters, including litigation, government investigations and merger review. His practice spans all industries and includes extensive experience in pharmaceuticals, medical devices and health care; high-technology industries; mass media; and financial institutions. He has particular expertise in the application of economics to complex legal matters and in working with economic experts, and, after law school and prior to joining the firm, he worked as an antitrust economist on cutting-edge litigation as executive director of Legal Economics LLC.

Mr Reinker received his JD, *magna cum laude*, from Harvard Law School in 2006, where he was on the Harvard Law Review, and received his BS, *magna cum laude*, in economics from Duke University in 2003. He clerked for the Honorable Michael Boudin of the US Court of Appeals for the First Circuit and while in law school taught antitrust economics at Harvard as a teaching fellow.

ROBBERT SNELDERS

Cleary Gottlieb Steen & Hamilton LLP

Robbert Snelders is a partner in the Brussels office of Cleary Gottlieb Steen & Hamilton LLP. Mr Snelders focuses his practice on EU competition law. He has extensive experience in EU and worldwide merger control proceedings, EU and international cartel and abuse of dominance investigations, litigation before national courts and the European Courts in Luxembourg and arbitration proceedings. He is distinguished by *Chambers Global* as an antitrust practitioner in Belgium and by *Chambers Europe* as a European antitrust lawyer. A graduate from Universiteit Leiden (the Netherlands, 1990, highest honours), the College of Europe (1991, DAELS), and Harvard Law School (1992), Mr Snelders is a member of the bars in Brussels and New York. His native language is Dutch, and he is fluent in English and in French.

THOMAS WOOLFSON

Cleary Gottlieb Steen & Hamilton LLP

Thomas Woolfson is an associate in the Brussels office of Cleary Gottlieb Steen & Hamilton LLP. Mr Woolfson's practice focuses on EU and Belgian competition law, as well as other regulatory fields of EU law. Mr Woolfson graduated *magna cum laude* from the Université catholique de Louvain (UCL, Belgium) in 2010 and worked as a teaching and research assistant at UCL's Centre for international and European law before earning an LLM degree as a Fulbright scholar at New York University School of Law (2012). Mr Woolfson is a member of the Bars in Brussels and New York. His native language is French, he is fluent in English, and he has a good command of Danish and Dutch.

ANTOINE WINCKLER

Cleary Gottlieb Steen & Hamilton LLP

Antoine Winckler is a partner based in the Brussels office, and his practice focuses on European and French competition law. Mr Winckler has advised clients in numerous cartel, merger control and abuse of dominance cases.

Mr Winckler also has extensive experience in representing corporate clients and financial institutions, as well as governments and public entities, regarding EU state aid rules.

Mr Winckler regularly represents clients before the European Commission, the European Courts in Luxembourg, the French Competition Authority and the Court of Appeal in Paris.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

Rue de la Loi 57
1040 Brussels
Belgium
Tel: +32 2 287 2000
Fax: +32 2 231 1661
br-reception@cgsh.com
fgonzalez-diaz@cgsh.com
tgraf@cgsh.com
rsnelders@cgsh.com
avanmelkebeke@cgsh.com
twoolfson@cgsh.com

12 rue de Tilsitt
75008 Paris
France
Tel: +33 1 40 74 68 00
Fax: +33 1 40 74 68 88
ebitton@cgsh.com
fdebure@cgsh.com
awinckler@cgsh.com

Theodor-Heuss-Ring 9
50668 Cologne
Germany
Tel: +49 221 800 400
Fax: +49 221 800 401 99
sbarthelmess@cgsh.com
tkuhn@cgsh.com

Via San Paolo 7
20121 Milan
Italy
Tel: +39 02 72 60 81
Fax: +39 02 86 98 44 40
mberetta@cgsh.com

Piazza di Spagna 15
00187 Rome
Italy
Tel: +39 06 69 52 21
Fax: +39 06 69 20 06 65
gfaella@cgsh.com