The Dominance and Monopolies Review

Second Edition

Editor
Maurits Dolmans

Law Business Research

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EDITOR'S PREFACE

Since the last (and indeed first) edition of this book, the law on monopolies and abuse of dominance has undergone evolutionary rather than revolutionary changes. Many of the sectors that regulators focused on in the past few years (most notably the digital economy, telecommunications and energy) unsurprisingly continue to be the subject of regulatory and judicial scrutiny. From the vantage point of 2014, the growing internationalisation of regulators' antitrust priorities and focus has continued, with intensifying enforcement in China and India and emerging economies. Books such as *The Dominance & Monopolies Review* make common trends both more apparent and capable of being comparatively analysed.

This editorial picks out three developments. First, while authorities in different countries may select similar or even the same cases, the substantive analysis may still diverge, and insufficient attention appears to be given to comity. Second, internationalisation of antitrust enforcement has given rise to globalisation of lobbying efforts, which can feed a potentially dangerous politicisation of antitrust policy especially in large and visible cases. Antitrust enforcement should be based on cold facts and the rule of law. Third, to end on a positive note, the means of resolving these types of case is shifting: settlements with, and commitments to, antitrust regulators are used increasingly to obtain more rapid and practical results where parties show an interest in avoiding protracted litigation.

As some of the more significant abuse cases in the past year underline, the European Commission and the US Federal Trade Commission (FTC), as well as authorities such as those in India and China, have a tendency to focus on similar issues and even the same cases. The *Google* case is one example; the issue of standard essential patents (SEPs) is another. This should be no surprise in an increasingly global and interdependent economy, in particular in worldwide markets for new technology, and where antitrust authorities exchange information and cooperate in the International Competition Network and organisations such as the OECD.

Despite the parallel focus, there remain divergences in analysis. This was thrown into relief by the different conclusions reached by the various authorities and courts in their analysis of Google's search business. In January 2013, after 19 months, the FTC closed its investigation into Google's business practices. As to the most important issues, including the complaint that Google had changed its search algorithm to demote rivals, and Google's alleged practice of promoting its own vertical properties, the FTC found that Google's practices improved its products and were pro-competitive.[1] Indeed:

> *The totality of the evidence indicates that, in the main, Google adopted the design changes that the Commission investigated to improve the quality of its search results, and that any negative impact on actual or potential competitors was incidental to that purpose. While some of Google's rivals may have lost sales due to an improvement in Google's product, these types of adverse effects on particular competitors from vigorous rivalry are a common by-product of 'competition on the merits' and the competitive process that the law encourages.*

Also:

> *Google's primary goal in introducing this content was to quickly answer, and better satisfy, its users' search queries by providing directly relevant information.*

Given the huge political pressure on the FTC to bring a case, this was a courageous decision. Nor was the FTC alone, since courts in Germany and Brazil came to the same conclusion.[2] The European Commission took a different approach: it agreed on the first point, concluding that:

> *the objective of the Commission is not to interfere in Google's search algorithm.*[3]

In contrast, however, it raised preliminary concerns with regard to the allegedly favourable display of links to Google's specialised search services on the ground that these links might divert traffic from rivals,[4] and it extracted commitments from Google (see below). Some other antitrust authorities seem poised to go even further, and appear

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1 'Statement of the Federal Trade Commission Regarding Google's Search Practices, In the Matter of Google Inc. FTC File No. 111-0163 (3 January 2013)' (FTC Google Search Statement), at www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf. 'FTC to Make Announcement Concerning Its Investigation of Google', FTC press release of 3 January 2013, at www.ftc.gov/news-events/press-releases/2013/01/ftc-make-announcement-concerning-its-investigation-google. While the author represented Google in the EU case, this analysis reflects personal views only and this editorial was not written at the client's request nor discussed with Google.

2 *Verband Deutscher Wetterdienstleister e.V. v. Google*, Reference No. 408 HKO 36/13, Court of Hamburg, 11 April 2013; *Buscape v. Google*, judgment of the 18th Civil Court of the State São Paulo – Case No. 583.00.2012.131958-7 (September 2012).

3 Commissioner Almunia, statement of 5 February 2014, http://europa.eu/rapid/press-release_SPEECH-14-93_en.htm.

4 Press release of 25 April 2013, 'Antitrust: Commission seeks feedback on commitments offered by Google to address competition concerns', IP/13/371.

determined to decide against Google on both points whatever the evidence. It is striking that leading antitrust authorities would come to such different conclusions, especially since the evidence of 'diversion' was thin, and the evidence that the goal is to improve search services is so clear. Where the FTC noted, for instance, that

> *other competing general search engines adopted many similar design changes, suggesting that these changes are a quality improvement with no necessary connection to the anti-competitive exclusion of rivals*

the EC or certain other authorities would counter simplistically that firms with a dominant position have a special responsibility and are not allowed to practise what non-dominant firms are free to do, ignoring the point that if non-dominant firms successfully engage in the same conduct, they cannot be found to leverage dominance, and *prima facie* seek to improve products or achieve efficiencies. Dominant firms should be allowed to do so too. Competition on product improvement is in the consumers' interest.

As the *Google* case unfortunately illustrates, manipulation of public opinion is increasingly a factor in highly visible and large antitrust proceedings. The global level and intensity of lobbying by complainants in this case is unprecedented, with competitors using trade associations to advocate views with an appearance of objectivity.[5] Publishers (with commercial goals that include objectives unrelated to the issues in the case, such as the quest for ancillary copyright for news snippets) are seen to use news fora they control to stir up public opinion and mobilise politicians. Lobbyists have long mustered support from US senators, but a new development is the lobbying of members of the European Parliament – including even its president – who may think that placating publishers or lobbyists helps them in elections. Parliamentarians are heard to speak out publicly with strong convictions, as if they have carefully evaluated the facts, the law, and the economic policies. But antitrust enforcement should be a cold-headed judicial or investigative process, with decisions based on facts, law and economics, not politics. If this politicisation continues (and if the European Courts do not curb it), it could muddy the boundary between consumer welfare and manipulated political goals, potentially turning important assessment tools such as marketing tests into opinion polls, and undermining the rule of law. That would not be in the consumer interest.

At the time of writing, at least, vice president Almunia has stood up against attempts to steer him away from confirming the *Google* commitments (see below). But in

5 Nick Mathiason, 'Microsoft in row over lobby tactics', *The Observer* (UK), 23 September 2007. www.theguardian.com/business/2007/sep/23/money.digitalmedia; Robert A Guth and Charles Forelle, 'Microsoft Goes Behind the Scenes', *Wall Street Journal*, 24 September 2007, http://online.wsj.com/news/articles/SB119059784609936938; www.telegraph.co.uk/technology/8184065/Dark-forces-gunning-for-Google.html; Vlad Saviv, 'What is FairSearch and why does it hate Google so much?' 12 April 2013, www.theverge.com/2013/4/12/4216026/who-is-fairsearch; Greg Keizer, 'Microsoft not fooling anyone by using FairSearch front in antitrust complaint against Google', 9 April 2013, www.computerworld.com/s/article/9238267/Microsoft_not_fooling_anyone_by_using_FairSearch_front_in_antitrust_complaint_against_Google.

highly visible cases, there is a concern that populist, political or protectionist temptations will cloud the clarity of analysis that should be the norm in antitrust investigations. In some countries, there are even more worrying hints of unreliable procedures, lack of protection of confidential information, potentially arbitrary process and decision-making and inadequate substantive analysis. Apart from political opportunism and a populist streak in policy choices, some authorities appear tempted to free ride on others' efforts and to outshine each other by extracting greater remedies than their colleagues whatever the merits of the case. There is in some cases also an apparent desire to protect local players against foreign firms, rather than focusing solely on consumer interest. These are dangerous developments. With the increasing proliferation of competition laws, greater attention to facts and the rule of law is required. The need for comity – and specifically greater respect for decisions by authorities in the country of origin of the defendant with respect to worldwide practices – is stronger than ever (provided of course that due process is followed, and national bias is avoided in the country of origin).

The *Google* case is interesting also in that it illustrates another trend – a positive one this time. To meet the EU concerns, Google offered commitments to resolve concerns and avoid long drawn-out proceedings and appeals. Having gone through three iterations, the commitments look likely to be adopted by the summer of 2014 (four years after the opening of formal proceedings).[6] Standards is another area where settlements played a significant role. In early 2013, the US FTC announced that Motorola LLC had agreed to a Consent Order to address allegations that it had reneged on its FRAND obligations not to pursue injunctions against users of Motorola's SEPs who were supposedly willing licensees.[7] The European Commission followed suit in early 2014, accepting commitments offered by Samsung (patterned on Google's agreement with the FTC).[8] The commitments lay out how SEP holders might approach their obligations with regard to willing licensees so as to avoid being found to have violated antitrust rules (as will, it is hoped, the Court of Justice's preliminary ruling in *ZTE v. Huawei*).[9] The common approach taken by both the FTC and the European Commission signals (as

6 Press release of 5 February 2014, 'Antitrust: Commission obtains from Google comparable display of specialised search rivals', IP/14/116.

7 'Agreement Containing Consent Order, In the Matter of Google Inc', FTC File No. 121-0120 (3 January 2013).

8 'Antitrust: Commission accepts legally binding commitments by Samsung Electronics on standard essential patent injunctions' (29 April 2014), available at http://europa.eu/rapid/press-release_IP-14-490_en.htm; EC MEMO/14/322, 'Antitrust decisions on standard essential patents (SEPs) – Motorola Mobility and Samsung Electronics – Frequently asked questions' (29 April 2014), available at http://europa.eu/rapid/press-release_MEMO-14-322_en.htm; 'Case Comp/C-3/39.939 – Samsung Electronics, Enforcement of UMTS standard essential patents, Final Commitments' (3 February 2014), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1502_5.pdf; and Commitment Decision (29 April 2014), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf.

9 Case-170/13, *Huawei Technologies v. ZTE*, OJ 2013 C. 215/5.

vice president Almunia recently commented) a significant moment of convergence.[10] It is expected that this convergence will be mirrored in jurisdictions such as India and China, where issues around essential patents have recently also become the subject of investigation and litigation.[11]

The use of commitments and settlements in dominance and monopoly proceedings is to be welcomed, especially in dynamic markets, as it may lead to expeditious and efficient resolution of issues. In Europe, after the 'procedural modernisation' embodied in Regulation 1/2003,[12] the Commission has so far settled two-thirds of its abuse cases by way of commitments.[13] The advantages from the defendants' perspective (at the cost of trustee oversight and a binding decision that can be enforced even if breaches are technical and have no negative impact on competition) are that fines are avoided; there is no factual finding of abuse that can be used as a basis for private damage claims; no legal precedent is established; firms are not embroiled in decade-long appeal proceedings; and parties avoid disputes about implementation of otherwise vague and generally worded remedy orders that can poison the relationship with the authorities. From the plaintiffs' perspective, these points can be seen as disadvantages (especially the absence of precedent when new types of abuses are alleged), but this may be outweighed by the advantage that a solution is found relatively quickly. Consumers benefit as well.

This is not to say that settlements are always beneficial, as already mentioned in last year's editorial. There is a risk of regulatory hold-up, where an antitrust authority extracts concessions in unprecedented cases, using the threat of excessive fines, long and expensive proceedings, extensive discovery, political decision-making, absence of adequate judicial review and expensive follow-up private damage claims as leverage. Not all commitments are truly 'voluntary' in this light. This does not apply to the same extent in the US, where parties have a more real choice of whether to use a negotiated procedure, in view of the role of the courts in infringement proceedings.

In the past 10 years, commitments have thus come to occupy an important and generally efficient position in the enforcement process in both the United States and, particularly, the EU. The process is, however, far from perfect. In Europe, the Commission has in practice reversed the sequence of the procedure prescribed by Regulation 1/2003: instead of first issuing a preliminary assessment and then negotiating commitments, it

10 Speech of 20 September 2013, 'Competition Enforcement in the knowledge economy', SPEECH/ 12/629. For an overview of the minor policy differences, see Koren W Wong-Ervin, Federal Trade Commission, 'Global Approaches To Standard-Essential Patents', 6 May 2014.

11 In the recent case of *Huawei v. InterDigital, Inc*, and the NDRC's ongoing investigations of Qualcomm and Interdigital, Inc in China, and, in India, the CCI's investigation in *Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson (Publ)*, 50/2013, 12 November 2013; and *Intex Technologies (India) Limited v. Telefonaktiebolaget LM Ericsson*, 76/2013, 16 January 2014.

12 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.

13 Of the 43 cases the Commission has dealt with since 1/2003 came into effect, 28 were settled by way of commitments and 15 by way of prohibitions.

tends to do the reverse. This has meant that defendants do not know the Commission's theory of harm in sufficient detail, and are more or less groping in the dark about how to address the Commission's concerns (although they will generally know at a high level from State of Play meetings what the overall issues are). Without a focused theory of harm, not only is legal certainty and clarity eroded, but there is also a risk that the Commission may move beyond what is strictly required to remedy its concerns, and instead seek to achieve political goals. On balance, however, the practice of accepting commitments is to be welcomed as a practical and realistic way of addressing concerns in the interest of consumers in a timely manner while reducing the expense and risks of full enforcement. It is hoped that authorities elsewhere will emulate this example, without succumbing to the temptation of regulatory hold-up.

I would like to thank all of the contributors for taking time away from their busy practices to prepare their insightful and informative contributions to this second edition of *The Dominance & Monopolies Review*. I am personally grateful for the assistance of my colleague Max Kaufman of the Brussels office. I look forward to seeing what evolutions or, indeed, revolutions, 2014 holds for the next edition of this book. Especially eagerly awaited are the European Court's judgment in *Intel* (conditional pricing) and the European Commission decision in *Gazprom*, and the US authorities' reviews of conditional pricing, and of the practices of patent assertion entities (PAEs) and privateers, which are directly relevant also for the EEA and other jurisdictions.

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June 2014

Chapter 24

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 anti-competitive *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) anti-competitive conduct that helps to obtain or maintain that power;[4]

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1 Kenneth S Reinker, Daniel Culley and Morgan L Mulvenon are associates 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.

b attempted monopolisation, which requires (1) a dangerous probability of achieving monopoly power; (2) anti-competitive 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 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

Over the past year, the US Supreme Court issued a decision on 'reverse payment' settlements. Notable decisions in lower US courts included cases on loyalty conditions and refusals to deal. The US antitrust regulators – the DOJ and FTC – continued their enforcement efforts related to patents, including efforts against patent assertion entities. Debate also occurred over whether to issue guidelines about enforcement of Section 5 of the FTC Act.

i US Supreme Court decision on reverse payment settlements

In *FTC v. Actavis*, the US Supreme Court held that reverse payment settlements 'can sometimes violate the antitrust laws', resolving a conflict among multiple intermediate appellate courts with some finding such settlements 'generally immune from antitrust attack' and at least one finding them presumptively unlawful.[10] The Supreme Court held that the traditional 'rule of reason' – requiring proof of anti-competitive effects and balancing the pro-competitive effects – should apply to reverse payment settlements rather than either a presumption of legality or illegality.[11]

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.

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, 2230 (2013).

11 Id. at 2238–39.

Reverse payment settlements typically arise in the context of pharmaceuticals: a patent holder that sells a name-brand drug files a suit for patent infringement against a potential entrant that might sell a generic version of the drug, the patent holder then makes a settlement payment to the potential entrant (a 'reverse' payment because the patent holder pays the alleged infringer, rather than the other way around), and the potential entrant then agrees to stay out of the marketplace until a later date. In *Actavis*, the FTC brought suit under Section 5 of the FTC Act against Solvay Pharmaceuticals (the name-brand manufacturer), and three generic drug companies, Actavis, Inc., Paddock Laboratories and Par Pharmaceuticals, alleging that reverse payment settlements between Solvay and the generic drug companies were an unlawful agreement to 'share in Solvay's monopoly profits'.[12] Specifically, in 2006 settlements, Solvay agreed to pay hundreds of millions of dollars to Actavis and tens of millions of dollars to the others in exchange for the generics not entering the market until August 2015.[13]

The Supreme Court rejected the argument that the existence of a patent 'immunize[s] the agreement from antitrust attack', explaining that the patent could be invalid or not infringed.[14] Instead, the Supreme Court explained that reverse payment settlements can 'amount to a purchase by the patentee of the exclusive right to sell its product' that it could 'lose if patent litigation were to continue and the patent were held invalid or not infringed'.[15] Thus, without the reverse payment settlement, the generic could enter the market and 'bring about competition', benefiting 'consumers in the form of lower prices', while with the reverse payment settlement, the name-brand manufacturer and the generic manufacturer could 'potentially produc[e] the full … monopoly return while dividing that return between the challenged pantentee and the patent challenger'.[16] The Supreme Court also explained that reverse payment settlements can sometimes have 'offsetting or redeeming virtues', such as where they approximate 'litigation expenses saved' or 'reflect compensation for other services that the generic has promised to return'.[17]

ii Continued uncertainty on the standard applicable to loyalty conditions

As detailed below, US courts remain split over the proper standard to determine whether loyalty conditions, such as pricing based on market share, are anti-competitive: some courts have analysed them as a variant of exclusive dealing, asking whether the loyalty condition substantially foreclosed the market and actually excluded competitors, while other courts have analysed them as a variant of predatory pricing, asking whether the loyalty condition resulted in below-cost pricing.

12 Id. at 2230.
13 Id. at 2229.
14 Id. at 2231.
15 Id. at 2234.
16 Id. at 2234–35.
17 Id. at 2236.

Eisai Inc. v. Sanofi-Aventis US LLC[18] applied the Court of Appeals for the Third Circuit's 2012 decision in *ZF Meritor, LLC v. Eaton Corp.*[19] In the *Sanofi* case, Eisai challenged certain Sanofi contracts with hospitals for its anticoagulant drug Lovenox that contained loyalty and volume rebates. The *Sanofi* court explained that, under *ZF Meritor*, the price-cost test applies when price is the predominant mechanism by which a defendant is alleged to have excluded its rivals. Eisai proffered six ways that Sanofi purportedly excluded its rivals aside from price, but the court found that all of these purported mechanisms came back to price.[20] Applying the price-cost test, the Court ruled that Sanofi was entitled to summary judgment.

In contrast, in *Retractable Technologies v. Becton Dickinson & Co*, a different lower court refused to grant summary judgment in a volume discount case[21] because it found that material issues of fact remained about the anti-competitive effects of the defendant's contracts.[22] The case was tried before a jury, and the jury ultimately rejected the plaintiff's claims.[23]

iii Courts continue to find that antitrust laws rarely impose a duty to deal with rivals

As detailed below, US courts generally will not impose upon antitrust defendants a duty to deal with rivals. In the past year, the Court of Appeals for the Tenth Circuit refused to impose a duty to deal in *Novell, Inc. v. Microsoft Corp.*[24] In that case, Novell, an independent software vendor, challenged Microsoft's decision to withdraw access to a particular application programming interface to Microsoft's Windows 95 that Novell needed to make its software operate on Windows 95. Novell argued that this tactic allowed Microsoft to maintain its monopoly in operating systems and helped Microsoft strengthen its position in software applications. The Tenth Circuit interpreted Supreme Court precedent as imposing a duty to deal on monopolists only when (1) a pre-existing arrangement existed that was voluntary and presumably profitable and (2) the monopolist's discontinuation of the arrangement suggests 'a willingness to forsake short-term profits to achieve an anti-competitive end'.[25] In *Novell*, the court found that Novell did not present evidence that could satisfy the second prong.[26]

18 *Eisai Inc. v. Sanofi-Aventis US LLC*, 3:08-cv-04168 (D.N.J. Mar. 28, 2014).

19 *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012).

20 *Eisai Inc. v. Sanofi-Aventis US LLC*, 3:08-cv-04168, slip op. at 60–70 (D.N.J. 28 March 2014).

21 *Retractable Technologies v. Becton, Dickinson & Co.*, 2013 U.S. Dist. LEXIS 116746 (E.D. Tex. 2013) (adopting 2013 U.S. Dist. LEXIS 121211 (E.D. Tex. 2013)).

22 Id.

23 *Retractable Technologies v. Becton, Dickinson & Co.*, No. 2:08-cv-00016-LED-RSP (E.D. Tex. 9 September 2013).

24 *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064 (10th Cir. 2013).

25 Id. at 1074–75.

26 Id. at 1076.

iv Debate over guidelines for Section 5 of the FTC Act

As noted above, Section 5 of the FTC Act prohibits 'unfair methods of competition' and probably reaches more broadly than the Sherman Act. Potential examples of the broader reach of Section 5 may include (1) invitations to collude where no agreement is reached; (2) the unilateral adoption of practices that facilitate oligopolistic coordination; and (3) the use of exclusionary conduct to obtain market power that does not rise to the level of monopoly power. However, the exact meaning of 'unfair methods of competition' remains unclear and subject to debate.

That debate continued in the past year. In June 2013, FTC Commissioner Joshua Wright expressed concern that this 'ambiguity' creates 'uncertainty in the business community' and that the 'promise [of the FTC] has remained largely unfulfilled' because of a lack of 'a coherent framework for applying its unfair methods of competition authority'.[27] Commissioner Wright thus issued a proposed policy statement to 'clarif[y] the standards and limits the Commission will adhere to in exercising its authority' under Section 5.[28] Commissioner Wright proposed that to bring a Section 5 claim the Commission should need to show (1) 'harm to competition'; and (2) 'an absence of cognizable efficiencies'.[29] Likewise, Commissioner Maureen Ohlhausen has spoken about guidance on Section 5, proposing a similar first prong and a second prong asking if the competitive harm is 'disproportionate to its benefits'.[30] Others, however, disagree on the need for more guidance. FTC Chairwoman Edith Ramirez, for example, has argued instead for a 'common law approach' to Section 5 and expressed concerns over attempts to 'formulate the guidance to try and codify our unfair methods principles'.[31]

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27 See 'Section 5 Recast: Defining the Federal Trade Commission's Unfair Methods of Competition Authority, Remarks of Joshua D. Wright, Commissioner, Federal Trade Commission' (19 June 2013), available at www.ftc.gov/sites/default/files/documents/public_statements/section-5-recast-defining-federal-trade-commissions-unfair-methods-competition-authority/130619section5recast.pdf.

28 See 'Statement of Commissioner Joshua D. Wright, Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act' (19 June 2013), available at www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-joshua-d.wright/130619umcpolicystatement.pdf.

29 Id. at 2–3.

30 See 'Section 5: Principles of Navigation, Remarks of Maureen K. Ohlhausen Commissioner, Federal Trade Commission' (25 July 2013), available at www.ftc.gov/sites/default/files/documents/public_statements/section-5-principles-navigation/130725section5speech.pdf.

31 See Law360, 'FTC Commissioners Spar Over Section 5 Guidance Boundaries' (13 February 2014), available at www.law360.com/articles/509894/ftc-commissioners-spar-over-section-5-guidance-boundaries.

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.[32] 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 market shares are more likely to support the inference of monopoly power, and typically shares below 50 per cent cannot support that inference.[33] But even a very high share does not automatically establish monopoly power.[34]

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.[35] Geographic markets are defined by looking at what other geographies sellers operate in and buyers can turn to.[36] 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.[37]

IV ABUSE

i Overview

Monopolisation requires anti-competitive 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.[38]

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32 See, for example, *United States v. E.I. DuPont de Nemours & Co.*, 351 US 377, 391 (1956).

33 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.')

34 US law does not recognise 'relative dominance' or 'collective dominance'.

35 See, for example, *Brown Shoe Co. v. United States*, 370 US 294, 325 (1962); DuPont, 351 US at 395.

36 See, for example, *Tampa Elec. Co. v. Nashville Coal Co.*, 365 US 320, 327–28 (1961).

37 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).

38 See, for example, *United States v. Grinnell Corp.*, 384 US 563, 570–71 (1966).

US courts and antitrust regulators have not established a definitive list of what conduct can be anti-competitive nor have they adopted clear standards for distinguishing between pro-competitive and anti-competitive conduct. The DOJ did issue guidance on monopolisation in 2008 but withdrew it in May 2009.[39] The list below, although not exhaustive, discusses the most important types of potential anti-competitive 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 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.[40] 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 (1) an upstream duty to deal with competitors; or (2) downstream predatory pricing.[41]

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 anti-competitive effects when it forecloses rivals from the market and impairs their competitiveness. Under US law, exclusive dealing cannot be anti-competitive unless it forecloses a 'substantial share' of the relevant market.[42] What counts as 'substantial' is unsettled. Some courts have suggested that foreclosure of

39 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.

40 *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.

41 *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 US 438 (2009).

42 *Tampa Electric Co. v. Nashville Coal Co.*, 365 US 320, 327 (1961).

30 per cent or less may suffice, while others have suggested that 40 to 50 per cent may be required.[43] Courts have also suggested that the foreclosure required to sustain a claim may be somewhat lower where the defendant is a monopolist.[44]

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 anti-competitive only when the resulting price is below cost.[45] Other courts have applied an exclusivity analysis, finding loyalty conditions to be potentially anti-competitive whenever they foreclose a substantial share of the market.[46] 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.[47]

MFN clauses provide that a customer will receive pricing or other terms as good as those that the seller offers other customers.[48] 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 anti-competitively 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 health care.[49]

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43 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 R.I.*, 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 (D.C. Cir. 2001) (en banc) ('roughly 40 per cent or 50 per cent share usually required' for an unreasonable restraint of trade claim).

44 See *Microsoft*, 253 F.3d at 70.

45 See, for example, *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1060–62 (8th Cir. 2000).

46 See, for example, *LePage's Inc. v. 3M*, 324 F.3d 141, 157–59 (3d Cir. 2003) (en banc).

47 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).

48 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).

49 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).

Tying

Tying is when a supplier conditions its sale of one product (the tying product) on the customer purchasing another product (the tied product).[50] 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 anti-competitively 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.[51] Additionally, tying requires that the defendant have market power in the tying product.[52] 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.[53] 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 anti-competitive 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 company. Similar to loyalty conditions, US case law on bundling is unsettled. Some courts have ruled that bundling cannot be anti-competitive unless it results in prices that are below 'an appropriate measure' of cost.[54] 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.[55] Other courts have instead found that bundling can be potentially anti-competitive whenever it forecloses a substantial share of the market.[56]

Exclusionary product design – where a company designs its product in a way that makes it difficult for competitors to develop compatible or interoperable products – also raises similar concerns as tying. Although exclusionary product designs can in certain circumstances be actionable, US courts are generally reluctant to second-guess product

50 See *Jefferson Parish Hospital v. Hyde*, 466 US 2, 21 (1984).

51 See *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 US 451, 462 (1992).

52 See *Jefferson Parish*, 466 US at 13–14.

53 See *Ill. Tool Works Inc. v. Independent Ink, Inc.*, 547 US 28, 35 (2006).

54 See, for example, *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 903 (9th Cir. 2008).

55 See id., at 906–08.

56 See, for example, *LePage's Inc. v. 3M*, 324 F.3d 141, 154–57 (3d Cir. 2003) (en banc).

design decisions.[57] 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 anti-competitive 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).[58] 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 anti-competitive 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.[59] 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.[60] Discriminatory pricing is not prohibited by the Robinson-Patman Act if the sale does not involve commodities, if the customers do not compete with one another downstream, or if the price differential is justified by differential costs, an effort to meet competitors' pricing, or changing conditions.[61] 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.

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57 See, for example, *United States v. Microsoft Corp.*, 253 F.3d 34, 65 (D.C. Cir. 2001) (en banc); *C.R. Bard, Inc. v. M3 Systems*, Inc. 157 F.3d 1340, 1382 (Fed. Cir. 1998).

58 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).

59 15 USC Section 13.

60 See *FTC v. Morton Salt Co.*, 334 US 37, 47 (1948).

61 15 USC Section 13(a), (b).

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 anti-competitive 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).[62]

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.[63] The FTC has also used Section 5 of the FTC Act to pursue enforcement actions against alleged abuses of the standard-setting process.[64]

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.[65] Similarly, enforcing intellectual property rights obtained through fraud can be monopolisation.[66] 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.[67]

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'.

62 See *Trinko*, 540 US at 415 n. 4.

63 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 (D.C. Cir. 2008) (not allowing such a claim).

64 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.

65 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).

66 See, for example, *Walker Process Equip. v. Food Mach. & Chem. Corp.*, 382 US 172 (1965).

67 See *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768, 783–84 (6th Cir. 2002).

V REMEDIES AND SANCTIONS

Available remedies in monopolisation cases include injunctive relief and monetary damages.[68] 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 anti-competitive conduct, reversing its anti-competitive effects, and denying the defendant the fruits of that conduct.[69] 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.[70] 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).[71] In addition, a US state can bring a *parens patriae* action seeking treble damages on behalf of its residents.[72]

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.[73] Entities subjected to compulsory process often seek to negotiate the scope of the discovery and sometimes seek to

68 As noted, criminal sanctions are theoretically available but not pursued in practice.

69 See, for example, *United States v. United Shoe Mach. Corp.*, 391 US 244, 250 (1968).

70 15 USC Section 15.

71 15 USC Section 15(b); 15a.

72 15 USC Section 15c.

73 See 15 USC Sections 46, 49, 57b-1; 15 USC Sections 1311–1314.

quash it,[74] although in practice 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.[75] 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.[76] 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,

74 See 15 USC Section 1314(b); 16 C.F.R. 2.7(d).

75 See *General Investment Co. v. Lake Shore & Mich. S. Ry. Co.*, 260 US 261, 286–88 (1922).

76 See 16 C.F.R. Sections 1.1-1.4; 28 C.F.R. Section 50.6.

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).

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.[77] 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.[78]

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 anti-competitive 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.

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77 See Fed. R. Civ. P. 23.

78 See *Illinois Brick Co. v. Illinois*, 431 US 720 (1977); *California v. ARC America Corp.*, 490 US 93 (1989).

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.[79] 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 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

We expect the coming year to largely continue current enforcement practices and do not anticipate major shifts in the law. At the time of publication, there were no significant monopolisation cases pending before the US Supreme Court.

79 See 15 USC Section 16(a).

Appendix 1

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