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Global Legal Group

The International Comparative Legal Guide to:

Dominance 2009

A practical insight to cross-border dominance regulation

Published by Global Legal Group with contributions from:

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1 Legislation

1.1 Please set out the basic elements of the offence(s) under your relevant laws?

Section 2 of the Sherman Act, 15 U.S.C. § 2, prohibits monopolisation, attempts to monopolise, and conspiracies to monopolise. The offence of monopolisation requires proof that the defendant possesses monopoly power and has engaged in exclusionary anticompetitive conduct. The offence of attempted monopolisation requires proof that the defendant has a specific intent to monopolise, has engaged in exclusionary anticompetitive conduct, and has a dangerous probability of obtaining monopoly power. The offence of conspiracy to monopolise requires proof of the existence of a combination or conspiracy, an overt act in furtherance of the conspiracy, and specific intent to monopolise. Judicial decisions are mixed as to whether the conspiracy to monopolise offence requires that one of the conspirators has a dangerous probability of successfully obtaining monopoly power.

1.2 What is the underlying purpose of the competition legislation that applies to the conduct of dominant undertakings?

The purpose of U.S. monopolisation law is to protect the competitive process and thereby protect consumers by barring the anticompetitive acquisition or maintenance of monopoly power. U.S. antitrust law does not prohibit abuse of monopoly power through exploitative pricing.

1.3 Does the legislation also apply to public bodies?

The Sherman Act does not apply to the conduct of the federal government or to the states. Conduct of local government will not be subject to the Sherman Act when the State authorised or directed a given municipality to act as it did. However, under the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34 36, local governments may not be sued for damages even when they are not acting pursuant to state authorisation or direction, although injunctive relief is permitted.

1.4 Does the legislation apply to: (i) unilateral conduct of a non-dominant firm whereby such a firm seeks to acquire a position of dominance; (ii) collectively dominant undertakings; and (iii) dominant buyers as well as suppliers?

The Sherman Act prohibits attempts to monopolise where the defendant has a dangerous probability of obtaining monopoly power. The Sherman Act also prohibits monopsonisation (buyer-side monopolisation) and attempts to monopsonise under the same principles that apply to monopolisation and attempted monopolisation. U.S. antitrust law does not, however, have a concept of collective dominance. The Sherman Act reaches single firm conduct only when that single firm has monopoly power or a dangerous probability of obtaining such power.

1.5 Are there sector-specific regulations which apply to unilateral conduct and how do these relate to the general prohibition of abuse of dominance?

No, there are not.

2 Dominance

2.1 How is dominance, or your equivalent concept, defined under national law?

Monopoly power is not defined by statute. However, U.S. courts have defined monopoly power as "the power to control prices or exclude competition".

2.2 How is dominance established / proven and what type of evidence is used?

Monopoly power can be established by direct evidence of the actual exercise of control over prices in the relevant market or the actual exclusion of competition from the relevant market. Such direct proof is rare, however, and courts generally determine the existence of monopoly power by indirect proof, specifically by looking to the defendant's share of the relevant market and the existence of barriers to entry.

Judicial decisions have typically found monopoly power where the defendant has a market share of 70% or more in a properly defined market that has high barriers to entry. A dangerous probability of obtaining monopoly power, which is required under the attempted monopolisation offence, is typically found where the defendant has a share of 50% or more of a properly defined market.

2.3 How is the relevant market established to assess market power?

A relevant market has both product and geographic dimensions. Product markets are defined by "reasonable interchangeability";

products that are reasonably interchangeable compete with each other and are part of the same relevant market. The "reasonable interchangeability" test looks to cross-elasticity of demand, and includes in the market those firms that "have the ability -actual or potential- to take significant amounts of business away from each other". A relevant geographic market is determined by looking to where customers can reasonably turn for alternative sources of supply.

Courts will also look to "supply side substitution" to determine the scope of a relevant market. If suppliers or producers can quickly and cheaply shift to supply the market in response to a higher price for products in the market, the output of those suppliers will be included in the relevant product market as well.

Some courts have adopted the market definition test of the U.S. Department of Justice and Federal Trade Commission's 1992 *Horizontal Merger Guidelines*. Under the *Guidelines* the agencies define a relevant product market by asking whether a hypothetical monopolist of a given market could "impose . . . a small but significant and nontransitory" price increase. If such a price increase would cause enough buyers to shift to other products so that the increase would be unprofitable for the hypothetical monopolist, the agencies expand the market to include the closest substitutes for products in the putative market and repeat the analysis until a group of products is identified for which the price increase would be profitable for the hypothetical monopolist. The smallest group of such products constitutes the relevant product market.

2.4 Is a safe harbour provided for low market shares and/or is there a presumption of dominance for high market shares? If so, what are the relevant market share thresholds?

U.S. antitrust law does not contain a statutory safe harbour or statutory presumption of dominance. However, a market share of 70% or more in a market with barriers to entry is generally required to find monopoly power and a share of 50% or more is generally required to find the dangerous probability of successful monopolisation required to support an attempted monopolisation claim. Courts rarely find monopoly power where the defendant's market share is below 50%, and rarely find a dangerous probability of monopoly power where the defendant's share is below 30%. Courts will not find either monopoly power nor a dangerous probability of obtaining such power where barriers to entry are low.

2.5 How is dominance assessed in relation to after-markets?

U.S. courts will not find an aftermarket to be a proper antitrust market where pricing in the aftermarket is disciplined by pricing in the foremarket. Accordingly, an aftermarket is not a proper market where customers engage in lifecycle pricing or do not face substantial information and switching costs. Most U.S. courts will assume that customers can engage in lifecycle pricing and will not find an aftermarket unless a manufacturer has exploited customers by a surprise change in aftermarket policies that harms customers that are "locked in" to the manufacturer's products by the existence of high switching costs.

3 Abuse

3.1 How is abuse defined? Is there a general standard? Is there a closed list of abuses?

The monopolisation and attempted monopolisation offences require proof of anticompetitive exclusionary conduct. It is clear that conduct will not be found anticompetitive simply because it harms a competitor. Rather, conduct is unlawfully exclusionary only where it harms the competitive process and thereby harms consumers. However, defining the scope and limits of such conduct is one of the most challenging problems in U.S. antitrust law.

Older cases held that conduct was anticompetitive if it was not "competition on the merits" or "honestly industrious". More recent cases and commentators have struggled to create a more rigorous standard to distinguish anticompetitive conduct from vigorous competition. Among the tests proposed are the "profit sacrifice" test (used in predatory pricing cases and proposed for use elsewhere), which holds that conduct is anticompetitive only where a firm sacrifices short term profits in return for monopoly pricing in the long term after competitors are excluded. Others have proposed that conduct be deemed anticompetitive only where if fails the "no economic sense" test -- where the conduct makes no sense as a business matter except for its potential to exclude competitors.

3.2 What connection must be demonstrated between dominance and the abuse?

Anticompetitive conduct will support a monopolisation claim only where there is a causal relationship between the conduct and obtaining or maintaining monopoly power. For example, anticompetitive conduct in markets where the firm lacks monopoly power (or a dangerous probability of obtaining such power) will not run afoul of U.S. antitrust law. However, courts will allow antitrust claims to proceed on an inference of causation. For example, in the *Microsoft* case, the Court of Appeals for the District of Columbia Circuit held that a court may infer causation where a defendant has engaged in conduct that "reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power".

3.3 Does certain conduct benefit from a safe harbour?

There are no statutory safe harbours under U.S. antitrust law. Judicial decisions do, however, create certain safe harbours. For example, the Supreme Court has created a safe harbour for predatory pricing claims where the prices charged are above an appropriate level of cost (usually marginal cost or average variable cost). Other judicially-created safe harbours exist for the solicitation of government activity that would harm competitors (including both requests for legislative or executive action and use of the courts) and, in some cases, the exercise of intellectual property rights.

3.4 Are certain types of conduct considered *per se* illegal, without a need to demonstrate actual negative effects on competition?

No. While certain anticompetitive agreements are deemed illegal *per se* under Section 1 of the Sherman Act, no *per se* rules apply to unilateral conduct that can be challenged under the monopolisation provisions of Section 2 of the Sherman Act.

3.5 Can the unilateral conduct of a non-dominant firm be abusive, e.g. does your national law provide for special obligations where a particular customer is in a relationship of dependency?

Unilateral conduct by a firm with a dangerous probability of obtaining a monopoly can violate the Sherman Act's prohibition on attempted monopolisation, but there are no special obligations to customers in a relationship of dependency under U.S. antitrust law.

4 Types of Abuse

4.1 Does the definition of abuse include both exclusionary and exploitative conduct?

No. U.S. antitrust law reaches only exclusionary conduct. It does not prohibit charging high prices or similar exploitative conduct.

4.2 To what extent is excessive pricing considered to be abusive?

Excessive pricing does not violate U.S. antitrust law. Indeed, the Supreme Court has held that "[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. . . To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct".

Predatory Pricing

4.3 Is there a price/cost test for evaluating predatory pricing? If so, what is the relevant measure of cost?

In the Brooke Group case, the Supreme Court of the United States held that predatory pricing can be unlawful only where prices are set below an "appropriate measure" of cost, but the Court has not clarified what that measure must be. Lower courts have generally required pricing below either reasonably anticipated marginal cost or below average variable cost. A few decisions admit the possibility that pricing between average variable cost and average total cost may be predatory in certain circumstances.

4.4 To what extent is recoupment relevant to the evaluation of predatory pricing?

In Brooke Group the Supreme Court held that to sustain a predatory pricing claim, the plaintiff must establish a "dangerous probability" that the monopolist will recoup "its investment in below-cost prices". This showing requires proof that the predatory pricing has the potential to drive competitors from the market and that the market structure makes recoupment plausible. Where, for example, entry is easy or the monopolist lacks capacity to expand output to take the share of excluded rivals, courts will find recoupment unlikely and have rejected predatory pricing claims.

4.5 Is there a specific abuse of margin squeezing?

The Supreme Court held this year in the *linkLine* case that U.S. antitrust law does not prohibit a "price squeeze" where the defendant has no duty to antitrust deal in the wholesale market. (Duties to deal created by other laws or regulations cannot support a price squeeze claim.) As discussed below, monopolists are required to supply their competitors only in very limited circumstances. Where there is no antitrust duty to deal, wholesale prices are unlawful only when they satisfy the test for predatory pricing, and the customer's ability to make a profit if it buys at the wholesale prices is irrelevant.

Rebates

4.6 Does the law distinguish between different categories of rebates? Are there certain legal presumptions that apply to particular types of rebates?

U.S. antitrust law generally takes a favourable view of rebates, viewing them as a form of procompetitive discounting. Volume discounts that reward large purchases can constitute unlawful monopolisation only where the resulting prices satisfy the rigorous test for predatory pricing. Where rebate schemes require customers to buy all or almost all of their requirements from the seller, they will usually be analysed as exclusive dealing (or *de facto* exclusive dealing).

4.7 Does the law recognise a "meeting competition" defence?

The precedent on a "meeting competition" defence is sparse. One court has refused to recognise the defence, while another declined to reach the question while noting that the Supreme Court had never suggested such a defence.

Refusal to Deal

4.8 In what circumstances is a refusal to deal considered abusive and is there a concept of an "essential facility" under your national law?

In the *Trinko* case the Supreme Court held that even firms with monopoly power generally have no duty to deal with their competitors. The Court noted that it had been hesitant to recognise such a duty "because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm".

Decisions after *Trinko* have generally held that a firm has no duty to supply competitors where there was no prior voluntary course of dealing or where the refusal to deal did not involve a "profit sacrifice" -- foregoing short-term profits with the expectation of gaining the ability to charge supra-competitive prices in the future.

Lower courts have recognised an "essential facility" doctrine, but the Supreme Court has expressly refused either to accept or reject the doctrine. The status of the doctrine is unclear after the *Trinko* decision.

4.9 Is a distinction drawn between termination of supply and *de novo* refusal of supply?

Yes. Under the Supreme Court's *Trinko* decision, antitrust liability for a refusal to deal generally requires a prior voluntary course of dealing.

4.10 Is a distinction drawn between a refusal to supply involving intellectual property rights and other refusal to deal cases?

There is generally no duty to deal under U.S. antitrust law for either tangible or intellectual property. Although the Supreme Court has not addressed the issue, even before the *Trinko* decision only a single lower court had ever found antitrust liability for a refusal to license IP.

Tying and Bundling

4.11 Does the law distinguish between different forms of tying and bundling?

Tying is usually attacked under Section 1 of the Sherman Act, which reaches concerted conduct, although it can also form the basis for a violation of Section 2. Express tying agreements are treated harshly under Section 1 and are nominally illegal *per se* where the defendant has market power in the tying product, although some courts have accepted efficiency defences.

Bundling -- where the defendant creates incentives to purchase multiple products but does not refuse to sell individual items in the bundle -- is not illegal *per se*. The Section 2 case law on bundling is unsettled. One appellate decision, the *LePage's* case, would allow a jury to find unlawful monopolisation any time a defendant with monopoly power engages in bundling, without regard to whether a competitor is able to match the price of the bundled product. This standardless approach has been widely criticised, and was rejected by a more recent appellate decision in *PeaceHealth*. Under the *PeaceHealth* test, which is similar to the test proposed by the Antitrust Modernization Commission, a bundled discount is unlawful only where only when the price of the competitive product in the bundle is below the defendant's average variable cost to produce that product after the total amount of discounts and rebates attributable to the entire bundle is applied. The Supreme Court has not yet resolved this dispute among the lower courts.

4.12 Does the law adopt a form or effects-based approach? Are there any tests which are used to determine legality?

As described above, the bundling case law is mixed. While the LePage's decision comes close to creating a *per se* rule against bundling, the *PeaceHealth* test is based upon an objective measurement of the defendant's costs. And while the *LePage's* court did not require that an equally efficient competitor be foreclosed by the bundle, the *PeaceHealth* test is designed to permit antitrust liability only where an equally efficient competitor would be foreclosed. The *PeaceHealth* court also concluded that its test would permit a finding of antitrust liability only where there was actual harm to competition.

4.13 In what circumstances would bundling and tying be objectively justified?

No pro-competitive justification is generally required for bundling because it results in consumers paying lower prices, which is by its nature procompetitive. While tying is nominally *per se* illegal under Section 1 of the Sherman Act, courts have occasionally accepted health, safety, and other efficiency justifications. Courts have also accepted efficiency defences in cases involving "technological ties" or product innovation. These same justifications have been accepted in Section 2 cases.

Discrimination

4.14 Does the mere fact that parties are being treated differently render such conduct abusive or otherwise unlawful in the United States or does the law require demonstration of actual or likely anti-competitive effects?

No. The United States does not recognise an abuse offence, and there is no barrier under U.S. monopolisation law to discriminatory treatment of customers or rivals. However, a separate statute, the Robinson-Patman Act, prohibits certain forms of discrimination in price or promotional services, regardless of whether the firm has monopoly power.

Other Abuses

4.15 Are there examples where systemic abuses of administrative or regulatory processes and/or aggressive litigation strategies have been characterised as abusive?

The First Amendment to the U.S. Constitution protects the right to petition for redress of grievances, and as such petitioning conduct can rarely form the basis for antitrust liability. Efforts to petition legislative or administrative bodies do not violate the antitrust laws where they seek government action to harm a competitor.

Petitioning is unlawful only when it is a "sham". Litigation can constitute a sham where the claims brought are "objectively baseless" and are an attempt to interfere directly with the business of a competitor by means of the litigation, without regard to the outcome of the lawsuit. Lower courts have also found sham in a pattern of baseless lawsuits even where some lawsuits have merit.

4.16 Are there any examples where a misuse of the standard setting process has been characterised as abusive?

The U.S. Federal Trade Commission (FTC) has brought a number of standard setting cases (including cases against Dell, Rambus, and Unocal) on monopolisation theories, alleging that a failure to disclose IP rights allowed a firm to anticompetitively obtain monopoly power.

4.17 Please provide brief details of other noteworthy abuses not covered above.

Knowing enforcement of a patent obtained by fraud or that is unenforceable can constitute an act of monopolisation or attempted monopolisation.

5 Public Enforcement

5.1 Which authorities enforce the legislation against abuse of dominance? What is the role of sector- specific regulators?

The Antitrust Division of the Department of Justice and state attorneys general are empowered to enforce Section 2 of the Sherman Act. Although the FTC enforces Section 5 of the Federal Trade Commission Act rather than enforcing Section 2 directly, conduct that violates Section 2 will also violate Section 5.

5.2 What investigatory powers do the enforcement authorities have?

The Antitrust Division and the FTC are able to obtain documents and responses to interrogatories and compel testimony during civil antitrust investigations. After initiating litigation, enforcement authorities are able to utilise the broad pretrial discovery allowed under U.S. civil procedure.

5.3 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions? What are the timescales?

The Antitrust Division and FTC usually begin their investigations with an informal inquiry that requests a voluntary response to requests for documents. If the informal inquiry identifies conduct of concern, they proceed to a formal investigation using compulsory process to require the production of documents, answers to interrogatories, and deposition testimony. This phase of the investigation often takes a year or more. Following this formal investigation, the federal enforcers may initiate litigation -- in federal district court in the case of the Antitrust Division and before an administrative law judge in the case of the FTC. Appeal from a district court decision lies in the circuit courts of appeal, with the possibility of certiorari being granted by the Supreme Court. Appeal from an FTC administrative law judge's decision lies with the FTC Commissioners, whose decision can be appealed to a court of appeals. Remedies are often stayed pending appeal. The full litigation and appeal process can take three or more years.

5.4 What are the sanctions and remedies that may be imposed in an abuse of dominance case? Do these include structural remedies?

The federal antitrust enforcers can obtain injunctive relief, including divestiture, if they establish a violation of the Sherman Act or FTC Act. There is no provision for civil penalties for violations of the Sherman Act in cases brought by the government. While the Federal Trade Commission has the power to order disgorgement, it has rarely sought such relief in antitrust cases.

5.5 Can abusive conduct amount to a criminal offence?

While violation of Section 2 of the Sherman Act is a criminal offence, under Department of Justice policy only hard core cartel cases are pursued criminally. No criminal monopolisation case has been brought in decades.

5.6 How often is the legislation enforced in practice?

The Department of Justice and FTC initiate a number of monopolisation investigations every year. Where the enforcers believe there is a violation of law, cases are typically resolved by consent decree rather than through litigation. Litigated government monopolisation cases have been rare in recent years, though the new leadership at the Department of Justice have spoken of reinvigorating enforcement.

6 Private Enforcement

6.1 Can the legislation be enforced in private actions before your national courts?

Yes. The private antitrust cause of action is well-established in the United States.

6.2 To what extent is interim relief available?

Preliminary injunctions and temporary restraining orders are available in antitrust cases on the same basis as interim relief is awarded in any other civil matter.

6.3 To what extent are private damages available and can punitive damages be awarded?

A successful antitrust plaintiff is entitled to recover three times its actual damages suffered, plus reasonable attorneys' fees.

6.4 How frequent are private enforcement actions before your national courts?

Private antitrust enforcement is common. According to statistics maintained by the Administrative Office of the U.S. Courts, 1,318 civil antitrust lawsuits were filed in 2008.

7 Defences

7.1 What defences are available to a firm accused of abusing its dominant position and to what extent are efficiencies taken into account?

Where a plaintiff alleges that conduct is anticompetitive, the defendant will be permitted to introduce evidence demonstrating a legitimate business justification for its conduct. Where the defendant offers such a justification for its conduct, the plaintiff must establish either that the justification is pretextual or that the anticompetitive harm outweighs the procompetitive benefit of the conduct.

8 Recent Developments

8.1 Please provide brief details of significant recent or imminent developments not covered by the above in relation to the United States.

In May the new Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, Christine Varney, formally withdrew a report issued by the Antitrust Division in the closing days of the Bush administration on monopolisation enforcement. That report, *Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, expressed a sceptical view of enforcers' and the courts' ability to distinguish anticompetitive from procompetitive conduct, noted the risks of "overdeterrence", and suggested that conduct should be unlawful under Section 2 of the Sherman Act only where anticompetitive effects "substantially outweighed" efficiencies.

Assistant Attorney General Varney rejected this view and stated that the report went "too far in evaluating the importance of preserving possible efficiencies" to the detriment of redressing exclusionary and predatory conduct. She said that the Division would "go 'back to the basics' and evaluate single-firm conduct against . . . tried and true standards that set forth clear limitations on how monopoly firms are permitted to behave". The speech suggested that the new administration will reverse the trend towards bright line rules and safe harbours, and that the Division would instead "look closely at both the perceived procompetitive and anticompetitive aspects of a dominant firm's conduct, weigh those factors, and determine whether on balance the net effect of this conduct harms competition and consumers".

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Jonathan Gleklen's antitrust practice encompasses civil litigation, government investigations, counseling, and transactional matters. He was one of four Americans identified by *Global Competition Review* as among the "world's 40 brightest young antitrust lawyers and economists" in its "40 Under 40" issue and has been ranked by publications including *Chambers USA* and PLC's *Competition Law Handbook*.

Mr. Gleklen speaks and writes frequently on antitrust subjects. He currently serves as the Editorial Chair of the next edition of *Antitrust Law Developments*, the leading two volume antitrust treatise. He previously served as the Editorial Chair of the *Antitrust Law Journal*, served on the editorial board of *Antitrust Law Developments* (6th ed. 2007), and was the Editorial Chair of the *2003 Annual Review of Antitrust Law Developments*, an annual supplement to the fifth edition of the treatise.

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